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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) COMPANY DIRECTORS' SURVEY OF ASX CORPORATE GOVERNANCE GUIDELINES

On 25 September 2003, the Australian Institute of Company Directors ("AICD") published the results of a survey of the directors of Australia's 1,500 publicly-listed companies. The survey reveals that boards are willing to adapt to the new world of corporate governance reporting introduced by the ASX Corporate Governance Council's Corporate Governance Guidelines and Best Practice Recommendations.

While accepting the guidelines, the survey highlights the concerns of directors over some elements. Firstly, there needs to be greater education for both companies and investors that it is totally acceptable for companies to explain why they do not follow some of the recommendations. Sixty-two per cent of respondents believe an explanation of "non-compliance" may discourage potential investors, so it is essential that investors understand that an explanation is compliance with the guidelines.

Secondly, directors believe the definition of "independence" found in the guidelines needs to be refined as only 27 per cent believe the definition "adds value" in its current form. Forty-three per cent of respondents currently comply with the recommendation of a majority of "independent" directors on the board, 11 per cent stated they will change the make up of their board while 46 per cent prefer to explain why they do not comply.

The survey highlights confusion among directors regarding what they specifically need to comply with, with many directors confused as to the difference between recommendations, commentary and guidance notes. Seventy-nine per cent of respondents are concerned that compliance with the commentary and guidance notes will be expected.

Finally, the survey points to the need for a longer transition period for small to medium-sized businesses, businesses which will experience the most difficulty in adopting the guidelines. Only 44 per cent of respondents intend to adopt the guidelines in the current reporting year.

Chief Executive Officer of AICD, John Hall, said it is encouraging that company directors are recognising the importance of the guidelines and have illustrated their commitment to them. The results of the survey will be provided to the Implementation Review Group, established by the ASX Corporate Governance Council to review and refine the guidelines.

A full copy of the survey results is available on the AICD's website at  
[http://www.companydirectors.com.au/index.html](http://www.companydirectors.com.au/index.html" \t "_new)

(B) GETTING VALUE FROM AGMS

On 23 September 2003, the Business Council of Australia released a new Code of Conduct for annual general meetings. BCA President, Dr John Schubert, said the Code, developed by the BCA's Chairmen's Panel, is designed to increase the value of AGMs for shareholders, Boards and management.

"The annual general meeting is an important element of corporate governance and the main opportunity each year for ordinary shareholders to comment and question the Board and management of their companies.

"The new Code of Conduct will improve the efficiency of those meetings and increase the opportunity for all shareholders to speak, by providing a process to ensure that shareholders are considerate of each other's right to participate," he said.

The Code has been developed with initial input from BHP Billiton and in consultation with the Australian Shareholders' Association. The BCA has now written to the Chairmen of the top 50 companies in Australia, encouraging them to adopt the Code for their company AGMs.

"We believe that wide adoption of the Code will demonstrate business's commitment to the full participation of shareholders in effective and meaningful AGMs, while at the same time setting a standard for managing those that would seek to disrupt the meetings," said Dr Schubert.

The Code is available on the BCA website at [http://www.bca.com.au](http://www.bca.com.au" \t "_new)

(C) RELEASE SHARE REGISTER ONLY FOR A PROPER PURPOSE

Chartered Secretaries Australia (CSA) has urged the government to amend current legislation so that it would require the request for a release of a company's share register to meet a proper purpose test.

Following successful proceedings recently brought by the Australian Securities and Investment Commission (ASIC) against National Exchange, Richard Jones, Chairman of Chartered Secretaries Australia's (CSA) National Legislation Review Committee, says issues of privacy within shareholder registries must be further tightened now to prevent anymore share market 'bottom feeders' preying on nervous shareholders.

"What we need is legislation that gets to the core of the problem. Significant concerns exist in relation to access to share registers and communication with shareholders. At the moment anyone can ask for the share register and a company has to supply it. That effectively denies shareholders the privacy rights they would have as a consumer," said Mr Jones.

The law as it stands requires companies to give anyone access to their share registers. The only control on the use of the information is that it be used for matters related to shareholders. Companies cannot refuse access even if they believe the use would be to support unethical or unfair practices. "This is a fundamental flaw, and it allows schemes such as those of National Exchange to continue. Companies have no alternative but to write to shareholders outlining the true position, often at considerable cost. The law needs to be changed to give companies the power to reject requests for access to their registers if those requesting access cannot satisfy the company that the request meets a proper purpose test."

ASIC needs to develop guidelines, or a definition, for a proper purpose test in this instance to assist companies.

For further information contact:  
Mr Richard Jones   
Chartered Secretaries Australia  
Telephone: 03 8641 0296

The recent case between ASIC and National Exchange is reviewed in Item 5A of this Bulletin.

(D) CEO TURNOVER STUDY

New Australian findings in a study by international management consulting firm Booz Allen Hamilton, released on 17 September 2003, reveal that CEO turnover in Australia is higher than the global rate and the average tenure of Australian CEO's is almost half that of their global peers.

Booz Allen Hamilton conducted the Australian arm of the global study in a joint initiative with the Business Council of Australia (BCA) to analyse CEO turnover in Australia's largest enterprises.

The study found that the average tenure for CEO's leaving office forced or otherwise, in Australia in 2002 was 4.4 years, down from 5.8 years in 2001 and half the global average of 8.6 years. Australian CEO's have just two years to achieve results or face an increased risk of being fired within the next two years.

Among the study's findings:

· CEO turnover in Australia is higher than the global rate (Australia 16.8% versus 10.1% globally).  
· In Australia CEO turnover related to mergers and acquisition is higher than the global average (Australia 21% versus 14% globally) influenced by the strength of the Australian economy.  
· Succession from within the company continues to be the primary source of CEO talent in Australia and similar to global trends, Australia saw a number of high profile younger CEO's exit.  
· CEO's hired from outside the company are more polarised in their performance, with returns to shareholders much stronger in the first half of the CEO's tenure than the second.   
· Financial Services is the safest sector for CEO's in Australia - similar to global trends.

Some key messages emerged from the study:

· It is critical for CEO's to define their strategy quickly and base it on realistic performance targets and an appropriate horizon for delivery.  
· It is sustaining change and persistently exceeding the market's expectations that will continue to be the hallmark of all enduring CEO's.  
· Leadership style, individual skills and personality of a CEO remain central to the company's ability to achieve alignment and successfully drive change.  
· CEO's need to actively engage boards and communicate their strategic plans, to ensure directors understand the complexities involved in executing change.  
· CEO's need to reflect jointly with their boards how to create a success story, and learn how to monitor the effectiveness of their working relationship.

Mr John Schubert, President of the BCA, said that the study flagged important messages for Australian companies, investors and the market generally.

"The study underlines the fact that our top executives must meet a growing and increasingly complex range of performance expectations within the context of having a far shorter tenure than their global peers," he said.

"It also highlights a worrying trend that our markets have an increasingly focus on short-term outcomes from CEO's as opposed to their capacity to deliver longer-term strategies of value creation."

The study is available on the BCA website at [http://www.bca.com.au](http://www.bca.com.au" \t "_new)

(E) GOVERNMENT'S RESPONSE TO THE RECOMMENDATIONS OF THE HIH ROYAL COMMISSION

The report of the HIH Royal Commission into the failure of the HIH Insurance Group was released on 16 April 2003. Since that time, the Government has implemented an enhanced governance structure for the Australian Prudential Regulation Authority (APRA) and appointed three new APRA members from 1 July 2003.

The Government has also referred 56 possible breaches of the law to the relevant agencies and committed funding of $42 million to ensure the efficient investigation and prosecution of any civil or criminal charges arising from the collapse of HIH.

On 12 September 2003, the Treasurer announced the Government's final response to the findings of the Royal Commission. The Royal Commissioner made 61 policy recommendations. A summary of Government's response to the recommendations is included here. Some of the recommendations fall under the responsibility of various independent bodies such as APRA, the Australian Stock Exchange and the Australian Accounting Standards Board.

The Treasurer has referred the relevant recommendations to those bodies and asked them to carefully consider Justice Owen's recommendations and advise him of their response. Justice Owen also made a number of recommendations that deal with State and Territory regulation and taxation of general insurance. The Treasurer has written to the States and Territories encouraging them to carefully consider the recommendations of the report and to take appropriate action.

Justice Owen recommended that the Commonwealth Government extend prudential regulation to all discretionary insurance-like products. In addition, Justice Owen referred to insurance cover underwritten offshore, although he made no specific recommendation in this respect. Some level of insurance cover in the Australian market is currently provided by discretionary mutual funds (DMFs) and direct offshore foreign insurers (DOFIs). However, these entities are not subject to the same level of prudential regulation by APRA as Australian authorised insurers.

To inform its consideration of the appropriate regulatory framework for DMFs and DOFIs, the Government is commissioning a review to examine the extent and nature of cover provided by DMFs and DOFIs.

The review will be headed by Mr Gary Potts, former Executive Director of Markets Group, Department of the Treasury. The review will be taking submissions and details of the review, including the terms of reference, are available on the Treasury website.

Recommendation 61 of the report proposed that the Commonwealth Government introduce a scheme to support policyholders of insurance companies in the event of the failure of any such company. The appropriateness of government intervention following financial institution collapses should be considered in terms of its possible financial system-wide impacts and consequences for the design of the regulatory framework. These are complex matters. Moreover, the precise design of any guarantee, its incentive properties and its associated financial costs warrant close consideration.

With this in mind, the Government is commissioning a comprehensive study to examine these issues. Professor Kevin Davis, Professor of Finance at The University of Melbourne, has agreed to lead the study. Following the completion of the study, Treasury will undertake a public consultation process on possible policy options. The details of the study, including the proposed process and terms of reference are available on the Treasury website.

The Commission made a number of recommendations relating to corporate governance and financial reporting. Some of these recommendations will be implemented in the CLERP 9 draft legislation which is intended to be released for public comment in October this year.

The terms of reference for the review of discretionary mutual funds and direct offshore foreign insurers and further information about the review are available at [http://dmfreview.treasury.gov.au](http://dmfreview.treasury.gov.au" \t "_new)

The terms of reference for the study of financial system guarantees and further information about the study are available at [http://fsgstudy.treasury.gov.au/content/default.asp](http://fsgstudy.treasury.gov.au/content/default.asp" \t "_new)

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| **HIH RECOMMENDATIONS** | **GOVERNMENT RESPONSE** |
| Recommendation 1 proposes that the *Corporations Act 2001* (Corporations Act), the relevant accounting standards and the ASX Listing Rules relating to directors’ remuneration be reviewed to ensure they achieve clear and comprehensive disclosure of all remuneration paid to directors. | Accept. This recommendation is being implemented under the CLERP 9 process. |
| Recommendation 2 proposes that the Corporations Act be changed to impose duties based on functions rather than status (eg director or officer). | Anomalies in the definition of officer will be corrected in CLERP 9. The Government does not propose to recast the duties of directors and officers at this time but will ask the Companies and Markets Advisory Committee, taking wider submissions, to review this question in light of the Royal Commission’s observations. |
| Recommendation 3 proposes that the Government broaden the membership of the AASB to include non-accountants. | Accept. Current legislation provides for this to be implemented. The Government will write to the Financial Reporting Council (FRC) about this matter. |
| Recommendation 4 proposes that Australia participate in the development of international accounting standards. | Accept. This recommendation is being implemented through Australia’s adoption of international accounting standards. |
| Recommendation 5 proposes that Australia reserve the right to require more stringent accounting standards that are not inconsistent with relevant international standards. | Accept. This recommendation reflects the current situation. |
| Recommendation 6proposes that the AASB alter its Urgent Issues Group (UIG) or create a separate group to promptly issue binding rules on the interpretation/application of accounting standards; and that this group include lawyers and users of financial statements. | Accept. The Government will write to the Australian Accounting Standards Board (AASB) and the FRC about this recommendation. |
| Recommendation 7 proposes that the accounting bodies encourage their members to consult independent third parties or the UIG when there is disagreement with company management about the interpretation or application of accounting standards. | Implementation of this recommendation is an issue for the professional accounting bodies. The Government will draw this recommendation to the attention of the accounting bodies. The Government will consult the FRC and AASB regarding the role of the Urgent Issues Group (UIG) |
| Recommendation 8 proposes amendments to accounting standard AASB 1023 *Financial Reporting of General Insurance Activities* to correct a number of deficiencies that were identified in the standard. | The AASB’s current work program provides for a revision of AASB 1023 as part of the program to converge Australian standards with standards issued by the International Accounting Standards Board (IASB). The AASB will be requested to consider the terms of recommendation 8 as it continues to work with the IASB in finalising the international standard on insurance contracts. |
| Recommendation 9 proposes that a standard of independence for auditors should be contained in legislation and professional standards. | Accept. This recommendation is being implemented under the CLERP 9 process. |
| Recommendation 10 proposes that the Corporations Act should be amended to require the board to provide a statement in the annual report that identifies all non-audit services provided by the audit firm and the fees applicable to each item of work and explains why those non-audit services do not compromise audit independence. | Accept. This recommendation is being implemented under the CLERP 9 process. |
| Recommendation 11 proposes that the CLERP 9 proposal for a “waiting period” of 2 years before a former partner directly involved in the audit of a client as a director or in senior management be extended. | Accept. This recommendation is being implemented under the CLERP 9 process. |
| Recommendation 12 proposes that the CLERP 9 proposal for rotation of the lead engagement partner and review partner be extended to key senior audit personnel. | CLERP 9 requires rotation of lead engagement and review partners after 5 years. It is these audit partners who are responsible for forming the final opinion on the financial statements of the client. In these circumstances, the Government does not consider that extending the rotation requirement to parties subordinate to the lead engagement and review partners will enhance auditor independence. |
| Recommendation 13 proposes changes to the content of the audit report and the inclusion of an audited operating and financial review in the annual report. | The Auditing and Assurance Standards Board (AuASB) will be consulted about the proposals for the audit report to contain comment on alternative accounting treatments, disclosure regarding significant matters arising in the audit process and for audit reports to be presented in plain English. These requirements are better suited for inclusion in the auditing standards rather than as prescriptive legislative requirements. A requirement for an operating and financial review (otherwise known as MD&A) is supported and it is intended that this be included in the CLERP 9 legislation. As MD&A material is descriptive in nature, it does not readily lend itself to audit processes. |
| Recommendation 14 proposes that the Corporations Act be amended to require listed companies to include a brief summaryof the nature and scope of the audit services provided by their auditor each year. | This requirement is better suited for inclusion in the auditing standards rather than being prescribed in legislation. The AuASB will be consulted concerning an amendment to the relevant auditing standard. |
| Recommendation 15 proposes that both the Australian Prudential Regulation Authority (APRA)and the Institute of Actuaries of Australia introduce compulsory certification of the completeness and accuracy of data. | The Government will refer this recommendation to APRA and the Institute of Actuaries of Australia. |
| Recommendation 16 proposes that the Institute of Actuaries of Australia and the APRAintroduce a requirement for more detailed disclosure of the exercise, incidence and impact of subjective judgment and departure from historical experience. | The Government will refer this recommendation to APRAand the Institute of Actuaries of Australia. |
| Recommendation 17 proposes that APRAextend the qualifications of the approved actuary to require that they not be an employee or partner of the organisation to which the approved auditor belongs. | The Government will refer this recommendation to APRAand the Institute of Actuaries of Australia. |
| Recommendation 18 proposes changed governance arrangements for APRA,including, replacing the non-executive board with an executive group comprising of a CEO and 2-3 commissioners and discontinuing the involvement of representatives from the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia on the board of APRA. | The Government has amended the *APRA Act* to implement an enhanced corporate governance structure for APRAthat took effect from 1 July 2003. The new members and Chair and Deputy Chair of APRAcommenced on 1 July 2003. |
| Recommendation 19 proposes that the *Australian Prudential Regulation Authority Act 1998 (APRA Act*) be amended to provide the chief executive with the power to establish an advisory board. | The Government supports this recommendation and will recommend to APRA that an Advisory Board be established. |
| Recommendation 20 proposes that the direct involvement of representatives of ASIC and the RBA in the governance of APRA be discontinued. This will require amendment of the *APRA* *Act*. | The Government has amended the *APRA* *Act* to implement an enhanced corporate governance structure for APRA that took effect from 1 July 2003. The new members and Chair and Deputy Chair of APRA commenced on 1 July 2003. Representation of the Australian Securities and Investment Commission  (ASIC) and the Reserve Bank of Australia in the governance of APRAhas been discontinued. |
| Recommendation 21 proposes that the APRAchief executive urgently instigates a review of APRA’sorganisational structure, balancing its cross-sectoral responsibilities with accountability and knowledge of financial services. | The Government will refer this recommendation to APUfor its action. |
| Recommendation 22 proposes that the Commonwealth Government consider removing the requirement for the Treasurer’s agreement to operational decisions involving APRA’s prudential oversight of general insurers. | The Government accepts the policy intent of this recommendation and will remove the requirement for APRA to seek the Treasurer’s agreement to make operational decisions which do not involve wider policy issues. |
| Recommendation 23 proposes the Government review the inconsistencies between the legislative provisions for merit review under the *Insurance Act 1973* and the *Banking Act 1959.* | The Government accepts this recommendation. |
| Recommendation 24 proposes that APRA implement a programme to build the skills of staff involved in the supervision of general insurers. This should involve a review of its human resource management policies to assess APRA’s competitiveness in the financial services sector labour market. The review should take account of the adequacy of remuneration, training and career structures as well as other steps to increase APRA’s attractiveness as an employer. | The Government will refer this recommendation to APRAfor its action. |
| Recommendation 25proposes the Government adopt a three-year rolling fund arrangement to set APRA’s budget. | This already occurs in practice under existing funding arrangements. |
| Recommendation 26 proposes that APRA develop a more sceptical, questioning and, where necessary, aggressive approach to its prudential supervision of general insurers. Consultation, inquiry and constructive dialogue should be balanced by firmness in its requirements and a preparedness to enforce compliance with applicable standards. In particular, APRA should take a firm approach to ensuring regulated entities’ timely compliance in the lodging of returns and the provision of information. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 27 proposes that APRAcontinue to develop and review processes, guidelines and training to assist its staff in considering the appropriate approach to take towards supervised entities in different situations. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 28 proposes that APRA develop systems to encourage its staff and management continually to question their assumptions, views and conclusions about the financial viability of supervised entities, particularly on the receipt of new information about an entity. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 29 proposes that APRA develop an internal system for tracking all relevant information concerning regulated entities. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 30 proposes that APRA develop mechanisms to investigate the reinsurance arrangements for general insurers on a random but frequent basis. | The Government will refer this recommendation to APRAfor its action. |
| Recommendation 31 proposes that the effectiveness of the current memorandum of understanding (MOU) between APRA and ASIC be reviewed; the processes  for liaison, coordination and exchange of information between APRA and ASIC should be reviewed on a regular basis; to facilitate the exchange of information, the Commonwealth Government should make a regulation specifying ASIC for the purposes of s.56(5)(a) the *APRA Act*.  The Government has already implemented enhanced exchange of information arrangements between APRA and ASIC through recent amendments to the *APRA Act*. ASIC is specified for the purposes of the *APRA Act.* | The Government will refer the responsibility for reviewing the existing memorandum of understanding (MOU) between APRA and ASIC to APRA for its action. |
| Recommendation 32 proposes that matters relating to the coordination of Commonwealth regulation affecting the  insurance industry be the province of the  Commonwealth Treasury. | Accept. This already occurs in practice. Treasury will continue to facilitate ongoing liaison, coordination and exchange of information between regulators. |
| Recommendation 33 proposes that coordination of matters related to the regulation of the insurance industry be addressed through the proposed ministerial council (see recommendation 54 below). | Accept. Since March 2002 the Commonwealth has regularly convened a meeting of Commonwealth and State and Territories Insurance Ministers to discuss insurance matters generally. The forum will continue to consider insurance matters as they arise. |
| Recommendations 34 deals with the disclosure of information by authorised general insurers. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 35 proposes that information that enables external users to make an informed assessment of an insurer’s outstanding claims provisions and reinsurance arrangements be published by the insurer or APRA. APRA should develop reporting returns for insurers that would enable this to occur if existing returns are insufficient. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 36 proposes that insurers be required to make greater disclosure of qualitative information relating to their risk and reinsurance management strategies. Other qualitative information - where the prospect of disclosure may affect the quality of information provided to companies - need not be disclosed. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 37 proposes that APRA identify which regulatory activities should be disclosed publicly and by what means. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 38 proposes that APRA develop and promulgate a standard for the effective regulation of authorised insurers that operate as part of a corporate group. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 39 proposes that APRAmonitor the financial condition of corporate groups, including those with foreign operations. Pending the development of the proposed prudential standard on supervision of corporate groups, APRA should use existing powers to require groups to provide any information it considers necessary to perform this role. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 40 proposes that APRA take steps to ensure that it effectively exchanges with relevant foreign regulators information and intelligence on the operations of Australian insurers with international operations. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 41 proposes that APRA modify the prudential standards to require the annual production by an authorised general insurer’s approved actuary of a report on the overall financial condition of the insurer. | The Government will refer this recommendation to APRA for its action. |
| Recommendation 42 proposes that the Commonwealth Government amend the *Insurance Act 1973* to extend prudential regulation to all discretionary insurance-like products - to the extent that it is possible to do so within constitutional limits. | The Government will commission a review to examine the role of discretionary mutual funds in the insurance market. The review will also include an examination of the role of direct offshore foreign insurers in the insurance market. Details of the review including the terms of reference are available on the Treasury website. |
| Recommendation 43 proposes that the Corporations Act be amended so that the APRA may apply to wind up a company that is an authorised insurer if any of the criteria specified in s.52( l)(aa), (ab) or (a) of the *Insurance Act 1973* are met. | The Government accepts this recommendation. |
| Recommendation 44 proposes that the Corporations Act be amended to specify that the interests of policyholders are interests to which the court should have regard in deciding whether to make a winding-up order. | The Government accepts this recommendation and notes this already occurs in practice. |
| Recommendations 45 proposes that the Australian Stock Exchange (ASX) amend Listing Rule 3.1 to require-or publish a guidance note making it clear-that price-sensitive announcements have the approval of either the board or a delegate of the board subject to ratification by the board. | The Government will refer this recommendation to the Australian Stock Exchange for its action. |
| Recommendation 46 proposes that the ASX amend the Listing Rules to prohibit ‘blacklisting’ - defined as exclusion of a person or organisation from briefings by a company or a pattern of such exclusion in the face of negative reports on the company by those analysts over a specific period. | The Government will refer this recommendation to the Australian Stock Exchange for its action. |
| Recommendation 47 proposes that the ASX clarify Listing Rule 1 1.1, so that it applies to any significant change in the business or assets of a listed company, whether it be by acquisition, disposal, amalgamation or otherwise. Further, that the ASX amend the Listing Rules to define 'significant change', so that it encompasses financial and geographic factors as well as the nature and scale of the company's business. | The Government will refer this recommendation to the Australian Stock Exchange for its action. |
| Recommendation 48 proposes that the ASX amend Listing Rule 1 1.2, so that it applies to any disposal of the whole or substantially the whole of the assets or operations of a listed company. | The Government will refer this recommendation to the Australian Stock Exchange for its action. |
| Recommendation 49 proposes that MR4 should become the sole prudential regulator of general insurance. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendation 50 is that if the States and Territories remain involved with prudential regulation, that there be effective information exchange with APRA. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendations 51-52 propose that the States and Territories reduce inconsistencies in their statutory schemes, and that they apply relevant prudential requirements. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendation 53 proposes that the States and Territories consider allowing greater price flexibility in their statutory schemes. This is a matter that would be appropriate for consideration by the proposed ministerial council. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendation 54 recommends that the Commonwealth use a ministerial council to discuss and resolve general insurance and perhaps other financial services matters with the States. | Accept. Since March 2002 the Commonwealth has convened a meeting of Commonwealth and State and Territories Insurance Ministers to discuss insurance matters generally. The forum will continue to consider insurance matters as they arise. |
| Recommendation 55 is that the States and Territories abolish stamp duty on general insurance products. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendation 56 is that those States and Territories that have not already done so abolish fire services levies on insurers. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendation 57 is that the States and Territories exclude the cost of the GST for the purposes of calculating stamp duties or any other state or territory levies that are imposed on insurance premiums. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendation 58 is that governments avoid imposing on insurers levies and other taxes that cannot be passed on to policyholders. | The Commonwealth will refer this recommendation to the States and Territories for their consideration. |
| Recommendation 59is that the *Income Tax Assessment Act* (ITAA) *1936* be amended to align it with the modified accounting standards proposed. | Australia is committed to adopting international accounting standards and considers it appropriate to await consideration by the AASB of recommendation 8 to examine the behavioural impacts arising from any new model before aligning the taxation treatment of general insurers with their accounting treatment. |
| Recommendation 60 is to amend the law to make contributions to catastrophe reserves tax deductible, and releases assessable for tax. | Australia is committed to adopting international accounting standards and considers it appropriate to await consideration by the IASB of the arrangements. |
| Recommendation 61 recommends the Commonwealth Government introduce a systematic scheme to support policy holders of insurance companies in the event of a failure. | This matter was last considered under the Financial System Inquiry (the Wallis Inquiry) which recommended against establishing such a scheme. The Government has commissioned a study by an eminent person into the merits of financial system guarantees. The study will include how any guarantee might be funded and how it might impact on consumers and incentives in financial markets. Details of the study including the terms of reference and how the study will be conducted are available on the Treasury website. |

(F) 2003 US BOARD OF DIRECTORS GOVERNANCE AND REMUNERATION SURVEY

A new survey has examined trends in operational and remuneration practices of boards of directors of large US companies. Buck Consultants has released its survey of 166 US companies with median revenue of US$1.1 billion.

In relation to board and committee practices, the survey found: 46% had recently restructured their committee membership with another 16% considering doing this; 42% had recently sought new board members with specific expertise with another 24% considering doing this; 43% had recently hired outside/independent consultants to assist the board with another 11% considering doing this; 39% had recently increased the number of meetings for committees of the board with another 11% considering doing this; 33% had recently implemented holding meetings without management present with another 14% considered doing this; 18% had recently implemented providing director education with another 17% considering doing this; and 8% had recently implemented increasing the number of meetings for full board with another 9% considering doing this.

Interlocking boards (where an executive of A serves on the board of company B, and an executive of B serves on the board of company A) have declined significantly, with only 10% of the companies surveyed indicating any remaining interlocks.

The combined role of Chairman of the Board and CEO remains common in US companies. Only 28% of the companies surveyed have a non-employee chairman although this is a reduction.

While a formal evaluation of non-executive board members is considered good practice, only 17% of the companies surveyed conducted them and, of those, only 7% actually tie pay to the performance evaluation's results.

In relation to 2003 remuneration practices, payment of cash retainers for directors remains the most prevalent form of compensation, with 91% of respondents paying them. Of the companies that pay retainers, 76% pay the entire retainer in cash, while others pay retainers in varying combinations of cash, equity and stock options. In relation to the median annual cash retainer, for companies with annual revenues greater than $US10 billion the median annual cash retainer was $US50,000, for companies with annual revenues between $1 billion and $10 billion, the retainer was $35,000, for companies with annual revenues between $500 million and $1 billion, the retainer was $30,000, for companies with annual revenues between $100 million and $500 million, the retainer was $20,000 and for companies with annual revenues less than $100 million, the retainer was $17,500. 69% of companies pay directors a per-meeting fee on top of the annual retainer (typically in the range of $1,000 to $1,500 per meeting).

The use of stock options remains a popular form of remuneration with the number of stock options granted to directors upon their initial election to the board tending to be inversely proportional to the company's size. The smallest companies in the study granted a median of 25,000 options while the largest companies granted 15,000 options. The number of stock options granted annually to directors ranged from 3,000 to 10,000 (with smaller companies offering more options).

A key finding is that equity remuneration, even during a weak stock market, still provides at least half of most directors' total remuneration. The value of annual grants ranges from $43,000 to $65,500 (using the Black-Scholes valuation model).

In relation to total remuneration, the median total remuneration paid to directors in 2003 ranges from $72,500 for companies with revenues between $100 million and $500 million to $127,900 for companies with revenues of more than $10 billion.

Further details of the study are on the Buck Consultants website at [http://www.buckconsultants.com/](http://www.buckconsultants.com/" \t "_new)

(G) REHABILITATING LARGE AND COMPLEX ENTERPRISES IN FINANCIAL DIFFICULTIES

On 12 September 2003, the Corporations and Markets Advisory Committee published a Discussion Paper on rehabilitating large and complex enterprises in financial difficulties.

This Paper was developed in response to a request from the Parliamentary Secretary to the Treasurer, Senator the Hon Ian Campbell, to consider whether the Australian voluntary administration (VA) provisions, in force since 1993, are suitable for handling the rehabilitation of large and complex enterprises. The issues the Senator asked the Committee to consider include:

· possible changes to the VA provisions to better accommodate large corporate recovery cases;  
· possible changes to the scheme of arrangement provisions to accommodate these cases; and  
· whether a new system for corporate recovery, along the lines of Chapter 11 of the United States Bankruptcy Code, should be adopted.

In releasing the Paper, the Convenor of the Advisory Committee, Richard St John, said:

"The financial failure of any company can have severe repercussions for its creditors, employees, suppliers, customers and shareholders. Processes that allow the prospects of recovery to be fully explored stand to benefit all these parties and the economy generally. This is especially the case with large and complex enterprises, where the rehabilitation challenges may be magnified."

The Discussion Paper looks at key areas that affect the likelihood of corporate recovery:

· Early remedial action. The earlier a financially distressed company responds to its financial difficulties, and enters into discussions with its major creditors; the better may be its prospects of successful rehabilitation.  
· Ongoing financing. A company may have a better chance of successful recovery if it can obtain new loan or equity finance during the rehabilitation period.  
· Flexible timetable. The recovery procedure timetable needs to be sufficiently flexible to adjust to the needs of particular companies.

The Paper compares the debtor?driven US Chapter 11 with the more creditor?oriented Australian VA procedure in each of these areas. Some of the key differences are:

· the US system leaves the board of directors in control while, under VA, the company is run by an external administrator.  
· the rights of all creditors are frozen under the US system, whereas some creditors in Australia can enforce their rights regardless of a VA.  
· the US system has special priority rules aimed at encouraging ongoing funding of a company in rehabilitation. The VA procedure is more protective of the rights of existing creditors.

The Paper also:

· Discusses recent changes in the UK that greatly restrict the rights of holders of floating charges to bypass the administration procedure by appointing a receiver over the company's assets. There is no equivalent restriction in Australia.  
· Looks at issues under the current VA provisions, including:  
   · whether to retain voting of creditors by number as well as by value and, if so, whether the administrator should continue to have the casting vote in the event of any deadlock between number and value;  
   · whether to exempt equity?for?debt swaps from the prospectus disclosure requirements and the takeover provisions; and  
   · whether there should be further provision for dealing collectively with companies in a corporate group.  
· Identifies problems with using creditors' schemes of arrangement as an alternative form of corporate revival. A key problem with schemes is the continuing liability of directors for insolvent trading.

Copies of the Discussion Paper are available on the CAMAC website at [http://www.camac.gov.au](http://www.camac.gov.au" \t "_new)

The Advisory Committee invites submissions by Friday 28 November 2003.

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(H) DIVIDEND REINVESTMENT PLANS CONTINUE TO GROW

On 11 September 2003, KPMG Corporate Finance released a study showing that dividend reinvestment plans (DRPs) continued to grow in popularity in 2002-03 in Australia, raising almost 30% more capital for listed companies than the total of all Initial Public Offers.   
The study found that listed companies raised $4.3 billion from dividend reinvestment plans in the year to 30 June 2003. This was 30% more than the total of $3.2 billion raised by all IPOs over the same period. Lower share prices meant the total amount raised by dividend reinvestment plans decreased slightly in 2002-03 compared to the previous year. However, DRPs grew in popularity with investors, with the number of DRP share issues increasing by 11% from 314 in 2001-02 to 350 in 2002-03.

Five year history of capital raised - DRPs versus IPOs

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | 1999 | 2000 | 2001 | 2002 | 2003 |
| Number of DRP issues | 323 | 299 | 302 | 314 | 350 |
| Total raised by DRPs ($m) | $3,630 | $3,850 | $3,912 | $4,630 | $4,298 |
| DRP value as a % of all raisings through ASX | 14% | 12% | 14% | 18% | 17% |
| Number of IPOs | 49 | 161 | 124 | 60 | 55 |
| Total raised by IPOs ($m) | $4,898 | $15,430 | $3,860 | $1,987 | $3,220 |
| IPO value as a % of all raisings through ASX | 18% | 47% | 14% | 8% | 13% |

"DRPs have raised more money for listed companies than IPOs for the past three years. They are a very cheap way to raise funds and have been an important source of equity for many of our largest companies."

Mr Gross said the popularity of DRPs with investors, despite the cancellation of share price discounts on most schemes in the late 1990s, could be tied to solid share price performances.

"Six of the 10 largest DRP issues in 2002-03 showed price gains at 30 June 2003. The odds were even better if you were not an investor in AMP, which accounted for two badly performing DRP issues in the top 10 by value."

A DRP issue by Westpac on 23 December 2002 produced the best result, showing a gain of 8% for shareholders who elected to reinvest their dividends.

Biggest DRP issuers 2002-03

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Date issued | Amount raised  ($ million) | Issue price  ($) | Price at 30 June 2003  ($) | Price change  (%) |
| Westfield America Trust | 03/03/03 | 258.8 | 1.98 | 2.08 | + 5 |
| AMP | 01/05/03 | 232.0 | 7.64 | 4.97 | - 35 |
| AMP | 25/10/02 | 215.5 | 11.48 | 4.97 | - 57 |
| Westpac | 23/12/02 | 177.6 | 13.95 | 16.25 | + 16 |
| Westpac | 08/07/02 | 159.9 | 16.52 | 16.25 | - 2 |
| Westfield Trust | 04/03/03 | 137.6 | 3.18 | 3.45 | + 8 |
| Westfield America Trust | 03/09/02 | 132.3 | 1.90 | 2.08 | + 9 |
| Westfield Trust | 03/09/02 | 123.8 | 3.18 | 3.45 | + 8 |
| Wesfarmers | 30/09/02 | 95.3 | 28.48 | 25.30 | - 11 |
| National Australia Bank | 07/01/03 | 83.2 | 32.42 | 33.50 | + 3 |

Among the major banks, Westpac issued the largest amount of new capital through dividend reinvestment plans, issuing total new capital of $337.5 million, followed by National Australia Bank with $164.4 million, then ANZ with $105.4 million. CBA did not issue any new capital but does have an active dividend reinvestment plan - demand for shares is met by purchasing shares on market and redistributing to investors in lieu of dividend.

AMP made four DRP issues $232.0 million (1 May 2003 at $7.6383 per share), $215.5 million (25 October 2002 at $11.4776 per share), $79.9 million (also on 25 October 2002, at $11.40 per share) and $41.6 million (12 May 2003 after DRP issue repriced to $5.50 a share) for a total face value of $569 million.

(I) FSA PROPOSALS FOR CROSS-BORDER FINANCIAL SERVICES SHOPPING FROM HOME

On 3 September 2003, the United Kingdom Financial Services Authority (FSA) set out its proposals to implement a European initiative - the Distance Marketing Directive (DMD) - to encourage cross-border financial services home shopping.

The DMD aims to provide increased protection, and greater choice, for consumers throughout the European Economic Area (EEA) by:   
· setting minimum standards for information that must be provided to consumers before entering into a financial services contract by "distance means"; and,   
· for a range of products and service, giving a cooling-off period (14 or 30 days) in which a consumer may, without penalty, cancel such a contract.

Once the proposals are implemented across Europe consumers buying retail financial services or products by post, fax, internet and telephone will be given common rights and protection when dealing with any financial services firm within the EEA. But, until other European states have put the protections in place, UK rules will continue to apply to European firms dealing with UK consumers.

For UK firms, the FSA is proposing amendments to its rules. Firms conducting designated investment business at a distance are already subject to detailed FSA rules for these activities. For these firms the structure of the rules will remain largely unchanged, but there will be a number of changes of detail. For deposit-taking by banks, building societies and credit unions and for e-money issuers, the FSA is proposing new rules on pre-contract information and cancellation rights under the DMD.

The FSA is responsible for implementing the Directive for those firms and activities it already regulates or, in the case of first charge mortgages and general insurance, it will regulate in future. The Department of Trade and Industry (DTI) will implement the Directive for consumer credit, second charge mortgages and related activities.

Notes:

· Consultation Paper 196 Implementation of the Distance Marketing Directive: proposed rules and guidance is available on the FSA website [http://www.fsa.gov.uk/pubs/cp/196](http://www.fsa.gov.uk/pubs/cp/196" \t "_new) The timetable for consultation and making rules is:   
   · 2 December 2003 - closing date for responses to the CP;   
   · March/April 2004 - publication of our Policy Statement with made rules;   
   · 9 October 2004 - new rules to take effect.  
· FSA published a Discussion Paper (DP) in March 2003 which looked at the main provisions of the Distance Marketing Directive (DMD).   
· The European Parliament and Council adopted the Distance Marketing Directive (DMD) on 23 September 2002. It must be implemented by 9 October 2004. A copy of the DMD may be found at Annex 5 to the Consultation Paper.   
· The European Economic Area (EEA) comprises the member states of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom) together with Iceland, Norway, and, Liechtenstein.   
· The Treasury have overall UK responsibility for implementation of the DMD. On 18 July 2003 they issued their own Consultation Document seeking responses on their proposed overall approach to implementation and on draft implementing regulations. The Treasury consultation closes for responses on 17 October 2003.   
· FSA is consulting separately on conduct of business rules for general and pure protection (other than long-term care) insurance, (see CP187: Insurance selling and administration & other miscellaneous amendments).   
· From 31 October 2004 FSA will regulate mortgage advice, arranging, lending and administration in relation to most first charge mortgages. In May 2003 FSA published CP186 (Mortgage regulation: Draft conduct of business rules and feedback on CP146), its consultation on draft conduct of business rules for its new mortgage regime, which will implement the DMD for those activities.   
· The DTI is responsible for implementing the DMD for activities within its consumer credit regime. For financial services that fall within neither the DTI nor the FSA regimes, HM Treasury propose to split enforcement responsibilities between the FSA and the DTI.   
· The FSA regulates the financial services industry and has four objectives under the Financial Services and Markets Act 2000: maintaining market confidence; promoting public understanding of the financial system; securing the appropriate degree of protection of consumers; and fighting financial crime.   
· The FSA aims to maintain efficient, orderly and clean financial markets and help retail consumers achieve a fair deal.

(J) REVIEW OF THE INSURANCE CONTRACTS ACT

On 3 September 2003 the Australian Minister for Revenue and Assistant Treasurer, Senator Helen Coonan, and Parliamentary Secretary to the Treasurer, Senator Ian Campbell, announced a review of the [Insurance Contracts Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6416" \t "default).

The review is aimed at ensuring the Act continues to meet its original consumer protection objectives and does not discourage insurers from writing policies in Australia.

"The Insurance Contracts Act was enacted nearly 20 years ago," Senator Campbell said. "It was originally introduced as a result of recommendations of the Australian Law Reform Commission and was designed to protect consumers against the harsh outcomes arising from application of the common law principles that applied to insurance contracts up until that time."

Senator Coonan said: "Over the past 20 years, the Act has been subject to judicial interpretation and the insurance environment has changed. "In the context of the debate on the affordability and availability of indemnity classes of insurance - including public liability and professional indemnity - particular concern has been expressed about the operation of section 54 of the Act.

"Insurers contend that judicial interpretation of section 54 presents an obstacle to more insurers entering the Australian market for liability insurance, thereby adding to the cost and reducing the availability of cover."

Mr Alan Cameron AM (as Chair) and Ms Nancy Milne will conduct the review. Mr Cameron has extensive experience in both the public and private sector, including eight years as Chairman of the Australian Securities and Investments Commission and its predecessor, the Australian Securities Commission. Ms Milne is a specialist insurance and reinsurance lawyer and a partner with Clayton Utz.

Given the particular concerns about section 54 of the Act, the panel has been asked to report to Government on this provision by no later than 3 1 October. The balance of the panel's report is due by 31 May 2004.

Terms of reference

The review of the operation of the [Insurance Contracts Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6416" \t "default) (the Act) is to be conducted having regard to the following:

1. Whether the rights and obligations of insurers and insureds (including persons  
seeking insurance) under the Act continue to be appropriate, including in light of:

· product, regulatory and other developments in the financial services industry (particularly the insurance sector) since the Act was enacted; and  
· judicial interpretation of the Act.

2. Whether any amendments to the Act are required to take account of the matters set out in item 1, and whether there are any deficiencies in the Act, such as aspects of the relationship between insurers and insureds that are not adequately covered;

3. Whether any amendments are warranted in order to remove ambiguity and more clearly express the intent of the Act; and

4. Any other matters relating to the Act which the reviewers consider it appropriate to examine.

A written report on the findings of the review is to be provided to the Government by 31 May 2004.

Given concerns that section 54 of the Act may be adversely impacting on the cost and availability of professional indemnity and similar types of insurance, a preliminary report on urgent issues relating to that section is to be provided to the Government by 31 October 2003, in order that any resultant legislative amendments can be implemented at the earliest available opportunity.

Information relating to the review is available from the Review's website at [http://icareview.treasury.gov.au/content/default.asp](http://icareview.treasury.gov.au/content/default.asp" \t "_new)

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(K) AUDIT COMMITTEE KEY TO INVESTOR CONFIDENCE

On 1 September 2003, the European Federation of Accountants (FEE) issued a series of recommendations for corporate governance. The FEE, which represents more than 500,000 accountants throughout Europe, has launched a discussion paper with practical recommendations to strengthen corporate governance and to increase confidence in financial reporting. The recommendations specifically strive to move the corporate governance debate forward, by highlighting the essential role the audit committee needs to play in the future.

According to FEE, the role of the audit committee for listed companies is essential. Audit committees' core responsibilities should include: reviewing financial reporting arrangements (including internal control); monitoring of the relationship with the external auditor; and monitoring of the work and resources of the internal audit function. It should also establish a policy on purchasing of non-audit services.

In its paper FEE has also detailed the elements of good corporate governance relevant to the process of financial reporting and auditing and has considered the fundamental relationships and obligations between the company boards, auditors, shareholders and other stakeholders in an effective corporate governance system.

FEE's key recommendations for sound corporate governance include:

· All listed companies should have an audit committee function discharged by non-executive directors or supervisory board members where, at a minimum, the majority of the committee's members are independent.   
   · Entities not having an audit committee should disclose in a corporate governance statement their reasons for not having an audit committee and how the audit committee function has been discharged.  
· The audit committee should establish its policy on purchasing non-audit services in line with applicable legislation. The audit committee's report should set out its policy on non-audit services and explain its assessment that there are sufficient safeguards to ensure independence in relation to the provision of these services.  
· Companies should be required to make a comprehensive corporate governance statement in their annual report, as disclosure is a powerful tool to improve corporate governance.  
   · Information on the audit committee's responsibilities and activities should be provided as a part of the board's corporate governance statement.  
   · There is a need to agree common principles on the form and content for corporate governance reporting.  
· The use of extended ("long form") reports by the external auditors in combination with presentations and discussions should be explored by boards. It facilitates more informal and in-depth exchange of views between the auditor and the audit committee or board.  
· Internal Control: The board should ensure a regular evaluation of the nature and extent of the risks to which the company is exposed and the controls to manage them.  
   · FEE is at present undertaking a project on internal control which will allow directors and auditors to serve the public interest by appropriately reporting on companies' systems of internal control.  
· Boards should ensure that the company has an ethical code emphasising integrity and that they and their staff understand and apply it.  
· There is no need for a separate European Corporate Governance Code. However, some principles and common benchmarks for national codes should be set at European level, together with guidance on the "comply or explain approach" to corporate governance advocated by the Jaap Winter Group Report, in order to ensure adequate coordination.  
· In order to ensure an appropriate balance of power, no single individual, or group, should have unfettered control of the company. FEE recommends that in a unitary board, the roles of chairman and chief executive should be held by different people balanced by a strong independent non-executive element. In a two-tier structure, at least for listed companies, the management board should have further members in addition to the chief executive.

Notes:

1. The new publication Discussion Paper on the Financial Reporting and  
Auditing Aspects of Corporate Governance was approved for publication by  
the FEE Council on 25 June 2003. It can be downloaded free-of-charge from the  
FEE website ([http://www.fee.be](http://www.fee.be" \t "_new)) or ordered from Sylvie Romancide (Facsimile: + 32 2 231 11 12, Email: [Sylvie\_Romancide@fee.be](mailto:Sylvie_Romancide@fee.be)).

2. FEE's official response to the EC's consultation on its Communication of 21 May  
2003 on Company Law and Corporate Governance is available from:   
[http://www.fee.be/secretariat/Positionpaper.htm](http://www.fee.be/secretariat/Positionpaper.htm" \t "_new)

3. The Final Report of the High Level Group of Company Law Experts (Winter Group) on A Modern Regulatory Framework for Company Law in Europe is available from:  
[http://europa.eu.int/comm/internal\_market/en/company/company/modern/index.htm](http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm" \t "_new)

4. The Fédération des Experts Comptables Européens (FEE) is the representative organisation for the accountancy profession in Europe. It groups together 41 professional bodies from 29 countries. FEE member bodies are present in all fifteen member states of the European Union, nine European Union candidate countries and three member countries of EFTA. Between them, these bodies have a combined membership of 500,000 individuals, of whom approximately 94% are from EU countries.

(L) TRENDS IN CORPORATE RESPONSIBILITY

Integrative Strategies has recently released its Trends in Corporate Responsibility report analysing corporate performance statistics for Australian companies across a range of social and environmental indicators over a 12 month period.

The report uses material gathered from various media sources to comment on the performance trends in the areas of stakeholder perception, as well as investment performance comparisons. Integrative Strategies' report analyses some 204 Australian companies, with a total market capitalisation representing around 85% of the ASX All Ordinaries. This includes 95 of the top 100 companies.

Data is analysed using a series of 'screens' to assess performance. 'Negative screens' are an indicator of poor standards of responsibility and stewardship in relation to the nominated issues of the environment, alcohol, animal testing, genetically modified organisms, human rights violations, tobacco, weapons and armaments and uranium. 'Positive screens' create categories of companies that demonstrate exemplary standards of responsibility and stewardship in relation to a set of nominated issues. 'Prominent issue screens' act as a third tool to give either a positive or negative assessment of a company's performance in relation to a set of nominated issues. Both positive and prominent issue screens are analysed in terms of performance in the areas of animal rights, business networks and portfolio, community integration, corporate ethics, corporate governance, donations, environment, human rights (including labour), organisational communications and reporting.

Among the report's findings is a comparison of the Top 20 and Bottom 20 companies as investments. The results indicate that companies that rate higher in terms of responsibility did not lose money over the 12 months to June 2002, while the bottom 20 companies did, and that the top and bottom companies are virtually equal over a 3 year time frame.

Treating the two categories of companies as if they were separate portfolios, each company was weighted equally and consider as 1/20th of the overall portfolio. For a company in the bottom 20, the average company rating, on the basis of a $1000 investment per company, was $915 (-8.5%) over one year and $1552 (+55.5%) over three years. For a top 20 company, based on the same investment pattern, the return was $1016 (+1.6%) over one year and $1530 (+52.6%) over three years.

Using amalgamated data findings over one and three year periods, the report found that overall the most 'socially responsible' stocks were slightly less volatile than other less 'socially responsible' stocks during a fluctuating period in the market. Furthermore, the report suggests that leading companies had been able to maintain positive stakeholder perceptions during this period of uncertainty when other stocks had struggled to maintain solid performance returns. On average, fewer companies in the top 20 lost ground and more, on average, was returned in investment growth terms.

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(M) FSA PROPOSES NEW FINANCIAL RULES FOR LIFE INSURERS

On 29 August 2003, the United Kingdom Financial Services Authority (FSA) proposed new rules to determine how much capital should be held by life insurers. These rules will link the capital requirements for with-profits insurers more directly to how they smooth the payments they make to their policyholders. Thus the more smoothing takes place the more capital with-profits life insurers will have to hold. This will reduce the pressure on with-profits funds to sell equities when the stock markets fall as the capital requirements will also reduce as a reflection of their ability to adjust discretionary payments downwards.

The new rules would also give the regulator more scope to set higher capital requirements than the minimum levels to reflect any additional risks in the business. In addition the new regime would require all life insurers to undertake their own self-assessments of how much capital they need to hold, including through undertaking stress and scenario tests. Similar rules have already been proposed for non-life insurers in CP190 published in July 2003.

The proposed rules on the calculation of minimum regulatory capital would require life insurers with large with-profits funds to undertake two calculations to determine their minimum regulatory capital requirement- a modified version of the current calculation and a new, more realistic one which takes into account discretionary payments more explicitly. Life insurers would then have to hold enough capital to cover whichever calculation gave the higher result. Under the proposals companies would publish both the statutory and realistic figures once a year. They would also submit a further update on their realistic figures to the FSA every 6 months.

The new rules on capital propose that all life insurance firms would in future be given individually tailored guidance on how much capital they should hold, similar to the system already in place for banks in the UK. This individual capital guidance would be set with reference to the specific business and control risks incurred by each life insurer. The onus would be on life insurers to make their own assessment of their capital requirements and then discuss it with the FSA. Following these discussions the FSA would then be able to vary each insurer's regulatory capital requirement.

The timetable for implementing the proposals envisages that the new way of calculating capital requirements would come into force during the second half of 2004. The consultation period for CP195 is until 30 November 2003.

Notes:

1. The new rules on calculating capital requirements would be compulsory for all life insurers with aggregate with-profits liabilities of £500 million or more. These firms represent 95% of the with-profits life insurance liabilities.   
2. Capital requirements calculated on a regulatory basis would include guaranteed benefits. Capital requirements calculated on a realistic basis would include all payments to policyholders, whether they are guaranteed or discretionary. As the realistic calculation of capital requirements has no in-built margins for adverse experience, insurers would have to have an additional amount of capital to act as a buffer. The FSA is commissioning actuarial work to calibrate the size of this buffer.   
3. Proposals for the calculation of capital requirements also include changes to some of the methods and assumptions underlying the calculations - eg the assumption that all policy holders will take up a guaranteed annuity option. The waivers granted to some companies earlier in the year anticipated some of these changes.   
4. All with-profits insurers will continue to have to meet the EU minimum requirements. These are broadly that with-profits insurers have to have at least 4% of assets over and above their liabilities to meet the guaranteed payments to policyholders.   
5. In July 2003 the FSA published its proposals for an enhanced capital regime for non-life insurers. This can be accessed at [http://www.fsa.gov.uk/pubs/cp/190/](http://www.fsa.gov.uk/pubs/cp/190/" \t "_new) Previous consultations on the new financial rules for insurance companies can be found at [http://www.fsa.gov.uk/pubs/cp/143/](http://www.fsa.gov.uk/pubs/cp/143/" \t "_new), [http://www.fsa.gov.uk/pubs/cp/136/](http://www.fsa.gov.uk/pubs/cp/136/" \t "_new), [http://www.fsa.gov.uk/pubs/policy/ps136/](http://www.fsa.gov.uk/pubs/policy/ps136/" \t "_new) and [http://www.fsa.gov.uk/pubs/cp/97/.](http://www.fsa.gov.uk/pubs/cp/97/" \t "_new)   
6. Some syndicates at Lloyds of London also underwrite life insurance, although this only accounts for a small proportion of the overall life market. The FSA will be developing rules for Lloyds that are consistent with the ones proposed in this paper but take into account the unique features of Lloyds.   
7. The FSA set out its plans for reforming the regulation of insurance in its paper entitled The future regulation of insurance - a progress report in October 2002, also known as the Tiner report.   
8. The FSA regulates the financial services industry and has four objectives under the Financial Services and Markets Act 2000: maintaining market confidence; promoting public understanding of the financial system; securing the appropriate degree of protection of consumers; and fighting financial crime.   
9. The FSA aims to maintain efficient, orderly and clean financial markets and help retail consumers achieve a fair deal.

(N) NEW FRAUD AND PLANNING AUDITING STANDARDS APPROVED FOR EXPOSURE

At its recent meeting on 26 August the Australian Auditing and Assurance Standards Board (AuASB) has approved for exposure ED 84 "The Auditor's Responsibility to Consider Fraud in an Audit of a Financial Report" and ED 85 "Planning the Audit".

(1) Fraud

The AuASB Chairman, Mr. Bill Edge said, "The proposed revised fraud standard addresses one of the most important issues facing auditors today: responsibility for detecting fraud. The new ED encourages auditors to act with increased professional scepticism and is designed to help reduce the incidents of financial statement fraud by outlining the responsibilities of all those involved in the financial reporting process."  
Specifically, ED 84 sets out the auditor's responsibility to consider fraud in an audit of a Financial Report.

The ED also:

· explains that the primary responsibility for the prevention and detection of fraud rests with both those charged with governance and management of the entity and describes the responsibilities of these parties.  
· alerts auditors to risks of material misstatement due to fraud they may encounter in the conduct of an audit and requires the auditor to assess the risks of material misstatement due to fraud and to respond to the assessed risk.  
· requires the auditor to respond to the presumed risk of improper revenue recognition and the risk of management override of controls. This response includes testing the appropriateness of journal entries, reviewing the accounting estimates for biases and obtaining an understanding of the business rationale of significant transactions that are outside of the normal course of business for the entity.   
· discusses auditor communications with management and those charged with governance, as well as auditor communications to regulatory and enforcement authorities.

(2) Planning the Audit

The AuASB also approved the release of ED 85 "Planning the Audit". This ED complements the proposed guidance in ED 81 on Audit Risk issued for exposure in October 2002. Mr Bill Edge said, "This ED provides new guidance on matters the auditor should consider prior to performing significant planning activities: client acceptance and retention; ethical requirements including independence and communications with prior auditors; and the terms of the audit engagement. The ED also incorporates more specific guidance regarding planning considerations in initial audits and includes a discussion of the planning considerations related to the direction, supervision and review of the work of engagement team members." The deadline for comments to the AuASB on the two documents is 31 October 2003.

The draft standards are available on the AuASB website at [http://www.aarf.asn.au/](http://www.aarf.asn.au/" \t "_new)

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(O) NEW ZEALAND EXCHANGE RELEASES FINAL CORPORATE GOVERNANCE SUBMISSION

In August 2003, the New Zealand Stock Exchange (NZX) advised that it had released the final version of its proposed Listing Rule changes on Corporate Governance.

The final submission, including proposed changes to NZX Listing Rules and a Best Practice Code, is the result of extensive consultation with industry participants, which has led to amendments being made to the original proposal.

Most initiatives can now be found in the Corporate Governance Best Practice Code, which is disclosure based. However, the two core aspects of good corporate governance - the requirement for independent directors and the requirement for an Audit Committee - are included in the Listing Rules and require mandatory adherence.

The commentary on the Listing Rule amendments compares the final submission with the original proposal in detail and provides additional observations on the proposed Listing Rule changes.

Once the Rules have been submitted, the Minister has 40 days to disallow them. The Rules will come into force from the date of submission. The rules provide for a transitional period of 12 months from the date of commencement or at the conclusion of the Issuer's annual meeting.

The amendments are on the NZX website at [http://www.nzx.com](http://www.nzx.com" \t "_new)

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(P) NEW CODE OF BANKING PRACTICE RELEASED  
(by Mark Sneddon, Partner and Ron Holzer, Solicitor Clayton Utz)

(1) Introduction

On 1 August 2003 the Australian Bankers' Association released the revised Code of Banking Practice ("Code"). As at 13 August 2003, it had already been adopted by the Commonwealth Bank, Adelaide Bank, St George Bank and Bank SA. While the adoption of the Code by the banks is voluntary, once a bank adopts the Code (by a public statement) the intention is that it will have contractual force. This is because under the Code adopting banks must, in any written terms and conditions for a banking service or a guarantee obtained from an individual, include a statement to the effect that the relevant provisions of the Code apply to that banking service or guarantee. Once this statement is included in the terms and conditions between the bank and the customer or guarantor then a breach of the Code by the bank when dealing with that customer or guarantor will be a breach of contract.

(2) Coverage of the Code

The current Code applies to dealings by banks with small businesses as well as individuals who are or who may become customers and to dealings with individuals who are guarantors of individual and small business customers. The previous Code applied only to individuals.

A small business is defined to mean a business having:

(a) less than 100 full time (or equivalent) people if the business is or includes the manufacture of goods; or  
(b) in any other case, less than 20 full time (or equivalent) people,  
unless the banking service is provided for use in connection with a business that does not meet the elements in (a) or (b) above.

The meaning of the resuming words at the end of the definition is not completely clear. Perhaps it is intended to exclude loan facilities acquired by a 'small business' which then advances the money to a related body corporate that is a 'large business' for corporate group purposes. The scope of the words 'use in connection with' is difficult to measure at this point.

The references to "people" in parts (a) and (b) of the definition are significant. The draft version of the code referred to "employees". The reason for the change is to capture contractors and people engaged by an employment agency. This definition may create some difficulty for banks when implementing the Code as they will need to determine whether a business with whom they are dealing falls within this definition, by determining the number of "full time (or equivalent) people" in the business.

Banks should consider taking declarations from customers as to whether the customer is a small business but such declarations will not conclusively determine the application of the Code.

Banks will be responsible for ensuring that all staff, authorised representatives and intermediaries supplying or dealing in the banks services or products must comply with the Code. This will involve training and compliance monitoring of intermediaries such as mortgage brokers.

(3) Commitments

Part B of the Code contains some key commitments that banks give to customers who are covered by the Code. Some of the more interesting ones are:

· that the bank will act fairly and reasonably towards the customer in a consistent and ethical manner. In doing so the bank will consider the customer's conduct, its own conduct and the contract between the parties.   
· the bank agrees to comply with all relevant laws relating to banking services. This is significant as by the operation of this clause, a breach of a law will also be a breach of the contract between the banker and the customer. A breach of the law will therefore give the customer the right to claim damages for breach of contract.

(4) Disclosure and principles of conduct

There are significant disclosure obligations on banks which in many ways are parallel to but more specific than the FSR obligations. In addition, credit products are covered by the Code but not by FSR.

Some of the significant Principles of Conduct are set out below but the whole Code should be studied carefully.

(5) Assessment of repayment capacity for credit

Under clause 25.1, banks agree that before offering a credit facility or an increase in an existing facility the bank will exercise the due care and skill of a diligent and prudent banker in selecting and applying their credit assessment methods and informing an opinion of the customer's ability to repay the credit facility.  
This sets a high and contractually enforceable standard with which banks will need to comply when offering credit facilities.

(6) Co-debtors must receive direct benefit

Under clause 26.1 the bank states that it will not accept a customer as a co-debtor under a credit facility where it is clear on the facts known to the bank that the customer would not receive any direct benefit under the facility. The intention is that the customer should be asked to provide a guarantee instead. It is not clear what is a direct as opposed to an indirect benefit in all cases and when the bank will be under a duty to inquire as to the existence of 'direct benefit'.

(7) Guarantees

Some of the most far-reaching provisions in the Code relate to the taking of guarantees by banks. Clause 28 operates with respect to every guarantee and indemnity taken by the bank from an individual for the purpose of securing any financial accommodation or facility provided by the bank to another individual or to a small business.

Under clause 28.2 the bank will only accept a guarantee if the guarantors' liability is limited either to a specific amount or to the value of a specified security. This provision is consistent with the 1993 version of the Code.

Under clause 28.4 banks must do various things prior to taking guarantees. Some of the more significant ones are:

· from 1 July 2004 the bank will tell the guarantor about any notice of demand made by the bank on the borrower and any dishonour of any facility that the borrower has had with the bank which has occurred in the previous 12 months. From 1 July 2005 this information will cover the 2 years prior to the information being given. The bank will also provide information relating to whether there has been an excess or overdrawing of any facility by the borrower;  
· the bank will tell the guarantor if any existing facility that they have given the borrower will be cancelled or if a facility will not be provided if the guarantor does not provide the guarantee; and  
· the bank will provide the guarantor with various documents relating to the facility that the borrower has or is seeking to obtain from the bank.

To provide this information about an individual borrower, the bank will need to obtain the consent of the borrower under the [Privacy Act 1988](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6129" \t "default). Failure to obtain that consent will mean in practice that the bank cannot take the guarantee without breaching the Code.

Once a guarantee has been given the Code allows the guarantor to limit their liability. In particular clause 28.9 states that the guarantor may limit the amount or nature of the liabilities guaranteed under a guarantee at any time in the future. Quite reasonably however, the bank is not obliged to accept such a limit where:

· the limit is below the borrower's liability under the relevant credit contract at that time (plus any interest or fees and charges which may subsequently be incurred in respect of that amount), or  
· where the bank is obliged to make further advances or would be unable to secure the present value of an asset which is security for the loan.

So, if a guarantee was given to guarantee amounts being borrowed to construct a house, then the guarantor may not be able to limit the amount of the guarantee part way through construction if the bank is contractually obliged to lend the funds for the remainder of the construction.

Under clause 28.13 guarantees are unenforceable in relation to future credit contracts without the guarantor's written acceptance of the extension of the guarantee, except in limited circumstances.

Under clause 28.14 the bank agrees that it will not, under a guarantee, enforce a judgement against the guarantor unless:

· the bank has obtained judgement against the principal debtor for payments of the guarantee liability and the principal debtor has not paid the amount after thirty days of receiving written demand for payment of the judgement debt; or  
· the bank has made reasonable attempts to locate the debtor without success; or  
· the debtor is insolvent.

Note, however, that this will only apply where the principal debtor is an individual, not a small business.

An important carve-out is that the pre-contractual disclosure obligations do not apply to:

· sole directors of a company guaranteeing the debts of the company; or  
· a director of a company guaranteeing a commercial asset financing facility provided to the company where the sole or principal security is the asset financed.

(8) Credit cards and charge back rights

Under clause 10.5 of the Code the bank will, in its terms and conditions, give general information regarding chargeback rights relating to credit cards. The bank will also give to the customer a prominent statement of the time frames within which a customer should report a disputed transaction. This will assist the bank in exercising any rights of chargeback against the merchant.

(9) Direct debits

Under clause 19 the bank agrees:

· to promptly process a customer's instructions to cancel a direct debit request relevant to a banking service provided by the bank; and  
· to promptly process customer complaints that a direct debit was unauthorised or otherwise irregular,

and not direct or suggest the customer must first raise the matter with the merchant who initiates the direct debits.

(10) Subsidiary Credit Cards

In relation to subsidiary credit cards, clause 27.3 states that a primary card holder will not be liable for the continuing use of a subsidiary card from the later of: the date they request the bank to cancel the subsidiary card and when the primary card holder has taken all reasonable steps to have the subsidiary card returned to the bank.

(11) Disadvantaged customers

Under clause 6 the banks promise to take reasonable measures to enhance the access of elderly customers and customers with disabilities to a transaction services. Under clause 14 the banks promise to provide details of accounts which may be suitable to a low income earner or disadvantaged person if the customer tells the bank that they are a low income earner or a disadvantaged person. The banks will also do this if they become aware that the customer is in receipt of Centrelink or like benefits.   
Under clause 25.2 the bank agrees to assist the customer in overcoming financial difficulties that a customer has in a credit facility with the bank. For example, the bank would work with the customer to develop a payment plan.

(12) Significance of the Code

Given that the Code will now be part of the contract between the banker and customer it will become more significant in affecting the relationship between the banker and the customer. The Code also has a revamped review process to ensure that it is reviewed every three years so that it remains relevant to future banking conditions. There is a Code Compliance Monitoring Committee that will monitor Code compliance and which can publicly name a bank that does not take its obligations under the new Code seriously.

Elizabeth Wentworth, General Counsel to the Australian Banking Industry Ombudsman, has stated that the Code has the potential to be relevant to causes of action other than breach of contract such as:

· negligence where it may set the standard of reasonable care.  
· the Code may be taken into account in determining whether a bank has acted unconscionably in a business transaction in an action brought under Section 12CC of the [ASIC Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default).  
· the Code may be relevant in determining whether a bank has exercised due care and skill in an action brought under Section 12ED of the ASIC Act.  
· the Code has the potential to be relevant in an action for misleading and deceptive conduct brought under Section 12EA of the ASIC Act.

Given ABA ownership of the Code the early adoption by four banks and that most banks adopted the 1993 Code of Banking Practice, it is likely that once banks have correct systems in place and have properly trained their staff and representatives, most Australian banks will adopt the Code. Adoption will involve significant training and compliance programs which some banks may be able to dovetail with their FSR training and compliance.

2. RECENT ASIC DEVELOPMENTS

(A) NEW ASIC POLICY ON TAKEOVER RELIEF

On 23 September 2003, ASIC released an expanded policy on takeover relief, Policy Statement 159 Takeovers: Discretionary powers.

Policy Statement 159 aims to give bidders, targets and holders certainty in complying with the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), while maintaining the principles behind takeover regulation. It solves practical problems encountered by bidders and targets during a bid.

ASIC prepared Policy Statement 159 following comments from takeover market participants on policy proposals released in February 2003.

Policy Statement 159 replaces Interim Policy Statement 159. ASIC originally released IPS 159 at the time the [Corporate Law Economic Reform Program Act 1999](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) (CLERP Act) commenced, with the intention of reviewing it after the CLERP Act had operated for a reasonable time.

Significant new policies in PS 159 include:   
· clarifying that a partly-paid share is in the same class as a fully-paid share;   
· class order relief for companies that enter into listing rule escrows with holders. Case-by-case relief for companies or underwriters that enter into voluntary escrows with holders;   
· re-affirming ASIC's policy that a company that contrives a rights issue or underwriting so that a person obtains control of the company without making a takeover bid risks an application to the Takeovers Panel for a declaration of unacceptable circumstances;   
· case-by-case relief allowing a bidder to exercise options it has acquired under a takeover bid for the options; and   
· class order relief so that employee share scheme securities that are non-transferable can be compulsorily acquired.   
Policy Statement 159 also reflects legislative changes to the Act arising from the [CLERP Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) and the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default).

Copies of PS 159 and related class orders [CO 00/343], [CO 00/344], [CO 00/345], [CO 01/1544], [CO 03/633], [CO 03/634], [CO 03/635] and [CO 03/636] are available from ASIC's website at **[Error! Hyperlink reference not valid.](file:///C%7C/Documents%20and%20Settings/petersj/My%20Documents/Eudora/attach/www.asic.gov.au" \t "_new)**, or ASIC's Infoline on 1300 300 630.

(B) DISCRETIONARY POWERS - WHOLESALE FOREIGN FINANCIAL SERVICES PROVIDERS

On 12 September 2003, the Australian Securities and Investments Commission (ASIC) released Policy Statement 176: Licensing: Discretionary powers - Wholesale foreign financial services providers (PS 176), relating to the entry of foreign providers of wholesale financial services, who are regulated by overseas regulatory authorities, into the Australian market.

"Under the policy statement, ASIC will permit a foreign financial services provider to provide their services to wholesale clients in Australia, without first obtaining an Australian financial services (AFS) licence, if the overseas regulation of the provider is sufficiently equivalent to our own", ASIC Executive Director, Policy and Markets Regulation, Mr Malcolm Rodgers said.

PS 176 outlines how ASIC will use its powers under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to facilitate entry into the Australian market of foreign providers of wholesale financial services who are regulated by overseas regulatory authorities. In PS 176, ASIC refers to these wholesale providers as 'foreign financial services providers' (FFSPs).

PS 176 explains how ASIC may, as contemplated by the legislation and subject to certain conditions, provide relief from the AFS licensing requirements where a wholesale FFSP is regulated by an overseas regulatory authority approved by ASIC.

Relief from the AFS licensing requirements, under PS 176, may be granted to a wholesale FFSP where they can satisfy a two-pronged equivalence test. For an applicant to fulfil this equivalence test, ASIC must be confident that:

· the applicant's overseas regulatory authority delivers sufficiently equivalent regulatory outcomes to the Australian regulatory regime; and  
· there are effective co-operation arrangements between ASIC and that overseas regulatory authority.

Generally, regulation by an overseas regulatory authority will be considered to provide outcomes that are sufficiently equivalent to regulation by ASIC if, among other factors, the overseas regulatory regime:

· is clear, transparent and certain;  
· is consistent with the IOSCO Objectives and Principles of Securities Regulation;  
· adequately enforced in the home jurisdiction; and  
· achieves similar outcomes as the Australian regime achieves in relation to the regulation of wholesale financial services.

Effective co-operation arrangements will provide for prompt sharing of information about the overseas regulatory regime and co-operation in relation to supervision, investigation and enforcement between jurisdictions. Usually, effective co-operation arrangements will be in the form of a Memorandum of Understanding (MOU) or some other documented arrangement, although they may be supplemented by more informal arrangements.

These two fundamental criteria form the basis for the equivalence test in PS 176 and are derived from ASIC's Principles for cross border financial services regulation November 2002). These Principles, and accordingly PS 176, seek to strike a balance between the facilitation and availability of foreign financial services into Australia, with ensuring that there are adequate measures for reducing systemic risk and protecting the market

Notably, PS 176 deals with applications for relief under section 911A(2)(l) of the Act. It does not deal with applications for exemption under section 911A(2)(h) as set out in ASIC's Policy Proposal Paper 'Licensing: Discretionary powers - Foreign financial services providers'. This is because the provisions in section 911A(2)(h) may be subject to amendment in the [Financial Services Reform Amendment Bill 2003](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=70904" \t "default).

If section 911A(2)(h) is amended as proposed then ASIC will seek to deal with applications for relief under the amended section 911A(2)(h) in the way set out in PS 176. In the interim, FFSPs can approach ASIC directly to discuss any applications under section 911A(2)(h) in its existing form. For these circumstances, ASIC will be guided by the policy proposals that dealt with the existing section 911A(2)(h) in ASIC's Policy Proposal Paper: Licensing: Discretionary powers - Foreign financial services providers (December 2002).

Finally, since August 2002, ASIC has granted interim exemptions on a case-by-case basis. The benefit of these interim exemptions is not removed by this policy. However, we will be in contact with those FFSPs who are relying on an interim exemption about the eventual expiration of that relief.

PS 176 is available on the ASIC website at [http://www.asic.gov.au](http://www.asic.gov.au" \t "_new)

(C) REPORTING REQUIREMENTS FOR AFS LICENSEES WHO ARE INDIVIDUALS

On 12 September ASIC issued a new Class Order [CO 03/748] on reporting requirements for Australian Financial Services (AFS) licensees who are natural persons. A natural person is defined as an individual, as opposed to a company, partnership, trustee etc.

The class order applies to a profit and loss statement, also known as a statement of financial performance, that must be prepared and lodged by a natural person licensee under subsection 989B(1) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).

The class order permits a natural person licensee to exclude from the profit and loss statement revenues and expenses that do not relate to his or her financial services business.

This means that a natural person licensee could choose to exclude personal revenue and expenses and/or revenue and expenses that relate to any other business that they conduct. Alternatively, a natural person licensee can choose not to rely on [CO 03/748] and instead include in a profit and loss statement all of their revenues and expenses, whether personal or business.

ASIC has also released a revised Form FS 70: Australian Financial Services Licensee - Profit and Loss Statement and Balance Sheet and a revised Form FS 71: Australian Financial Services Licensee - Audit Report. FS 70 and FS 71 take into account these recent policy changes. A natural person licensee must indicate in the revised Form FS 70 the type of revenues and expenses that are included in their profit and loss statement.

The relief under [CO 03/748] is confined to the preparation of profit and loss statements. A natural person licensee must still prepare a balance sheet, also known as a statement of financial position, that discloses all of his or her assets and liabilities, including his or her personal assets and liabilities and the assets and liabilities of any other business.

[CO03/748] does not affect the reporting requirements for securities dealers or futures brokers who have not yet been granted an AFS licence.

The class orders are available on the ASIC website at [http://www.asic.gov.au](http://www.asic.gov.au" \t "_new)

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(D) COURT RULES NATIONAL EXCHANGE OFFER IS MISLEADING AND DECEPTIVE

On 10 September 2003 the Federal Court of Australia declared that an unsolicited offer to Onesteel shareholders by National Exchange Pty Limited (National Exchange) and its sole director Mr David Tweed, is misleading and deceptive.

Justice Finkelstein made declarations that the offers to purchase shares in Onesteel Limited were misleading and deceptive. In his judgement Justice Finkelstein said that "in resolving this case it is impossible to ignore the fact …. that the offer has been purposely composed so that it will mislead shareholders".

"Today's decision confirms ASIC's belief that the National Exchange offers could have led shareholders to believe they were getting a good deal when in fact they were not", ASIC Executive Director Consumer Protection, Mr Peter Kell said.

"This judgment reinforces the fact that you cannot mislead people over the value of a share offer and expect to get away with it. People have a right to clear and fair communication in relation to their financial dealings", Mr Kell said.

The Court made orders:

· preventing National Exchange and Mr Tweed from making further offers in a similar form to Onesteel shareholders;  
· requiring National Exchange to write to all shareholders who had received the offer explaining that the true value of the offer was less than the $2 per share as stated in the offer; and  
· giving shareholders who have accepted the offer 28 days to have their shares returned at no cost to them.

Background

The judgement follows an application to the Court on 15 August 2003 by the Australian Securities and Investments Commission (ASIC).

ASIC alleged that the offer to Onesteel shareholders by National Exchange did not make it clear that the purchase price of $2 per share would be paid in fifteen annual instalments of 13c, commencing 3 September 2004.

ASIC previously issued a media release on 7 August 2003 warning shareholders in Onesteel Limited to consider the offers carefully before deciding to accept them.  
ASIC has since July 2002 warned consumers about unsolicited offers to purchase their shares.

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(E) ASIC ISSUES DRAFT SECTION 1013DA 'SRI' GUIDELINES

On 3 September 2003, the Australian Securities and Investment Commission (ASIC) released draft guidelines for the inclusion of information relating to labour standards and environmental, social and ethical factors in the product disclosure statements (PDSs) of investment products.

Recent reforms to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) mean that investment products are now required to disclose this information in a PDS.

The reforms also provide ASIC with the power to issue guidelines about the new requirement under s1013DA of the Act. Once finalised, product issuers will be required to comply the guidelines after the expiry of the transition arrangements set out in them.

"The effect of the guidelines will be twofold. Firstly, industry players will have more certainty about their new disclosure obligations in the area; and secondly, consumers will be in a better position to choose products that match any investment goals they have relating to labour standards or environmental, social or ethical considerations", ASIC Deputy Executive Director of Consumer Protection, Ms Delia Rickard said.

"In drafting the guidelines ASIC has taken a non-prescriptive, principles-based approach, as this is a relatively new area of investing where product design must be able to develop freely in a flexible environment", Ms Rickard said.

"ASIC will review the final guidelines in 2006, with a view to market conduct in the area", Ms Rickard said. The approach taken in the legislation and the draft guidelines allows product issuers to determine for themselves: whether or not they have regard to any aspect of these considerations, which particular factors they will have regard to, and how they will consider them, in terms of methodology, weighting etc.

The guidelines state that where product issuers do intend to have regard to some or all of these considerations, they must tell consumers which matters they take account of and how, so that consumers can clearly understand their approach. Where there is no set approach then this too must be made clear.

Regulations clarify that when a product with an investment component does not have regard to any of these matters, this must be stated explicitly by the product issuer.

The draft guidelines were developed following consultation on a discussion paper ASIC issued in December 2002.

Submissions received following the issue of the discussion paper indicated dissatisfaction with the use of the term 'socially responsible investing (SRI)' guidelines, and for this reason ASIC has chosen not to use the term in developing the draft guidelines.

ASIC is inviting submissions on the draft guidelines by Wednesday 15 October 2003.

Submissions should be sent to [delia.rickard@asic.gov.au](mailto:delia.rickard@asic.gov.au)

The guidelines are available on the ASIC website at [http://www.asic.gov.au](http://www.asic.gov.au" \t "_new)

(F) NATIONAL WEALTH MANAGEMENT COMPANY TO PAY 235,000 INVESTORS $67.2 MILLION COMPENSATION

On 3 September 2003, Mr David Knott, Chairman of the Australian Securities and Investments Commission (ASIC), announced that 235,000 investors in 21 superannuation and life insurance products will receive $67.2 million compensation by 31 December 2003.

The compensation is one of a number of undertakings by National Australia Financial Management Limited (NAFiM), National Australia Superannuation Pty Ltd (NAS) and MLC Nominees Pty Ltd (together, the National Group) to ASIC and to the Federal Court of Australia. The compensation undertaking is consistent with the 16 August 2002 announcement by the National Group.

These undertakings also address ASIC's concerns that investors did not receive adequate and timely disclosure about the integration of the superannuation businesses of the National and MLC, or the subsequent unit price reduction of their investments on 30 October 2001.

`The settlement should send a strong signal that high disclosure and governance standards are required when superannuation funds are merged', Mr Knott said.

'The arrangements conclude a lengthy and complex investigation by ASIC. The National Group cooperated to ensure that investors would be fully compensated and informed about the issues', he said.

Under the enforceable undertaking to ASIC, $67.2 million compensation will be paid to 235,000 investors from shareholder funds. The compensation covers:   
· the unit price reduction on 30 October 2001 that lowered the value of their units by $60.3 million. On 16 August 2002, the National announced that it would repay this money; and   
· a further $6.9 million in compensation that relates to historical errors in unit pricing by NAFiM over the last 10 years, which was identified by the National Group during the course of ASIC's investigation.   
Under the enforceable undertaking, which runs until July 2006, the National Group must take steps to address ASIC's concerns about corporate governance within the superannuation businesses, unit pricing and complaint handling including engaging external experts to review and report on these areas. The reports are to be provided to ASIC and must not be paid for from investors' funds.

Under the undertakings to the Federal Court, the National Group:   
· has agreed to distribute a disclosure statement to all investors affected by the unit price reduction and publish it on their websites, and   
· will implement a disclosure compliance program to ensure that it complies with its disclosure obligations under the [Australian Securities and Investments Commission Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) (ASIC Act), the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and the [Superannuation Industry (Supervision) Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "default) (SIS Act).

ASIC commenced proceedings in the Federal Court because it considered that the National Group's disclosure was misleading or deceptive, and that it failed to comply with the significant event disclosure obligations under the SIS Act. The National Group disputed the proceedings, which were finalised when the undertakings were provided to the Court.

Under the enforceable undertaking, the National Group has also agreed to pay the costs incurred by ASIC during its investigation and relating to the proceedings.

Copies of the Federal Court undertakings, the enforceable undertaking to ASIC and the disclosure statement are available at [http://www.asic.gov.au](http://www.asic.gov.au" \t "_new)

3. RECENT ASX DEVELOPMENTS

(A) ASX AND SHENZHEN STOCK EXCHANGE SIGN MOU

Australian Stock Exchange Ltd (ASX) and Shenzhen Stock Exchange (SSE) have signed a memorandum of understanding to develop closer ties, marking an upgrading of the relationship between two of the region's most progressive equities markets.

The MOU was signed on 18 September 2003, by ASX Chairman Mr Maurice Newman AM, and SSE Chairman Dongzheng Chen, in Shenzhen earlier today. Under the MOU, the two exchanges agree to co-operate in exchange programs, keep each other informed of major policy changes in the markets, host secondment of personnel and exchange information about each other's markets. It is hoped that in time this could lead to further co-operation in areas where there is a clear mutual benefit for both exchanges.

Mr Newman said this agreement followed on from the MOU agreement signed with the Shanghai Exchange on 27 September 2002. He said that he hoped this would lead to a close and productive association with SSE, a leading equities market in the People's Republic of China.

"We are delighted that this agreement will have an immediate outcome; that is secondments of staff from Shenzhen to ASX at the end of this month. The opportunity for us to exchange information in this way is important and valuable for both parties in an increasingly globalised industry."

"This is firm foundation for the future development of both of us, and is a further recognition of the rapid rise of PRC and the development of its financial markets following China's entry into the WTO." Shenzhen Stock Exchange is the PRC's second largest equities market after the Shanghai Stock Exchange. At 31 December 2002, Shenzhen had 508 listed companies, with a total market capitalisation of 502 billion Yuan (approx US$61 billion.).

The PRC is Australia's 4th largest export destination (7%), 3rd largest import source (10.1%) and Australia's 3rd largest merchandise trade partner (8.6%).

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(B) ASIC RELEASES FIRST ASX ASSESSMENT

On 4 September 2003, the Australian Securities and Investments Commission (ASIC) released the results of its first assessment of the Australian Stock Exchange's (ASX) market supervision role.

This initial report follows the introduction on 11 March 2002 of a [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requirement for ASIC to conduct an annual assessment of all market licensees, with regard to their obligations to operate a fair, orderly and transparent market.

'The report follows a comprehensive review of the ASX's arrangements by ASIC, and confirms that the ASX is operating a market of high integrity. The new requirement ensures that the ASX has an accountability to ASIC under the Corporations Act', ASIC Deputy Chairman, Mr Jeffrey Lucy said.

The report covers both the ASX and ASX Futures markets, and concludes that each has suitable market supervision processes, including arrangements for handling conflicts of interest, monitoring the conduct of market participants and enforcing compliance with the Listing Rules.

ASIC's report acknowledges the substantial resources the ASX has devoted to supervising its market. The ASX's decision-making structures and the oversight role played by the ASX Supervisory Review Pty Ltd demonstrated its ability to handle conflicts of interest. The report also highlights the ASX's reliable market infrastructure, including its systems and rules, and the strong commitment of staff involved in the ASX supervision.

In some areas, ASIC has requested and the ASX has agreed that further work would help bolster its already strong supervision arrangements.

Changes have been agreed, or are already underway, in relation to the supervision of warrant and futures markets, record-keeping of supervisory decisions, and coordination of its supervisory arrangements.

A copy of the report is available on ASIC's website at [http://www.asic.gov.au](http://www.asic.gov.au" \t "_new)

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4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL REFUSES AUIRON ENERGY LTD APPLICATION

On 22 September 2003 the Takeover Panel announced that it had decided to make no declaration or order in relation to the application by Westchester Financial Services Pty Ltd regarding the meeting of AuIron Energy Limited to seek approval by AuIron shareholders of the acquisition by AuIron of the Yarrabee Coal Company Pty Ltd, in exchange for a substantial interest in AuIron.

The meeting was held on Friday 19 September, and approved the acquisition and the issue of shares in AuIron to the vendor of Yarrabee, which will hold 48% of the shares in AuIron, with options to subscribe for more shares. The transaction cannot proceed immediately, however, as AuIron and the vendors have undertaken to the Panel not to complete it (or withdraw from it) without giving the Panel notice.

Westchester submitted that unacceptable circumstances had arisen in relation to the acquisition of Yarrabee for three main reasons:

a) the notice of meeting and accompanying independent expert's report did not adequately analyse the value of the Yarrabee acquisition and particularly did not adequately assess the value of AuIron's other assets and the alternatives to the Yarrabee proposal;  
b) the documentation regarding the acquisition did not comply with the requirements of the London Stock Exchange's Alternative Investments Market leading to AuIron losing its listing on AIM; and  
c) no substantial shareholder notice had been filed in relation to in excess of 5% of the shares in AuIron which are held by a nominee for Williams de Broe plc, a London stockbroker, mainly on behalf of its clients, and Williams de Broe had indicated that it would vote those shares in favour of the resolutions for the acquisition of Yarrabee.

The Panel will provide reasons for its decision as soon as possible. In the meantime it advises that it was not satisfied that the notice of meeting and independent expert's report were misleading or materially deficient, that the loss of the AIM listing had any coercive effect on AuIron shareholders or that there was any misuse of the votes attached to the Williams de Broe client shares.

Once time expires for an application for review on Wednesday 24 September, the sitting Panel will be prepared to allow the acquisition and share issue to proceed.

The sitting Panel is made up of Jeremy Schultz, Marian Micalizzi and Alice McCleary.

(B) MEDIUM NEUTRAL CITATION SYSTEM

On 11 September 2003, the Takeovers Panel announced that it has adopted the medium neutral citation system currently used by most Australian Federal, State and Territory courts and other tribunals in relation to its own decisions. The form of citation, to be used in referring to previous Panel decisions in applications, submissions and other communications to and from the Panel as well as in the Panel's own decisions, will be: (name of company whose affairs are the subject of the proceeding) [year of the announcement by the Panel of its decision] ATP (sequential number of the decision). Accordingly, the recent decision in Trysoft Corporation Limited will be referred to as: Trysoft Corporation [2003] ATP 26.

Consistently with the guidelines produced by the Australian Institute of  
Judicial Administration, the paragraphs in the reasons for Panel decisions will continue to be separately numbered and parties and others writing to the Panel are requested to use the appropriate paragraph number as a " pinpoint". It will assist if the same use of "pinpoint" is adopted even if the relevant reasons for decision have been reported. For example to refer to paragraph 10 of the Panel reasons in the decision in Pinnacle 05: Pinnacle VRB (No. 5) [2001] ATP 14; 39 ACSR 43; 19 ACLC 1154 at [10] To assist practitioners and others wishing to use this system, a list of all Panel decisions since 1 March 2000 with their medium neutral citations has been added to the Panel's website.

The Panel has also decided, where possible, to assist practitioners and other users of Panel decisions by including catchwords and references to legislation, ASIC policy and class orders, Takeovers Panel guidance and Court and Panel decisions considered in the reasons at the beginning of its published reasons.

As the Panel updates its web site [http://www.takeovers.gov.au](http://www.takeovers.gov.au" \t "_new), medium neutral citation information will be included both in the naming of each decision and also in cross-references to it from other decisions. Similarly, over time not only will catchwords and referred materials be included in new reasons for decision, but they will be added to the existing body of reasons.

A list of medium neutral citations of past Panel decisions can be found at: [http://www.takeovers.gov.au](http://www.takeovers.gov.au" \t "_new)

(C) BREAKFREE 02 - PANEL AFFIRMS ASIC DECISION

On 10 September 2003, the Takeovers Panel advised that it has decided to affirm the decision by the Australian Securities and Investments Commission to refuse to consent under ASIC Class Order 00/0344 to the early dispatch of an amended bidder's statement from S8 Limited (S8) concerning its takeover bid for BreakFree Limited (BreakFree).

S8 announced its takeover bid on 11 July 2003. The amended bidder's statement consolidates the original statement dated 19 August 2003 with the supplementary statement dated 2 September 2003.

The Panel concluded that there were substantive issues in the continuing dispute between BreakFree and S8 as to whether aspects of the amended bidder's statement are misleading in a material respect. On that basis, the Panel agreed with ASIC that it was not appropriate to consent to the early dispatch of the bidder's statement.

The Panel will post its full reasons for this decision on its website ([http://www.takeovers.gov.au](http://www.takeovers.gov.au" \t "_new)) when they have been settled.

The sitting Panel for the proceedings was Kathleen Farrell (sitting President), Peter Cameron (sitting deputy President) and Meredith Hellicar.

5. RECENT CORPORATE LAW DECISIONS

(A) NATIONAL EXCHANGE OFFER FOUND TO BE MISLEADING AND DECEPTIVE  
(by Eleanor Jackson, Centre for Corporate Law and Securities Regulation)

Australian Securities and Investment Commission v National Exchange Pty Ltd [2003] FCA 995, Federal Court of Australia, Finkelstein J, 10 September 2003

The full text of this judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/september/2003fca955.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/september/2003fca955.htm" \t "_new)   
or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  
  
(1) Overview

The activities of National Exchange Proprietary Limited (National Exchange), a licensed securities dealer and its sole director, Mr David Tweed, have long been under scrutiny from ASIC in relation to the company's past practice of making unsolicited offers for shares below market value.

In a recent decision of the Federal Court, Finkelstein J found that an offer made to Onesteel shareholders by National Exchange on 25 July 2003, although literally true and ostensibly above market price, nevertheless constituted misleading or deceptive conduct in contravention of section 1041H of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).

Orders were made to constrain National Exchange from making further offers of this nature to Onesteel shareholders and to enable those shareholders who had already accepted the offer to terminate their contracts with Mr Tweed's company.

(2) The facts

Onesteel is a publicly listed company that manufactures and distributes steel products. Approximately 95 per cent its 190,000 shareholders hold 5,000 shares or less. The closing market price for these shares on 25 July 2003 was $1.93.

On that day, National Exchange sent written offers to 5,000 of Onesteel's shareholders offering to buy their shares for $2.00 each. Of those 5,000 shareholders, 4,114 held less than 4,000 shares. The terms of the offer indicated that payment would be made in fifteen equal annual instalments, with the first payment to be made on 3 September 2004.

The offer contained repeated, prominent references to the $2.00 share price and tabulated comparisons with the current market price, features that ASIC argued created the misleading impression that the offer was more favourable than the current market price. ASIC alleged that under-emphasised administrative instructions down-played the fact that the offer was not for cash and would be paid in annual instalments over a fifteen year period.

National Exchange claimed that the wording of the offer indicated that the document was an important one that warranted attention from a legal or financial adviser if its recipient did not understand the terms. In addition, the offer contained all the factual information regarding to the nature of the payments terms and a recommendation to compare the value of the fifteen annual payments to the total market price.

(3) Decision

Section 1041H of the Act prohibits a person from "engag[ing] in conduct in relation to a financial product or a financial service that is misleading or deceptive or is likely to mislead or deceive". Finkelstein J stated that the offer to buy a share was plainly "conduct in relation to a financial product" as defined by the Act and proceeded to assess the precise terms of National Exchange's offer to Onesteel shareholders.

Before doing so, Finkelstein J outlined the principles and precedent used to decide the case. These principles were firstly, that conduct that is misleading or likely to mislead must amount to a false representation and that the assessment of such is a matter for the court to decide objectively on the facts: Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177, 202-203 and the cases cited therein.

Secondly, that the finding of misleading conduct by the Court does not turn on the intention of the defendant: Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Let (1978) 140 CLR 216, 288. Therefore, a defendant with innocent intentions might nevertheless be guilty of conduct amounting to a false representation. His Honour highlighted however, that commonsense dictated that a defendant who engaged in conduct with the intention of deceiving is likely to be "credit[ed] with occasional or possible success": Slazenger & Sons v Feltham & Co (1889) 6 RPC 531, 538 per Lindley LJ.

Thirdly, Finkelstein J stated that conduct is only misleading if there is a "sufficient nexus" between the conduct about which the complaint is made and the erroneous assumption that it is alleged to create: Campomar Sociedad, Limitada v Nike International Ltd (199) 202 CLR 45, 83. Such a nexus would be demonstrated by the likelihood, or reasonable possibility, that Onesteel's shareholders would be misled by the offer.

(a) Conduct amounting to a false representation

Finkelstein J followed the approach of Deane and Fitzgerald JJ in Taco Co of Australia Inc, as largely supported by Nike International Ltd, in his consideration of whether or not conduct in this case amounted to a misrepresentation as it concerned the identifiable group of the 5,000 Onesteel shareholders. It was plain to Finkelstein J that an offer which is factually true in every respect may nevertheless be misleading: Hornsby v Building Information Centre 140 CLR at 227.

His Honour found it reasonable to assume, given the likely diversity of qualifications, experiences and temperaments of shareholders targeted by the offer, that many of the shareholders would not weigh each word of the offer in an analytical or educated manner or subject the offer to close scrutiny. The assessment of misleading conduct was therefore made on the basis of the offer's overall impression on the general shareholding public.

National Exchange contended that the offer included sufficient information to avoid the conclusion that it had engaged in misleading conduct. These arguments received limited credit from his Honour in light of evidence that even the former company secretary of Onesteel, arguably an educated and analytical reader, upon receipt of the offer, initially thought that it was a cash offer.

(b) Intention of defendant

His Honour stated that he found it impossible to ignore the fact that the offer had been purposely composed so that it would mislead shareholders. Furthermore, National Exchange's examples of shareholders who would accept the offer were wholly unconvincing. His Honour concluded that its terms were such that no reasonable shareholder would accept them in appreciation of the fact that the offer price was payable over 15 years.

(c) Conduct resulting in an erroneous assumption

In conclusion, his Honour held that a number of shareholders would have wrongly formed the view that they had received a cash offer for their shares upon receipt of National Exchange's letter of offer.

Finkelstein J acknowledged that, although only one shareholder had come forward with complaints of being misled and only a few others had accepted the offer, these facts did not support National Exchange's conclusion that their offer was not misleading. His Honour attributed these events to negative media attention generated by ASIC about the offer and the change in market price of Onesteel shares shortly after the offer was made. Many shareholders would therefore have been dissuaded by ASIC's warnings and in any event the offer was commercially unattractive, even for those shareholders under the mistaken impression that the offer was for cash.

His Honour highlighted that, in the absence of proof of actual deception, section 1041H can still be contravened as the test is an objective one. Therefore, while evidence that relevant persons have in fact formed erroneous conclusions is admissible, it was not essential to a finding of misleading conduct.

(4) Orders

Declarations were made to the effect that the offer constituted misleading and deceptive conduct in contravention of section 1041H of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and that Mr Tweed procured the sending of offers by National Exchange. Injunctions were made to restrain the defendants from making further offers in the form of, or a form to the effect of, the offers sent to Onesteel shareholders on 25 July 2003.

Finkelstein J also made orders requiring National Exchange to send all accepting shareholders a letter giving them notice that any contract made on acceptance of the offer from National Exchange could be revoked within 28 days at their election. In the interim an injunction was made restraining National Exchange from lodging for registration any transfers already received from shareholders until the expiration of the 28 day period.

(B) DOES THE PRINCIPLE IN RE LONDONDERRY'S SETTLEMENTS APPLY TO SUPERANNUATION SCHEMES?  
(By Nghi Tran, Phillips Fox)

Crowe v Stevedoring Employees Retirement Fund [2003] VSC 316, Supreme Court of Victoria, Balmford J, 3 September 2003

The full text of the judgment is available at:   
[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/september/2003vsc316.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/september/2003vsc316.htm" \t "_new)  
or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

The plaintiff was a retired stevedore and was a beneficiary of the Stevedoring Employees Retirement Fund ('the Fund'). The defendant ('the trustee') was established for the sole purpose of acting as the trustee of the Fund.

The plaintiff brought proceedings in the Supreme Court of Victoria and by the further amended originating motion filed on 21 August 2003 sought orders for the production of materials related to the benefits the plaintiff received under the Fund. To summarise, the plaintiff sought the production of documents from the trustee which accounted for and recorded the decision to increase the classification base wage to $712 per week, including all minutes of discussions and correspondence. The plaintiff also sought production of earlier actuarial reports.

(1) The increase in the CBW

The CBW was originally defined as the 'ordinary weekly base rate of pay' of the employee in question, but the definition had been modified. The CBW was used in calculating the benefit received by members. In 1998 the CBW was increased to provide for a floor level of $712 per week, so that members previously on a CBW below that amount were moved up to $712; no change was effected to those who were on a CBW of $712 or above. It initially applied only to employees of 'Patricks' but by the end of June 1999 employees of most if not all of the participating employers had received that increase. The increase in the CBW to $712 per week had been made pursuant to Rule 41A of the Trust Deed which prescribed how a surplus would be applied if an actuarial investigation revealed a surplus.

In determining whether to compel the trustee to produce materials relating the CBW increase, Balmford J had to consider: first, whether the [Superannuation Industry (Supervision) Regulations 1994](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8413) applied to prevent disclosure; and second, whether the principle in Re Londonderry's Settlement applied to prevent disclosure.

(2) Do the [Superannuation Industry (Supervision) Regulations 1994](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8413" \t "default) apply to prevent disclosure to the member?

Counsel for the defendant referred to Regulation 2.40 of the [Superannuation Industry (Supervision) Regulations 1994](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8413" \t "default) made under the [Superannuation Industry (Supervision) Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "default). Regulation 2.40(1) provides for certain information to be given on request by a trustee of a superannuation entity to certain defined persons. Regulation 2.40(2) provides that Regulation 2.40 'does not require (or, by implication, authorise) the disclosure of (a) internal working documents of the entity'. Counsel for the defendant submitted that the documents sought by the plaintiff were internal working documents, and that their production was prohibited by Regulation 2.40(2).

Balmford J held that Regulation 2.40(2) was not a prohibition on the disclosure of internal working documents; it was solely a limitation on the effect of that regulation.

(3) Does Re Londonderry's Settlement apply to prevent disclosure to the member?

(a) What does Re Londonderry's Settlement stand for?

Balmford J accepted that Re Londonderry's Settlement stood for the principle that beneficiaries have no right to inspect documents private to the trustees which may evidence the reasons why the trustees made their decisions: Sheller JA in Hartigan Nominees v Rydge (1992) 29 NSWLR 405.

Harman LJ in Re Londonderry's Settlement said that the principle that trustees are not bound to disclose reasons for their decision: 'rests largely I think on the view that nobody could be called upon to accept a trusteeship involving the exercise of a discretion unless, in the absence of bad faith, he were not liable to have his motives or his reasons called in question either by the beneficiaries or by the court.'

(b) Which cases support the proposition that Re Londonderry's Settlement applies to superannuation schemes?

Counsel for the defendant cited the following authorities in support of the proposition that the principle in Re Londonderry's Settlement applies to superannuation schemes: Tierney v King [1983] 2 Qd R 580; Rattee J in Wilson v Law Debenture Trust Corp plc [1983 2 Qd R 580; Megarry V-C in Cowan v Scargill [1995] 2 All ER 337 and Sheller JA in Hartigan Nominees v Rydge (1992) 29 NSWLR 405.

(c) Which cases support the proposition that Re Londonderry's Settlement does not apply to superannuation schemes?

Counsel for the plaintiff referred to a number of authorities in support of the proposition that Re Londonderry's Settlement does not apply to a superannuation scheme. These included: Batt JA in Telstra Super Pty Ltd v Flegeltaub (2000) 2 VR 276; Bryson J in Dillon v Burns Philp Finance Ltd unreported, decided on 20 July 1998; Vidovic v Email Superannuation Pty Ltd unreported, decided on 3 March 1995; Gallop J in Minehan v AGL Employees Superannuation Pty Ltd (1998) 134 ACTR 1; Hoffman LJ in McDonald v Horn [1995] 1 All ER 961; and Lord Browne -Wilkinson, in a paper published in February 1992 by the Leo Cussen Institute.

These authorities regarded the application of Re Londonderry's Settlement to superannuation schemes as wholly inappropriate. These authorities emphasised that the relationship between a member of a superannuation scheme and the trustee of the scheme is very different to the relationship between beneficiaries and trustees who are administering a trust instrument which expresses the bounty of a settlor.

(d) Does the principle in Re Londonderry's Settlement apply to superannuation schemes?

Balmford J held that Re Londonderry's Settlement was to be followed in Australia and that, however inappropriately, it applied to superannuation schemes. Balmford J held that the matter was at present governed by the decision of the majority in Hartigan v Rydge.

(e) Would production of materials sought by plaintiff disclose evidence of reasons for the trustee's decision?

Balmford J accepted the evidence that there was no decision by the trustee to increase the CBW to $712 per week. The increase was effected by the operation of Rule 41A of the Trust Deed, without the need for any decision to be made by the trustee. Therefore any material in connection with the CBW increase would not disclose the reasons for any decision of the trustee, and accordingly the provision of that material was not prohibited by Re Londonderry's Settlement.

(4) Can the trustee be compelled to produce earlier actuarial reports?

Counsel for the defendant referred to section 1017C(5) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). That section, combined with Regulation 7.9.45 of the [Corporations Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "default) provides that the trustee of a superannuation fund must provide to certain defined persons the most recent actuarial report on the fund. Counsel for the defendant submitted that if the common law permitted the production to a beneficiary of the earlier actuarial reports, 'this statutory provision would be rendered a nonsense'. Balmford J rejected this argument stating that counsel for the defendant had overlooked the principle that legislation is presumed not to alter the common law. Those provisions did not either expressly or impliedly prohibit the production of earlier actuarial reports. Balmford J held that the production of earlier actuarial reports was governed by the principle in Re Londonderry's Settlement.

Counsel for the defendant did not make any submission as to the confidentiality of the actuarial reports. Consequently, in deciding that the actuarial reports did not contain evidence revealing the reasoning process of the trust, Balmford J referred to the view of Sheller JA in Hartigan v Rydge in which she doubted whether actuarial reports are documents which would evidence the reasons for a trustee's decision.

(5) Conclusion

In Australia the principle in Re Londonderry's Settlement applies to superannuation schemes such that members have no right to inspect documents private to the trustees which may evidence the reasons for exercising discretionary powers and their reasoning processes. Balmford J held that the plaintiff was entitled to inspect materials relating to the CBW increase and the actuarial reports because these materials did not disclose the reasons for any decision of the trustee.

(C) WHAT IS A DEMAND ARISING OTHERWISE THAN BY A CONTRACT FOR THE PURPOSES OF BANKRUPTCY?  
(By Arianna Levy, Blake Dawson Waldron)

Charter Pacific Corporation Ltd v Belrida Enterprises P/L [2003] QCA 375, Supreme Court of Queensland, Court of Appeal, McMurdo P, Jerrard JA and White J, 2 September 2003

The full text of the judgement is available at:  
[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/september/2003qca375.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/september/2003qca375.htm" \t "_new) or   
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

This appeal looked at the meaning of "demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust" in the context of the exclusion from provable debts in section 82(2) of the [Bankruptcy Act 1966 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default). The court found that for a demand to arise by reason of a contract, the contract needs to be an essential element of the claim, and the damages must arise from a breach of that contract, not merely have some connection with it.

(1) Facts

The appellants, Michael and Andrew Coventry, were the directors of Evtech Pty Ltd. In late 1992, the appellants sought equity funding for Evtech for its Cell?U?Comm System, and advertised for investors. The respondent, Charter Pacific Corporation Limited, was a company which was in the business of commercial investment in technology.

Pursuant to a deed dated 24 March 1993, Charter Pacific acquired one half of the A Class shares in Evtech from the Coventrys (and others) and loaned Evtech $400,000. Under a second deed dated 13 August 1993, Charter Pacific acquired sufficient further shares to gain control of Evtech and loaned a further $204,634 to Evtech.  
The marketing of the Cell?U?Comm System was a failure and Evtech did not repay any of the loans advanced by Charter Pacific. The Coventrys were each declared bankrupt in 1994 and were discharged in 1997.

(2) The decision at first instance

Charter Pacific commenced action against the Coventrys in 1994. It sought damages for loss suffered as a result of its reliance on misleading representations made by the Coventrys concerning the Cell-U-Comm system before execution of the first deed for sale of shares in Evtech to Charter Pacific. Charter Pacific was successful at first instance (in a judgment handed down in August 2002), and was awarded damages of $604, 634 plus interest. These damages were awarded under section 1005 of the Corporations Law for a contravention of section 995(2) of the Corporations Law, which prohibited conduct that is misleading or deceptive with respect to dealing in securities. The trial judge did not determine damages claims by Charter Pacific for breach of contractual warranties and under contractual indemnities in the first deed, because the judge considered that the sums recoverable would be the same as under s1005.

The trial judge further held that Charter Pacific's claims against the Coventrys fell within section 82(2) of the [Bankruptcy Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default) and were not provable debts in their respective bankruptcies. That section provides that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy. As a result, discharge of the Coventrys from bankruptcy did not operate to discharge them from Charter Pacific's claims. Charter Pacific had not proved for any debt in the bankruptcy of either of the Coventrys.   
The Coventrys appealed, claiming that Charter Pacific's claims were provable, having arisen by reason of a contract or promise (that is, the first deed), and had been discharged by operation of law upon the Coventrys' being discharged from bankruptcy.

(3) The appeal

The Court of Appeal (Jerrard JA; McMurdo P, White J concurring) held that the claims were not provable debts, and dismissed the appeal. The Court found that Charter Pacific's claims arose by reason of the misleading representations made by the Coventrys, and not by reason of the contract subsequently entered into. The representations were made some months before execution of the first deed.  
The Court of Appeal followed the decision of the Victorian Court of Appeal in Aliferis v Kyriacou [2000] 1 VR 447, and noted its consistency with first instance decisions in the Federal Court (CCA Systems Pty Ltd v Communications and Peripherals (Australia) Pty Ltd (1989) 15 ACLR 720) and the New South Wales Supreme Court (Re NIAA Corporation Ltd (in liq), unrep, 2 December 1994).

In Aliferis, Brooking JA reviewed the history of section 82(2) and concluded that a provable debt arising by reason of a contract or promise is one in which a contract or promise was an element of the cause of action. Phillips JA held in Aliferis that the plaintiff had had a right to elect between 2 remedies, one of which (for breach of contract) may be barred and the other (in tort for negligence) was not. The plaintiff's action in that case not to participate in the deed of arrangement was consistent with an election to proceed with an action in tort.

In the current case, Charter Pacific pleaded an action in contract in addition to its action for contravention of section 995. That action in contract was not provable, and the Coventrys had been discharged from it. Nonetheless, the Court considered that Charter Pacific had made its critical election to pursue its non-provable claim under section 1005 by its conduct in not proving in the bankruptcies of the Coventrys.

The Court of Appeal distinguished other authorities cited by the Coventrys in support of a more expansive interpretation of section 82(2). These cases, including Jack v Kipping (1882) 9 QBD 113 and Gye v McIntyre (1991) 171 CLR 609, were concerned with the set off of mutual dealings in the context of section 86 of the [Bankruptcy Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default). In those cases, it had been held that claims in contract and claims in tort arising out of mutual dealings could be set off.

(D) VOIDABLE TRANSACTIONS AND SECTION 588FF: "SATISFACTION" REQUIRES EXAMINATION OF FACTS  
(By Sarah Doyle, Phillips Fox)

Crosbie v Commissioner of Taxation [2003] FCA 922, Federal Court of Australia, Finkelstein J, 2 September 2003.

The full text of this judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/september/2003fca922.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/september/2003fca922.htm" \t "_new) or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Background

This case involved a successful application by the former directors of Trollope Silverwood and Beck Pty Ltd (in liquidation) ('the Company) under Order 5 Rule 2(c) of the Federal Court Rules to intervene in an action brought by the liquidator of the Company (the plaintiff) against the Commissioner for Taxation (the defendant) to recover moneys paid for GST and FBT on the basis that the payments amounted to unfair preferences or insolvent transactions under sections 588FA and 588FC respectively of the Corporations Act 2000 (Cth) ('the Act'). The Commissioner had indicated that he would not contest the Company's claim, but would instead seek indemnity from the former directors of the Company under section 588FGA of the Act. The former directors sought leave to defend the Company's action for the purpose of challenging the assertion that the company was insolvent at the time the payments were made, thereby exculpating their own potential liability for the payments under section 588FGA of the Act.

(2) Findings

Justice Finkelstein held that the interests of justice demanded that the former directors be given permission to intervene to defend the proceedings, especially because the Commissioner had made it clear that he did not intend to take steps to protect the possible liability of the Australian Tax Office to the Company. Leave to intervene was given on the terms that the former directors be bound by all decisions made in that action, and that they be treated as if a party to the action on any issue relating to costs.

His Honour also noted that the right of a third party to appear at the trial, to cross examine witnesses and sometimes obtain discovery, is recognition of the necessity in some cases for the third party to play some role in the action against the defendant. The objects of the third party proceedings, as referred to by his Honour, are primarily to ensure that the third party is bound by the decision between the plaintiff and the defendant, to have any issues between the defendant and the decision between the third party decided as soon as possible after the decision in the case against the defendant, and to avoid the delay and expense of two trials.

His Honour noted that for section 588FGA of the Act to operate, the court had to have first made an order against the Commissioner under section 588FF that the payments were 'voidable transactions' in accordance with section 588FE. The company and the Tax Commissioner had applied for a consent judgment to be made to this effect, which would have precluded any intervention by the former directors in the proceedings.

Justice Finkelstein referred to two NSW cases, Cadima Express v Deputy Commissioner of Taxation (1999) 33 ACSR 527 and SJP Formwork (Aust) Pty Ltd (in liq) v Deputy Commissioner of Taxation (2000) 34 ACSR 604, in which agreement between the parties was deemed sufficient for a court to 'be satisfied' that a transaction was voidable under section 588FF. His Honour concluded that the decisions in those cases amounted to a patent error regarding the application of section 588FF and declined to follow them, relying on the case of Australian Securities Commission v Malborough Gold Mines Ltd (1993) 177 CLR 485, which provides that a single judge in one court may decline to follow the decision of a single judge in another court on a point arising under national legislation where he is convinced that an interpretation is plainly wrong.

His Honour also relied on a number of cases supporting his interpretation of the words 'must be satisfied' as requiring an examination of the relevant facts. Parisienne Basket Shoes Pty Ltd v Whyte (1939) 59 CLR 369 and Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611 both support the view that the satisfaction that is required by section 588FF is akin to a jurisdictional fact, the existence of which must be determined before the court can exercise its power to avoid a transaction. Hobart v Medical Board of Victoria [1966] VR 292 and Ex parte Merrett (1997) 140 FLR 412 both involved decisions made pursuant to different provisions containing the same requirement that the court be satisfied as to the existence of certain facts before an order could be made under the relevant provisions. In the former case, it was held that the requirement that the judge be satisfied in the relevant section of the [Medical Treatment Act 1988 (Vic)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=473" \t "default) required the judge to enter into the consideration of… the evidence. The latter case, which involved an application under section 596B of the Corporations Law for the issue of a summons for a public examination on the basis that the court was satisfied that the person the subject of the summons was guilty of misconduct, was held to require the applicant to show to the court [the relevant] facts.

Accordingly, Justice Finkelstein held that a consent judgment should not be available in respect of an application for an order under section 588FF of the Act, because the wording of that section requires the court to examine all the relevant facts before the power to make an order under that section can be invoked.

(E) CHEQUES - PROPER ENDORSEMENT OR CONVERSION?  
(By Adam Levine, Mallesons Stephen Jaques)

Oris Funds Management Ltd v National Australia Bank [2003] VSC 315, Supreme Court of Victoria, Osborn J, 1 September 2003

The full text of this judgment is available on:

[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/september/2003vsc315.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/september/2003vsc315.htm" \t "_new) or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Facts

The plaintiff OFS Funds Management Ltd ("OFM") as it was then named, was incorporated to operate a master trust fund for a superannuation business conducted by OFS Pty Ltd ("OFS"). In order to establish and operate this fund it was necessary for OFM to obtain access to increased working capital. OFM agreed with Tower Life Australia Ltd ("Tower") that Tower would take up a 40% equity stake in OFM for $960,000.

Owing to protracted negotiations as to the form of the transaction and the related due diligence process, OFM required funds for its cash flow. So, in March 2000 OFM and Tower entered into a Heads of Agreement whereby Tower would advance OFM $100,000. The Heads of Agreement was twice amended in May and June 2000 to allow for two additional advances of $150,000 each. These payments were made by Tower by way of three cheques payable to "OFS Funds Management Ltd or order" crossed and endorsed "Not Negotiable Bank Account Payee Only". The cheques were dealt with as follows:

The Tower cheque dated 6 March 2000 for $100,000 ("the March cheque") was endorsed by two directors of OFM (Stanley and Ponting) under the OFM company seal purportedly authorising payment to Tasvinum Management Pty Ltd ("Tasvinium"), another member of the OFS group. OFM's bankers, the defendant National Australia Bank ("NAB"), collected the March cheque and credited the proceeds to Tasvinium.

The Tower cheques dated 10 May 2000 for $150,000 ("the March cheque") and 7 June 2000 for $150,000 ("the June cheque") were endorsed by just one director of OFM (Stanley) purportedly authorizing payment to OFS. NAB collected the March and June cheques and credited their proceeds to OFS.

(2) Plaintiff's contentions

OFM contended that Stanley and Ponting did not have the authority to endorse any of the three cheques and that at the relevant dates OFM was the true owner of the cheques. So, their collection by NAB constituted the tort of conversion. OFM also contended that the cheques were not obtained by Tasvinum and OFS without fraud, duress or other unlawful means and that their title to the cheques was therefore defective by reason of section 3(3) of the [Cheques Act 1986 (Cwlth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6689" \t "default) ("Cheques Act").

(3) Defendant's contentions

NAB contended that OFM was estopped from denying the authority of Stanley and Ponting to endorse the cheques by reason of sections 128 and 129 of the then Corporations Law. NAB also contended that even if OFM otherwise established their claim, NAB received the cheques in "good faith and without negligence" and so it could rely on section 95(1) of the Cheques Act and did not incur any liability to OFM.  
  
(4) Decision

(a) The March cheque

Osborn J found that there was no resolution in the OFM board minutes authorising the making of the Heads of Agreement or any dealing with the March cheque. Even though additional consents to act as directors had been received, there were only three directors of OFM (including Stanley and Ponting) at the date of the March cheque. These directors were also the sole shareholders. The constitution of OFM provided that "any two directors may sign, draw, accept endorse or otherwise execute a negotiable instrument" but that the directors could determine that a negotiable instrument could be executed in a different way (i.e. with a different number of directors).

In addition, OFM did not have a bank account into which the March cheque could have been paid as OFM's business operations were being conducted through OFS. Osborn J found that the endorsement of the March cheque complied with OFM's constitution and that the absence of an express record of authority by the board was insufficient to prove on the balance of probabilities that there was no such authority.

In relation to OFM's contention based on section 3(3) of the [Cheques Act 1986](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6689" \t "default) that Tasvinium could not have good title to the March cheque because it had been obtained by fraud, Osborn J found that there could be no fraud unless OFM had established that the endorsement of the March cheque occurred without authority. Osborn J commented that fraud is a serious allegation and although it must only be proved on the balance of probabilities, the gravity of the allegation is relevant to the weight of the evidence necessary to satisfy the Court.

Osborn J also considered whether Tasvinum and OFS could be holders in due course of any of the three cheques. He held that under section 50(1) of the [Cheques Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6689" \t "default), they could not be holders in due course as the cheques were crossed. So, neither Tasvinum, OFS (nor NAB) could rely on section 49(3) of the Cheques Act whereby a holder in good course will receive good title to a cheque even where the original title was defective. However, Osborn J did consider that Tasvinum and OFS might be holders deriving title through a holder in due course under section 52 of the Cheques Act.

(b) The May and June cheques

The May and June cheques stood in different positions from the March cheque in that they were endorsed by one director only (Stanley). At the relevant dates additional directors had been appointed to the board of OFM, but there is no record of authority being given by the board to Stanley to endorse the cheques. Osborn J found that Stanley was not authorised by the directors to endorse the cheques in accordance with the company's constitution. So, NAB collected the cheques and credited the proceeds without the authority of OFM. In these circumstances, Osborn J considered that NAB had converted the cheques and would be liable to OFM unless it could satisfy the Court that it had collected the cheques "in good faith and without negligence" under section 95 of the [Cheques Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6689" \t "default) or that under sections 128 and 129 of the Corporations Law it was entitled to make certain assumptions when collecting the cheques that could not be denied by OFM.

(c) Section 95 Cheques Act

There was no allegation that NAB acted without good faith. Osborn J considered the case law on negligence under section 95 and determined that the test was whether the transaction was so out of the ordinary that it ought to have aroused doubts in the bankers' mind and caused them to make enquiries. Osborn J found that NAB was not negligent in dealing with the May and June cheques. This was because OFM operated through OFS and had no bank account of its own.

He further found that under the Heads of Agreement, OFS was the guarantor for OFM and that there were strong grounds that Stanley was authorised to endorse the cheques by OFM's three shareholders and executive directors. Osborn J was satisfied that any further inquiry made by NAB would not have altered the instructions or raised any doubt about them. Osborn J further considered the need for inquiry when a cheque is crossed "not negotiable - account payee" and is deposited to the credit of another party. He was satisfied that the relevant official in NAB had followed the bank's manual in relation to third party cheques.

(d) Sections 128 and 129 Corporations Law

NAB asserted that under sections 128 and 129, OFM could not deny that the cheques were endorsed with authority. With respect to the assumption in section 129(1) that a person may assume that the company's constitution has been complied with, Osborn J held that it should not be taken as requiring the person to have knowledge of the constitution. Rather, it should be taken to mean that a person dealing with a company can assume that the action taken by the company is in accordance with its constitution. So, NAB was entitled to assume that OFM's constitution had been complied with even if a single director had endorsed the cheques.

OFM contended that section 129(1) should be read down to exclude assumptions relating to the execution of documents, as section 129(6) dealt with this. Osborn J held that the assumption in section 129(6) related to documents executed under seal in accordance with section 127(2) and not whether the constitution has been complied with. He noted that section 127(2) was not a replaceable rule and that section 127(4) does not limit the ways in which a company can execute a document. So, the assumption in section 129(1) did not need to be read down.

Osborn J further held that the assumptions in section 129 are cumulative and so in making the assumption that the constitution had been complied with, NAB could also assume under section 129(4) that Stanley had properly performed his duties to the company. Osborn J also rejected OFM's contention that it was entitled to rely on section 128(4) in that NAB could not rely on the section 129 assumptions as it knew or suspected that the assumptions were incorrect.

(e) Conclusion

The Court rejected OFM's claim and held in favour of NAB.

(F) THE GRANT OF RELIEF UNDER SECTION 1322(4) OF THE CORPORATIONS ACT   
(By Simon Panegyres, Mallesons Stephen Jaques)

In the matter of National Roads and Motorists' Association Ltd ACN 000 010 506 [2003] FCAFC 206, Federal Court of Australia, Full Court, Ryan, Finkelstein and Gyles JJ, 27 August 2003.

The full text of this judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/august/2003fcafc206.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/august/2003fcafc206.htm" \t "_new)  
or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Introduction

This was an application for leave to appeal by National Roads and Motorists' Association Limited ("NRMA") from a refusal by Jacobson J to exercise the discretion provided for by section 1322(4)(d) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act").

(2) Background

The Constitution of NRMA ("Constitution") provided for an election for half of the Board of Directors of NRMA ("Board") to take place during the calendar year.

Rule 67 of the Constitution required an election to be held if the number of candidates was greater than the number required to be elected to the Board. Rule 67 also provided that voting at that election was to close on a date and at a time fixed by the Board, but no later than one day before the date fixed for the holding of the company's annual general meeting.

On 26 June 2003 NRMA published a notice calling for nominations for election as a director. The number of candidates for election to the Board was greater than the number of directors required and therefore an election was necessary. The indicative election timetable provided to candidates listed 21 November 2003 as the date on which the ballot would close.

The Board subsequently resolved to hold the annual general meeting on 8 October 2003, at which time a proposed new Constitution ("Proposed Constitution") would be put to members for approval. The terms of the Proposed Constitution were such that if it was adopted the number of directors would be reduced and there would be no half Board election.

An application was brought before Jacobson J by NRMA seeking that he exercise the discretion provided for by section 1322(4)(d) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and grant an order extending the closing of voting pursuant to Rule 67 to a time after the date fixed for the holding of NRMA's 2003 annual general meeting.

Section 1322 of the Act (so far as is relevant) provides as follows:

"(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes: …

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary order as the Court thinks fit. …

(6) The Court must not make an order under this section unless it is satisfied: …

(c) in every case - that no substantial injustice has been or is likely to be caused to any person."

(3) Primary decision

Jacobson J declined to exercise his discretion in favour of the grant of relief for the following reasons:

(a) It was not possible to determine whether there would be cost savings from departing from the provisions of the Constitution. Where there was merely the possibility of cost savings then it was not appropriate to exercise the discretion granted under section 1322(4). A departure from the provisions of the Constitution ought not to be made lightly.

(b) His Honour was not satisfied that no substantial injustice was likely to be caused to any person if the provisions of the Constitution were departed from. NRMA had the onus of satisfying 1322(6)(c) and in the absence of any reaction to the proposal from members or candidates, his Honour could not be satisfied that NRMA had discharged its onus.

(4) Arguments on appeal

NRMA argued that Jacobson J fell into error in two respects.

Firstly, in terms of the discretion under section 1322(4)(d), he had imposed two impermissible "glosses". These were:

(a) That relief should not be "lightly granted", at least where the application assumed contravention of a corporation's constitution. NRMA submitted that this was an unwarranted gloss, as if the discretion comes to be exercised, it is against a background of satisfaction of the requirements of section 1322(6), in which circumstances the Court does not start from any predisposition against relief.

(b) That relief should not be granted in aid of a benefit which might not certainly accrue. NRMA submitted that there was no reason to read down the scope of the section so as to require that the application be made with a view to securing a benefit which is certain to come to pass.

Secondly, it was submitted by NRMA that the approach to section 1322(6) had been flawed as there was no proper consideration of substantial injustice.

(5) Decision of majority

Leave to appeal was granted. In dismissing the appeal, the majority (Ryan and Gyles JJ) held as follows:

(a) Section 1322(4)(d) confers an unfettered discretion upon the Court subject to the requirements of section 1322(6).

(b) There was no basis for taking the view that Jacobson J had acted upon a wrong principle in the sense of not adhering to a binding rule, or that he had made any mistake of fact. The reasons of Jacobson J make it clear how the result was reached and the result was not unreasonable or unjust.

(c) The only mandatory requirement non-observance of which would vitiate the exercise of the discretion was that imposed by section 1322(6). His Honour did not ignore the statutory mandatory condition but instead expressly took it into account.

(d) The starting point to an exercise of the discretion in section 1322(4)(d) is that a case must be made for altering the effect of a provision of the Constitution. An assessment of the nature and likelihood of the claimed advantage in doing so is a proper part of the balancing process which is to be undertaken.

(e) The attack upon his Honour's treatment of section 1322(6) was misconceived. If his Honour had been disposed to grant relief, he would have been bound to comply with that provision. His Honour was quite entitled to exercise his discretion against the grant of relief without taking it into account at all.

(6) Dissenting judgment

Finklestein J, in his dissenting judgment, noted the need to exercise caution in setting aside a discretionary decision. His Honour was nevertheless of the opinion that there was sufficient error in the approach taken by Jacobson J or, at any rate, that the result was so unreasonable, as to warrant the reversal of the order made below.

Finklestein identified two key areas in which Jacobson J fell into error:

(a) Jacobson J proceeded on the assumption that the election timetable should only be altered for a weighty reason. The requirements of a company's constitution are not all of uniform importance. It all depends upon the circumstances and Jacobson J did not consider whether the circumstances mandated this approach.

(b) That there was only a "mere possibility" of saving a large sum was not to the point. The Board would not be acting properly if it failed to take steps that may reduce costs. The possibility of savings was more than merely speculative and NRMA's financial position was not good.

In the circumstances Finklestein J would have allowed the appeal to avoid the injustice that may have occurred from requiring NRMA to follow the election timetable in its Constitution.

(G) FURTHER GUIDANCE ON STATUTORY DERIVATIVE ACTIONS  
(by Rob Craig, Blake Dawson Waldron)

Isak Constructions v Faress [2003] NSWSC 784, Supreme Court of New South Wales, Barrett J, 27 August 2003

The full text of this judgment is available at:  
[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/august/2003nswsc784.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/august/2003nswsc784.htm" \t "_new) or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Introduction

This interlocutory proceeding concerned the applicant's eligibility to have a default judgment against Emerald Constructions (Aust) Pty Ltd (until 16 September 2002 Isak Constructions (Aust) Pty Ltd "the Company"), set aside (and any enforcement proceedings stayed) under the statutory derivative action provisions of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).

(2) Facts

On 4 December 2002, District court proceedings were initiated against the Company by statement of liquidated claim. Service of the statement was made at the registered office of the Company on 17 December 2002. The defendant in the District Court proceeding (and the applicant in the hearing before Barrett J) Mr Faress, stated that he handed the statement of claim to the second plaintiff Mr Isaaka on 18 December 2002, so that Mr Isaaka could deal with it on behalf of the Company. This was because a purported company resolution of 4 November 2002 had removed the applicant as a director. No action was taken by the Company following Mr Isaaka's receipt of the statement of claim, and the applicant became aware of the default judgment in May 2003.

(2) Barrett J's decision

(a) The standing of the Applicant under section 236(1)(a) of the Act

Counsel for the applicant submitted that his standing to bring proceedings under section 236(1)(a) of the Act derived from his status as a former officer of the Company. However, Barrett J noted that the efficacy of the steps taken to remove the applicant as a director were questionable, and would have to be addressed at trial. Although his Honour could not accurately state whether the applicant was a former director of the Company or remained a current director, section 236(1)(a)(ii) provides an "officer or former officer of the Company" with standing to bring a derivative action. Therefore, as the applicant came within the section taken as whole Justice Barrett was satisfied that he had the requisite standing.

(b) The Requirements of section 237(2) of the Act

In considering the application in question, Barrett J reiterated the view he expressed in Charlton v Baber [2003] NSWSC 745 that if the requirements of section 237(2) are met, a Court is compelled to grant an application as sought. The five requirements under section 237(2) of the Act are:

"(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and  
(b) the applicant is acting in good faith; and  
(c) it is in the best interests of the company that the applicant be granted leave; and  
(d) if the applicant is applying for leave to bring proceedings - there is a serious question to be tried; and  
(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or  
(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied."

With respect to the requirement in section 237(2)(a), his Honour felt that three matters indicated that the Company would not itself take responsibility for the District Court proceedings: firstly, no steps had been taken by Mr Isaaka on the Company's behalf; secondly, despite the dispute about ownership and control, Mr Isaaka was aware that the District Court proceedings were his responsibility; and finally, despite notice of the interlocutory proceedings the solicitor for the company filed a notice of ceasing to act in the proceedings and no appearance was made for the Company.

When assessing whether the applicant was acting in good faith, Barrett J applied the approach of Palmer J in Swansson v R A Pratt Properties Pty Ltd (2002) 42 ASCR 313. In doing so, his Honour held that the applicant's affidavit had clearly demonstrated an honest belief that a good cause of action existed. Interestingly, his Honour did not comment on whether the cause of action had a reasonable prospect of success. Finally, it was apparent that the applicant was not seeking to use the derivative action for a collateral purpose that would amount to an abuse of process. Defence of the proceedings was clearly in the Company's interest and in addition to the applicant's interest as guarantor of some of the Company's contractual obligations. In this way, Barrett J also dealt with requirement (c).

As section 237(2)(d) was not relevant to the proceedings, the only remaining hurdle to applicant's request for leave was his inability to show that the 14 day notice requirement had been met. In particular, the interlocutory process and supporting affidavit were filed and then served upon the solicitor for the Company on 15 August 2003. This meant that the notice was not in accordance with section 109X of the Act as it had been incorrectly given to the solicitor and not the company. Furthermore, the notice period in section 237(2)(e)(i\*) had not been met as the notice was not given until after the interlocutory process was filed.

On this basis, counsel for the applicant submitted that it was nevertheless appropriate to grant leave under section 237(2)(e)(ii). Counsel advocated that the steps taken were a suitable substitute for section 237(2)(e)(i) requirement, and that the Company was aware of the applicant's intention to make an application from his affidavit of 23 July 2003, and the judgment of Austin J on 25 July 2003. Justice Barrett accepted that a substance over form approach should be adopted with respect to whether the Company had knowledge of the applicant's intention, but noted that a Company must also be aware of the reasons for an application. In his Honour's opinion, departure from the requirements of section 237(2)(e)(i) could be justified only where the company was already aware of the relevant matters associated with the application, or where there was good reason to allow the applicant to represent the company without the company's knowledge of those matters.

In the present proceeding, Barrett J held that the Company was aware of the applicant's intentions and reasons since the affidavit and judgment of late July 2003. Furthermore, his Honour held that this would have been reinforced by the documents and covering letter sent to the solicitor for the Company on 15 August 2003. On this basis, his Honour granted the applicant leave as sought.

(H) STAMP DUTY PAYABLE ON IN SPECIE DISTRIBUTIONS UPON WINDING UP  
(By Connie Chaird and John Fowler, Corrs Chambers Westgarth)

Commissioner of State Revenue v Purdale Holdings Pty Ltd [2003] VSC 289, Supreme Court of Victoria, Nettle J, 15 August 2003

The full text of this judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/august/2003vsc289.htm](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new) or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) The law

Section 72 of the repealed [Stamps Act 1958 (VIC)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=202" \t "default) (the equivalent provision now being section 50 of the [Duties Act 2000 (VIC)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=48696" \t "default)) provided that the stamp duty payable on an in specie transfer of real property to a shareholder of a company arising from the winding-up of that company, may be reduced by an amount representing the shareholder's entitlement to the undistributed assets of the company if:  
"the Commissioner is satisfied that the company is not being wound up as a part of an arrangement or scheme devised with the collateral purpose of reducing the duty otherwise payable on the transfer".  
(2) The facts

During the period between 1967 and 1995, Louis Fleyfel and Leila Fleyfel incorporated, and were issued shares in the capital of, Purdale Holdings Pty Ltd and Byblos Holdings Pty Ltd. During that same period, Mr and Mrs Fleyfel incorporated, and were issued shares in one other proprietary company and established a family trust.

During the period between 1995 and 1999, Byblos Holdings Pty Ltd acquired three, and sold two, properties. In 1999, Byblos Holdings Pty Ltd's remaining property ("Property") was valued at $1.8 million.

In June 1999, the Fleyfel Unit Trust was established and Purdale Holdings Pty Ltd was appointed as trustee of that trust. In that same month, Purdale Holdings Pty Ltd issued to Mr Fleyfel units in the Fleyfel Unit Trust and advanced to Mr Fleyfel a loan, creating a debt due by Mr Fleyfel to Purdale Holdings Pty Ltd of $1.8 million.  
In that same month, Byblos Holdings Pty Ltd issued to Purdale Holdings Pty Ltd shares in the capital of Byblos Holdings Pty Ltd in consideration of Purdale Holdings Pty Ltd assigning to Byblos Holdings Pty Ltd the debt due by Mr Fleyfel to Purdale Holdings Pty Ltd of $1.8 million. In that same month, the members of Byblos Holdings Pty Ltd resolved to wind up the company.

In October 1999, the liquidator of the Byblos Holdings Pty Ltd made an interim distribution of cash and receivables, including the debt owed by Mr Fleyfel to the company of $1.8 million, to all the members of Byblos Holding Pty Ltd except for Purdale Holdings Pty Ltd. Thus, the debt owed by Mr Fleyfel to the company was extinguished.

In March 2000, the liquidator transferred from Byblos Holdings Pty Ltd to Purdale Holdings Pty Ltd the Property valued at $1.8 million in satisfaction of its entitlements as a shareholders, being the consideration given to Byblos Holdings Pty Ltd for the shares in the capital of that company.

The net result of the above transactions was that the Property was transferred from Byblos Holdings Pty Ltd to Purdale Holdings as trustee of the Fleyfel Unit Trust. Both entities were controlled Mr Fleyfel. As such the transactions resulted in no change to the beneficial ownership of the Property.

(3) The issues

Purdale Holdings Pty Ltd applied for a reduction in the amount of stamp duty payable on the transfer of the Property. The Commissioner rejected its application on the grounds that he was not satisfied that the company was not being wound up as a part of an arrangement or scheme devised with the collateral purpose of reducing the duty otherwise payable on the transfer pursuant to section 72 of the [Stamps Act 1958 (VIC)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=202" \t "default).

Purdale Holdings Pty Ltd appealed. The Victorian Civil and Administrative Tribunal ("Tribunal") decided that it was satisfied that the company was not being wound up as a part of an arrangement or scheme devised with the collateral purpose of reducing the duty otherwise payable on the transfer pursuant to section 72 of the [Stamps Act 1958 (VIC)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=202" \t "default) on the following grounds.

The Tribunal held that it must take into account the subjective intention of the parties involved when deciding whether or not a company is being wound up as a part of an arrangement or scheme devised with the collateral purpose of reducing the duty otherwise payable on the transfer and the Tribunal accepted that it was the intention of Mr Fleyfel to restructure his corporate group for health, income tax and succession purposes.

The Tribunal also held that it must consider the whole of the scheme and not focus on one part of the scheme in isolation, such as the transfer of land.

The Tribunal also held that "the collateral purpose" of reducing the duty otherwise payable on the transfer does not equate to the effect of reducing the duty otherwise payable on the transfer.

The Commissioner appealed.

(4) The decision

The Supreme Court of Victoria ("Supreme Court") held that it was not satisfied that the company was not being wound up as a part of an arrangement or scheme devised with the collateral purpose of reducing the duty otherwise payable on the transfer pursuant to section 72 of the [Stamps Act 1958 (VIC)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=202" \t "default).

The Supreme Court held that the Commissioner may find the "collateral purpose of reducing duty" in part of the overall arrangement entered by the taxpayer. Although the overall arrangement may be described as a scheme, that part of the overall arrangement may also be a scheme for the purposes of applying section 72 of the [Stamps Act 1958 (VIC)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=202" \t "default). The Supreme Court accepted the Commissioner's decision that the winding up of Byblos Holdings Pty Ltd constituted a scheme in itself and also accepted that this scheme was devised with the collateral purpose of reducing the duty otherwise payable on the distribution. In this regard the Supreme Court held that the expression "collateral purpose" equated to any purpose.

Notwithstanding the Supreme Court's decision to overturn the Tribunal's decision, the Supreme Court agreed with the Tribunal that the Commissioner may take into account the subjective intention of the parties involved when deciding whether or not the scheme was devised for the collateral purpose of reducing the duty otherwise payable on the distribution.

Additionally, the Supreme Court agreed with the Tribunal that a scheme having the effect of reducing duty otherwise payable is not necessarily determinative of the presence of a "collateral purpose" to reduce duty otherwise payable, however, it stressed that such an effect is a significant indicator of such a purpose.

(5) The practical implications

On the distribution of real property upon a winding up of a company, the Supreme Court has made it clear that the presence of a subjective intention for entering into the transaction for purposes other than avoiding duty, may be insufficient to satisfy the Commissioner that the winding up is part of a scheme devised with the collateral purpose of reducing the duty otherwise payable on the distribution.

More importantly, the Supreme Court has made it clear that the mere effect of reducing the duty otherwise payable on such a distribution is "a significant indicator" that a collateral purpose of the winding-up was the reduction of duty.

As the discretion discussed in this case has been repeated in section 50 of the [Duties Act 2000 (VIC)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=48696" \t "default) the decision of the Supreme Court remains relevant when considering the stamp duty consequences of in specie distributions arising from a winding-up of a company.

(I) SUPERVISION OF ADMINISTRATORS

(By Svetlana Zarucki, Clayton Utz)

In the matter of Pan Pharmaceuticals Limited (Administrators Appointed) ACN 091 032 914, Pan Pharmaceuticals Export Pty Limited (Administrators Appointed) ACN 100 857 514, Pan Laboratories (Australia) Pty Limited (Administrators Appointed) ACN 003 763 308, Pan Pharmaceuticals Services Pty Limited (Administrators Appointed) ACN 095 628 943, Pan Pharmaceuticals Technologies Pty Limited (Administrators Appointed) ACN 104 129 188 [2003] FCA 855, Federal Court of Australia New South Wales District Registry, Allsop J, 14 August 2003

The full text of this judgment is available at:  
[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/august/2003fca855.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/august/2003fca855.htm" \t "_new)  
or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

This decision deals with the willingness of the court to enter the field of decision making undertaken by an administrator under section 447E of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the "Act").

(1) Background

The applicant in this matter had expressed interest in acquiring the business of the Pan Group. Pan's administrators indicated to those interested in the business that any decision to be made by them to deal with the business would be subject to approval or consent of creditors at a meeting.

The applicant sought an assurance from the administrators that any sale contract executed by the administrators relating to the transfer of title of the assets of the Pan Group be subject to a precondition that the completion of the sale not take place prior to:

a) the expiration of the time limit for an appeal pursuant to section 1321 of the Act from the admission or rejection of a proof of debt or claim for voting purposes for the meeting of creditors;  
b) the expiration of the time limit for any person to seek review of a casting vote exercised by the Chairman at the meeting of creditors pursuant to section 600B or 600C of the Act;  
c) the expiration of such further time as the Federal Court may direct on application made for that purpose by any interested person prior to the expiration of the above periods.

In requesting the inclusion of such a term, the applicant foreshadowed the following potential disputes:

a) an application for review by the court of a casting vote exercised by the administrators at the meeting of creditors;  
b) an application arising out of the conduct of the administrators in dealing with the admission of proofs for voting purposes at the meeting of creditors;  
c) an application arising out of any decision of the administrators as to the just estimate of the debt or debts of creditors with an unliquidated claim under section 1321 of the Act.

The administrators declined to give an undertaking in the terms suggested by the applicant.

(2) Section 447E

The applicant took the administrators to court. In effect, it sought to restrain the administrators from conducting their administration otherwise than on the basis that the administrators propound a sale contract which contains the term suggested by the applicant. The applicant submitted that the court should do so in its supervisory capacity under section 447E of the Act.

Allsop J dismissed the application on the basis that he was not satisfied that the approach of the administrators was or would be prejudicial to the interests of the company, its creditors or members. His Honour was of the view that to make the order requested by the applicant would be an unjustified restriction on the power granted to the administrators.

(3) Comment

The problem faced by the applicant in this case was that the potential disputes and damages that may have arisen as a result of the administrators' conduct at the meeting of the creditors were not known. Thus any difficulties complained of as a result of any particular voting were hypothetical. The terms and nature of any complaints made could not be precisely determined. As a result the possibility of any damage to the company and whether or not that damage was significant and likely to prejudice the interests of the creditors when set against the commercial judgment of the administrators in attempting to get the greatest value for those interested in the company was not sufficient to lead the court to a conclusion that the conduct of the administrators was or would be inappropriate.

(J) VOIDABLE PREFERENCE PAYMENTS   
(By Kevin Kee, solicitor, Freehills)

BP Australia Ltd v Brown [2003] NSWCA 216, New South Wales Court of Appeal, Spigelman CJ, Mason P and Handley JA, 8 August 2003

The full text of this judgment is available at:

[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/august/2003nswca216.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/august/2003nswca216.htm" \t "_new) or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Overview

The liquidators of a company sought an extension of time within which to bring actions against various potential defendants, including BP Australia Ltd (BP) for the recovery of alleged voidable preference payments.

Section 588FF(3)(a) relevantly provides that an application in relation to a voidable transaction under section 588FF(1) "may only be made" within 3 years after the relation-back day or (under section 588FF(3)(b)) "within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years".

Section 1322(4)(d) is a general provision which empowers the court to, inter alia, extend the time available for instituting a proceeding.

This case follows a line of recent authority which establishes that section 1322(4)(d) is not available to extend the 3 year limit within which a liquidator may make an application for an extension of time under section 588FF(3)(b).  
Additionally, the Court confirmed that an order for an extension of time need not relate to a particular voidable transaction, but rather, may refer to a sufficiently defined category of transactions.

(2) History of the proceedings

At first instance level, the proceedings comprise seven judgments of Austin J:  
Before the 3 year time limit had expired, the liquidators brought an ex parte application under section 588FF(3)(b) to extend the time available to make an application under section 588FF(1) in relation to certain alleged voidable transactions including transactions between the company and BP. The court granted the order but allowed those affected, including BP, leave to seek to have the orders set aside.  
The court set aside the first judgment because BP had been denied natural justice because the first judgment was made ex parte.

The liquidators then sought to have BP joined as a defendant to the proceedings for the final hearing of the application to extend time. By this time, the 3 year time limit had expired, and therefore the court considered that it was futile to join BP and denied the application for joinder.

The fourth and fifth judgments are not relevant here. The liquidators then applied under section 1322(4)(d) for an extension of time within which to bring the application for an extension of time under section 588FF(3)(b). The court allowed the application.

The court then granted the extension of time sought under section 588FF(3)(b) to bring the section 588FF(1) application.

BP appealed the sixth and seventh judgments, whilst the liquidators appealed the second and third judgments.

(3) Decision and reasons for decision

(a) Summary

Spigelman CJ delivered the leading judgment with which Mason P agreed. Handley JA agreed with Spigelman CJ, but reserved judgment on one point. The New South Wales Court of Appeal held that:

(i) Section 1322(4)(d) is not available to extend the time prescribed by section 588FF(3)(b) within which a liquidator must apply for an extension of time to seek orders in relation to a voidable transaction under section 588FF(1).  
(ii) The obligation to comply with procedural fairness requires that a person likely to be adversely affected by the order of the court is given an opportunity of making submissions to the court before the court makes its decision. Therefore, the court cannot, absent exceptional circumstances, make an ex parte order granting an extension of time.

(iii) Provided the application for an extension of time is made within the time prescribed by section 588FF(3)(b), a defendant may subsequently be joined as a party after the date prescribed by that section.

(iv) The court may order that the applicant be allowed an extension of time within which to bring an application in relation to a particular voidable transaction, or in relation to a category of voidable transactions, provided the description of the category is clear. In deciding whether to allow the applicant an extension of time, the court must consider what is fair and just in all the circumstances. Whether the applicant has a reasonable excuse for the delay is a relevant factor, but is not in itself determinative. Austin J did not err in exercising his discretion.

(v) Spigelman CJ also suggested, but did not decide, that the "relation back day" (which is the date from which time is measured for the purposes of section 588FF) for the purposes of section 588FF may mean the date of the winding up order, rather than, as is generally the case in relation to companies that were in administration immediately before the winding up order, the day the administration began. It is on this point that Handley JA reserved judgment.

(b) Availability of section 1322(4)(d)

Spigelman CJ reviewed the authorities. In David Grant and Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265, the High Court decided that 1322(4)(d) was not available to extend the time available to set aside a statutory demand under section 459G (at [47]-[50]). On the other hand, some cases have sought to distinguish David Grant based on the statutory context. This is what Austin J sought to do (at [51]-[67]).

However, both before and after the decision of Austin J, courts have decided that section 1322(4)(d) is not available to extend the 3 years allowed in section 588FF(3)(b): Star v National Australia Bank Ltd (1999) 30 ACSR 583, Tagoori Pty Ltd (in liq) v Lee [2001] 2 Qd R 98, Greig v Australian Building Industries Pty Ltd (in liq) (2002) 171 FLR 41, and on appeal [2003] QCA 298 (at [50], [68]-[70])

Adding to the complexity, two further decisions have not followed Star and Greig, highlighting a difficulty with the approach in these cases which arises in relation to long administrations. In such cases, the 3 year limit may expire before a liquidation has even begun: Re Aura Commercial Interiors (2002) 20 ACLC 904; Sutherland v Dexion Pty Ltd (2003) 21 ACLC 341 (at [71]-[76]).

Spigelman CJ stated that section 1322(4)(d) ought be construed liberally and would only be read down if section 588FF(3)(b) is intended to cover the field (at [79]). His Honour held that a textual analysis combined with considerations of the purpose of Part 5.7B (within which section 588FF falls) warranted the conclusion that section 1322(4)(d) was not available (at [88]-[89]).

Textually, the word "only" has operative effect only if the application for an extension of time must be made within the 3 years prescribed by section 588FF(3)(b).   
The purpose of Part 5.7B leads to the conclusion that the specific time limit in section 588FF(3)(b) is intended to cover the field. The time limit in section 588FF(3)(b) serves the purpose of deterring liquidators from sitting on their rights to recover voidable transactions whilst creating certainty by marking off a time wherein the beneficiary of a voidable transaction remains at risk of divestiture (at [91]-[117]).

Spigelman CJ also addressed the concerns with this approach raised in Aura and Dexion. In obiter, his Honour suggested that time did not start running against the liquidator for the purposes of section 588FF until the date of the winding up order (at [125]).

An ordinary reading of the definition of "relation-back day" indicates that in the case of a company in administration before liquidation, the relation-back day is generally the day the administration began. His Honour relied on the proviso in the definition section that the definitions apply "unless a contrary intention appears" (at [123]-[128]). Handley JA expressly reserved judgment on this point (at [216]).

(c) Other aspects of the judgment

Given that section 1322(4)(d) was not available to extend time and the first judgment was confirmed to be made in denial of procedural fairness to BP (at [134]-[136]), the question then was whether Austin J was correct in refusing to allow BP to be joined as a party after the expiry of the 3 year limitation period. Spigelman CJ held only the application need be made within 3 years, and that BP could be joined after this period had expired (at [149]-[151]).

Counsel for BP suggested that liquidators may take unfair advantage of this by filing "shelf applications" without naming any particular creditors as defendants. His Honour countered this by referring to the case management practices of the courts, and the effect a delay in bringing an application may have on the exercise of discretion by the courts to extend time.

Next, his Honour considered the order to extend time itself. After holding that an order to extend time under section 588FF(3)(b) could be made in general terms, rather than by reference to a particular creditor (at [168]-[170]), Spigelman CJ reviewed the authorities relating to the exercise of the discretion to make the order and held that the correct approach was to ask what was fair and just in all of the circumstances. Therefore, Austin J did not err in not attaching determinative weight on the fact that the liquidators did not establish a reasonable excuse for the delay or in attaching significant weight to the absence of prejudice to BP in making the order.

(K) DETERMINING WHO IS THE APPROPRIATE PERSON TO CARRY OUT THE WINDING UP OF AN UNREGISTERED MANAGED INVESTMENT SCHEME  
(By Connie Chaird, Solicitor, Corrs Chambers Westgarth)

Australian Securities and Investments Commission v Atlantic 3 Financial (Aust) Pty Ltd [2003] QSC 265, Supreme Court of Queensland, Mullins J, 7 August 2003

The full text of this judgment is available at:  
[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/august/2003qsc03265.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/august/2003qsc03265.htm" \t "_new) or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) The law

ASIC may apply to the Court to have an unregistered managed investment scheme wound up pursuant to section 601EE(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  
The Court may make any orders that it considers appropriate for the winding up of an unregistered managed investment scheme, including a determination of who is the appropriate person to carry out that winding up, pursuant to section 601EE(2) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).

(2) The facts

Until May 2003, Atlantic 3 Financial (Aust) Pty Ltd, Frederic Acker and Gerilyn Marie Polanski operated 15 unregistered managed investment schemes ("Schemes"). In May 2003, ASIC applied to the Supreme Court of Queensland ("Supreme Court") for, and the Supreme Court made, orders that each of those Schemes be wound up.

At the same time, the Supreme Court appointed investigating accountants to provide it a report on each of the Schemes so that the Supreme Court could determine who is the appropriate person to carry out the winding up of those Schemes.

(3) The issues

ASIC applied to have a registered liquidator carry out the winding up of each of the Schemes.   
Atlantic 3 Financial (Aust) Pty Ltd applied to have it carry out the winding up of those Schemes. Additionally, Atlantic 3 Financial (Aust) Pty Ltd, Mr Acker and Mr Polanski agreed to pay the costs of that winding up. The majority of the investors of the Schemes supported this application.

(4) The decision

The Supreme Court held that it must balance all of the factors relevant to the winding up of a scheme when determining who is the appropriate person to carry out that winding up and on what terms. Factors which were relevant to the winding up of each of the Schemes included the investors' preferences, the amount of the total investment, the investigating accountants' recommendations, Atlantic 3 Financial (Aust) Pty Ltd's treatment of the relevant Scheme and the complexity of the relevant Scheme.

Having considered each of the above factors, the Supreme Court ordered that the investigating accountants carry out the winding up of 5 of the 15 Schemes and Atlantic 3 Financial (Aust) Pty Ltd carry out the winding up of the balance of those Schemes under the investigating accountants' supervision.

(5) The practical implications

The Supreme Court did not prescribe any guidelines on how each of the above factors ought to be weighed against one another. However, its decision, and the factors considered, in relation to each of the Schemes may be a useful guide to identifying which factors are more significant than others.  
For example, the Supreme Court appointed the investigating accountants to carry out the winding up of a Scheme if the amount of the total investment was significant or Atlantic 3 Financial (Aust) Pty Ltd's treatment of the Scheme, other than the fact that it failed to register it, was questionable.   
Subject to the absence of the above two factors, the Supreme Court appointed Atlantic 3 Financial (Aust) Pty Ltd to carry out the winding up of a Scheme if this was the majority of the investors' preference or if this was appropriate because of the complexity, and Atlantic 3 Financial (Aust) Pty Ltd's knowledge, of the Scheme.

(L) THE LIMITS OF SHAREHOLDER POWER  
(By John Corbett and Karen Perritt, Corrs Chambers Westgarth)

Massey v Wales; Massey v Cooney [2003] NSWCA 212, New South Wales Court of Appeal, 4 August 2003  
The full text of the judgment is available at:  
[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/august/2003nswca212.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/august/2003nswca212.htm" \t "_new)   
or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Introduction

This case highlights the dangers associated with the improper appointment of people to boards of directors. The decision also affirms the long-held view that while shareholders have ultimate control of a company, they are generally restricted in their involvement in the day-to-day operations of the company.

(2) Facts

As from February 2001, Zimmerman Holdings Pty Ltd (ZH) had two directors: Eli Barel and Yaqob Rajwan. ZH's shares were held equally by Yaqob Rajwan, Eli Barel and his brother Baruch Rajwan. Article 58 of ZH's Articles of Association ("Articles") allowed for the director(s) or the Company in a General Meeting to appoint any person to be a director either to fill a casual vacancy or as an addition to the Board. Article 66 stated the business of the company shall be managed by the director(s), and gave directors a wide power to exercise all the powers of the company.

On 28 August 2001, Yaqob Rajwan held a purported meeting of directors of ZH, of which no notice had been given to Eli Barel, and at which only he was present. He passed a resolution appointing his brother as a director of ZH and then notified ASIC of the appointment. This breached Article 73, which stated that two directors were necessary to constitute a quorum for a board meeting (thus the purported appointment was invalid).

On 10 September 2001, the Rajwans gave instructions to the law firm Massey Bailey to commence proceedings against a number of ZH's creditors and the other ZH director, Eli Barel. A defendant in those proceedings sought to dismiss proceedings on the basis that ZH's act in retaining Massey Bailey for those proceedings was invalid. A meeting of shareholders of ZH on 6 May 2002 carried a resolution ratifying the appointment of Massey Bailey, as solicitors for ZH in the relevant court proceedings. Further defendants subsequently sought to dismiss related proceedings on the same basis.

The Supreme Court of NSW, at first instance, held that the Rajwans did not have authority to give instructions on behalf of ZH to Massey Bailey to commence proceedings. Bryson J admitted evidence of the resolution of the general meeting of ZH on 6 May 2002, but limited its use to the application made under section 1322 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('Corporations Act'), on the basis that the powers of the meeting of shareholders did not extend to resolving the appointment of solicitors to conduct proceedings or to initiate proceedings.

Bryson J held that an organ of a company cannot ratify a purported exercise of power unless that exercise of power was within the power of the ratifying organ. Due to Article 66, commencing legal proceedings was not within the power of the general meeting. The Court also rejected Rajwans' submission that the general meeting had residual authority to use powers which might otherwise be exclusively vested in directors. It also rejected an application under section 1322 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) on the basis that the lack of notice to Mr Barel and the lack of a quorum were not procedural irregularities, and as such it was not just and equitable that an order for validation be made. His Honour ordered that Massey Bailey pay the defendants' costs of the proceedings.

Massey Bailey appealed the judgment to the NSW Court of Appeal. The key issue before the Court was whether the resolution of the general meeting on 6 May 2002 had the effect of ratifying the Rajwans' instructions to Massey Bailey or otherwise authorising the commencement and maintenance of legal proceedings. Grounds for appeal included:

a) the shareholders in general meeting had a residual power to ratify the proceedings (and did in fact do so); and   
b) the failure to convene a meeting of the board of the company prior to 6 May 2002 was a procedural irregularity for the purposes of section 1322 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), which did not cause substantial injustice (such that the proceedings brought by ZH were not invalid by reason of the failure to obtain the formal ratification of the board).

The court's decision focussed on the first ground of appeal noted above. Counsel for Massey Bailey submitted that the primary judge found that the board of ZH was deadlocked. As such, the general meeting had power to act, particularly in relation to the commencement of court proceedings.

(3) Decision

The Court of Appeal, in a unanimous decision, held that the primary judge had not erred (ie. there was no effective ratification of proceedings) and the appeal should be dismissed. When the constitution of a company states that the business of the company is to be managed by the directors, there is no general power of the company in general meeting to make management decisions or to control or direct the board of directors in the management of the company. Management of a company is by a group of people who each have a fiduciary duty to act in the interests of the company as a whole, rather than a body where the majority is free to favour its own interests over those of the minority. Although the general meeting does have power to approve transactions undertaken by directors which might otherwise be a breach of fiduciary duty, this requires full disclosure by the board to the general meeting and is subject to the requirement that there be no oppression or fraud on the minority.

Where a board is unable or unwilling to act (such as where there is a deadlock in the board), the general meeting does have some kind of reserve power, but the source of this power is a matter of implication or presumed intention of the members on the basis of business efficacy or necessity. Hodgson JA (with whom the other judges concurred) held that especially where a company's constitution contains an express power to appoint additional directors (as in the current case), it was not reasonable to regard a deadlock arising from disagreement between the only two board members as giving rise to any general power of management, when the deadlock could have been be resolved by the general meeting exercising its power to appoint additional directors.

Even if a company's constitution does not provide for the appointment by general meeting of additional directors, the power which the general meeting has to remove directors and replace them with other directors would itself be sufficient to prevent the implication of any general reserve powers in the general meeting to undertake management decisions.

Hodgson JA went on to confirm that while shareholders have ultimate control of a company, they have no authority to control its day-to-day management. His Honour cited Samuels JA in Winthrop Investments Limited v Winns Limited (1975) 2 NSWLR 666 at 623:

"[T]here are, no doubt, circumstances in which the shareholders in general meeting may exercise powers vested in the directors. … The shareholders may have ultimate control, because they can alter the articles or remove the directors; but they cannot interfere in the conduct of the company's business where management, as here, is vested in the board…The general meeting has power to intervene to resolve a deadlock … But they have no general power to transact the company's business, or to give effective directions about its management…[T]here is no universal rule that shareholders in general meeting may by ordinary resolution bind or represent the company with respect to anything and everything."

The Court held that the general meeting did not have the power to ratify the commencement of legal proceedings but could have appointed additional directors on 6 May 2002, (and the board so constituted would then have had power to ratify the commencement of proceedings). The Court postulated that costs might have been a factor in the board being unwilling to ratify the legal proceedings were the board to be faced with such a decision. As the directors were under a fiduciary duty to the company, if they had approved the commencement of proceedings they would have been liable for the large costs to its own solicitors and costs payable to the other parties to the proceedings. In this case, legal costs were estimated at several hundred thousand dollars.

Although the appeal failed and costs were awarded against the applicants, the Court held that the applicants raised substantial issues and granted leave to appeal. At the time of publication, no application for special leave had been lodged with the High Court.

(4) Conclusion

This case raises a number of issues. The unilateral appointment of a company director without proper notice or a quorum of directors will not subsequently be approved by the courts. The decision also reaffirms the long-held view that while shareholders have ultimate control of the company, they are not authorised to involve themselves in the day-to day running of the company where management of the company has already been vested in the board. Especially where a company's constitution provides for the general meeting to appoint additional directors, in the event of a deadlock of the board, the general meeting's power will generally be limited to the appointment of additional directors (or the removal and replacement of directors).

(M) PRIVILEGE AGAINST EXPOSURE TO A PENALTY  
(by Bianca Achilles, solicitor, Freehills)

ASIC v Vines [2003] NSWSC 701, Supreme Court of New South Wales, Austin J, 1 August 2003

The full text of this judgment is available on:  
[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/august/2003nswsc701.htm](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new) or  
[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)

(1) Summary

This case concerned an interlocutory application by the defendants. In the wider proceedings, ASIC is seeking declarations that each of the three defendants has contravened former sections 232(3), (4) and (6) of the Corporations Law in relation to GIO Australia Holdings Limited and GIO Insurance Limited. ASIC is further seeking orders prohibiting the defendants from managing a corporation, compensation for GIO Insurance Limited, and that the defendants pay to the Commonwealth a pecuniary penalty in relation to each contravention.

In the present interlocutory proceedings, the defendant applicants requested the Court set aside or vacate an earlier direction made which required the defendants to notify their objections to the plaintiff's tender bundle and affidavits by a certain date prior to commencement of the trial. The applicants argued that the direction infringed the privilege against exposure to a penalty. They argued for a wide application of the privilege, contending that the privilege prevents the Court from giving any directions that would provide assistance to the plaintiff in proving its case. His Honour Justice Austin disagreed. His Honour determined that the privilege against exposure was based on two propositions, namely, that the plaintiff in a penalty case must prove the case without assistance from the defendant, and second, the defendant should not be compelled to provide proof against him/herself. Austin J stated that the second proposition qualified the first. The defendants, by contending that they were not required to give any information that would assist the plaintiff in proving its case, were incorrectly seeking to liberate the first proposition from the second so as to render it absolute.

(2) The privilege against exposure to a penalty

Austin J discussed the fundamental principle behind the privilege and its application in recent cases. The privilege immunises a defendant in civil penalty proceedings from pre-trial information-gathering processes by way of discovery and interrogatories, as well as from any obligation to give evidence at the hearing. His Honour indicated that the privilege is closely connected to the privilege against self-incrimination - "the privilege against self-incrimination, and that against self-exposure to a penalty, are both reflections of the one fundamental principle" (quoting Burchett J in Trade Practices Commission v Abbco Iceworks Pty Ltd (1994) 52 FCR 96 at 129).

That fundamental principle was identified in the joint judgment of Deane, Dawson and Gaudron JJ in Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477 who, referring to self-incrimination, determined that the privilege, "is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself" (at 532). In Abbco, Burchett J cited the above expression of the principle, determining that by "[s]ubstituting 'the incurring of a penalty' for 'the commission of a crime' and 'the defendants' for 'the accused', I think this statement applies to the privilege against self-exposure to a penalty" (at 129).

In the present case, Austin J cited with approval further determinations from the Abbco decision. His Honour noted that in Abbco, the majority tied the privilege against exposure to two propositions, the second qualifying the first. "The first is that the plaintiff in a penalty case must prove the case without assistance from the defendant. The second is that the defendant should not be compelled to provide proof against himself. The second proposition qualifies the first because it means that the defendant is immunised from assisting the plaintiff only where the assistance is in some fashion relevant to providing proof against him" (at paragraph [7]).

(3) Circumstances in which the privilege will apply

Having established the principle behind the privilege, Austin J moved on to consider those circumstances in which the privilege applies. Austin J cited the Abbco decision again, noting (at paragraph [16]) that Burchett J had described the privilege as the defendants' "right to decline to be themselves the authors of their own destruction by producing the evidence" (at 116). According to Austin J, the privilege is attracted where there is a risk that the defendant, by complying with the plaintiff's request or the Court's orders, will directly or indirectly produce evidence of conduct to which a penalty attaches. In particular, where the defendants are required to provide information that would expose themselves to the risk of setting in train a process that may lead to the discovery of real evidence in support of the plaintiff's case (at paragraph [22]).

Austin J determined that in the present case there was no risk that the defendants' notification of their objections to the plaintiff's tendered evidence and affidavits would lead the plaintiff to a chain of inquiry that would produce evidence of conduct exposing the defendants to a penalty. The notification of objections may lead to ASIC tendering additional evidence, but that evidence would only be tendered to overcome deficiencies indicated by the objections. Austin J ruled that "there is nothing inherent in the process of notifying objections to the admissibility of evidence that would connect that process to the provision of evidence tending to prove conduct exposing the defendants to a penalty, or providing leads for the discovery of real evidence to that effect" (at paragraph [25]).

Additionally, as this interlocutory application was heard in the Equity Division of the New South Wales Supreme Court, it was open to the Court to consider discretionary grounds. However, Austin J ruled that the defendants' case for vacating or setting aside the Court's earlier orders was not made out, either in terms of the privilege against exposure to a penalty or on discretionary grounds.   
  
6. RECENT CORPORATE LAW JOURNAL ARTICLES

(A) COMPANY AND SECURITIES LAW JOURNAL

R Cross, 'The Takeovers Panel three years on: Should we ever go back to the courts?' (2003) 21 Company and Securities Law Journal 376   
The Takeovers Panel has enjoyed widespread acclaim as a dispute resolution forum. Renowned for its timely, informal and commercial approach to takeover disputes, the Takeovers Panel represents a significant improvement upon the previous court-based regime. Most commentators have accepted the basic structure and function of the Takeovers Panel and have mainly suggested further reforms to streamline the forum. This article asks, given the successes and shortcomings of the Takeovers Panel to date, can the courts ever present a viable alternative to the Panel? In discussing this question the author presents the proposed structure that a court-based regime might take in order to seriously compete as a viable alternative to the Panel.

A Hargovan, 'Director's duties to creditors in Australia after Spies v The Queen - is the development of an independent fiduciary duty dead or alive' (2003) 21 Company and Securities Law Journal 390

An aspect of the High Court decision in Spies v The Queen (2000) CLR 603 dealing with the scope of directors' duties to creditors has excited recent academic controversy. Some commentators have argued that Spies clarified and confirmed Mason J's dicta in Walker v Wimborne (1976) CLR 1 and that it has rejected the idea of directors' independent fiduciary duty to creditors. Other commentators disagree, arguing in particular that Spies leaves open the possibility that an independent fiduciary duty to creditors may be confirmed in a subsequent Australian case. This article rejects the commentary that suggests, as its prime contention, that the reasoned statements by the majority in Spies are merely obiter and of little authoritative value to the law in this area. This article also considers, and regards as unlikely, legal and policy reasons that could result in a confirmation by a future High Court of an independent fiduciary duty to creditors.

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   - Conflicts Between American and Foreign Law: Does the Balance of Interest Test Always Equal America's Interest?  
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