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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) UK REVIEW OF NON-EXECUTIVE DIRECTORS

On 15 April 2002 United Kingdom Secretary of State for Trade and Industry, Patricia Hewitt and the Chancellor, Gordon Brown, appointed an independent Review into the role and effectiveness of non-executive directors.

Building on the work of the Myners and Company Law Reviews, the Review will assess:

- the population of non-executive directors in the UK - who they are, how they are appointed and how they can be drawn from a wider pool of talent;  
- the independence and effectiveness of non-executives;  
- the actual and potential relationship between non-executives and institutional investors; and  
- what could be done to strengthen the quality, independence and effectiveness of UK non-executive directors.

The Review is to be chaired by Derek Higgs who is Chairman of Partnerships UK plc and a non-executive director of Egg plc, The British Land Company plc, Allied Irish Banks plc and Jones Lang La Salle Inc. He is also a senior adviser in the UK to UBS Warburg and a Director of London Regional Transport and Coventry City Football Club. He was a director of Prudential plc between February 1996 and December 2000, and Chairman of its fund management subsidiary, M&G Investment Management Ltd. Prior to joining Prudential, he spent 24 years as a corporate adviser with the SG Warburg Group. He is Chairman of Business in the Environment, a member of the Financial Reporting Council and a qualified chartered accountant.

(B) NASDAQ PROPOSES IMPROVEMENTS TO CORPORATE GOVERNANCE STANDARDS

On 12 April 2002 the Nasdaq Stock Market, Inc. announced that the executive committee of its board of directors has approved initial recommendations and ideas from the Nasdaq Listing and Hearing Review Council to enhance corporate governance standards for the companies listed on Nasdaq.

Nasdaq is the world's largest stock market. With more than 4,000 companies, Nasdaq lists more companies and trades more shares per day than any other U.S. market.

The Council, which is a standing, independent, and expert advisory committee on listing and corporate governance issues, has identified a number of key areas for action, including: the redefinition of an independent director, requiring shareholder approval of stock option plans, and changes to the auditor selection process, codes of conduct, and continuing education for board members. Nasdaq is also considering the establishment of an annual award for the company in each market sector that displays the most enlightened and progressive practices in corporate governance.

Proposed improvements include:

(a) Ensuring independent directors on audit committees:

The Council states that Enron audit committee members were criticized for lacking independence due to their business or other relationships with the company. The Council recommends that the economic relationship between an audit committee director and a company be further limited by tightening the definition of "independence." Additionally, executive officers of all stock markets would not be allowed to serve on the boards of the companies listed on their market.

Current Nasdaq independence rules include objective, bright-line standards. For example, a director who receives compensation of more than $60,000 for consulting or other non-board related services is not considered independent.

(b) Expanding shareholder approval of stock option plans:

A rule change that will be submitted to the Nasdaq board of directors in May would require that all stock option plans that include officers or directors must be approved by shareholders. While the current Nasdaq rule does generally require such shareholder approval, there is an exception for broadly based plans. The broadly based plan exception currently allows officer and director participation, as long as the majority of the options go to non-executive employees. Under the proposal, broadly based plans could not include officers and directors.

(c) Codes of Conduct:

The Council recommends that all companies adopt a Code of Conduct as a best practice. There should also be board-approved procedures for monitoring compliance.

(d) Strengthening audit committee authority:

Audit committees of Nasdaq companies should, as a best practice, recommend the selection or replacement of each independent auditor. Transparency will be increased in the process. The Council recommends that this be coupled with a new SEC requirement that each company disclose in its annual report whether the board disagreed with any recommendations of its audit committee regarding the selection or replacement of independent auditors.

(e) Harmonizing Nasdaq's Rules with Regulation Fair Disclosure:

Nasdaq's current rules require that companies disclose material information to the public through a major wire service and notify Nasdaq in advance of doing so, to allow an assessment of whether a news dissemination halt is appropriate. Following the adoption of SEC Regulation FD, which allows for alternative means of dissemination including conference calls and web casts, there has been confusion among some issuers as to the acceptable means of information dissemination. To clarify this situation, the Council recommends that Nasdaq's rules be harmonized with Regulation FD, to facilitate full and fair disclosure, and address the current uncertainty among issuers.

(f) Continuing education for all board members:

Nasdaq supports the concept of continuing education for all board members and is an ongoing sponsor of several major corporate governance conferences. Nasdaq is considering a proposal to establish a best practice for the continuing education of board members.

(C) SECURITIES AND EXCHANGE COMMISSION DISCLOSURE CHANGES

On 11 April 2002 the United States Securities and Exchange Commission approved the following matters:

(1) The Commission has issued for comment its proposals to accelerate the periodic report filing dates for domestic issuers and to require disclosure concerning Web site access to these reports. The proposals call for:

(a) Quarterly reports on Form 10-Q to be filed within 30 calendar days after quarter end instead of the current 45 days; and

(b) Annual reports on Form 10-K to be filed within 60 calendar days after fiscal year end instead of the current 90 days.

The proposals would accelerate these due dates only for domestic reporting companies that have:

(a) A public float of at least $75 million;

(b) Been subject to the Exchange Act reporting requirements for at least 12 calendar months; and

(c) Previously filed at least one annual report on Form 10-K.

The proposals would also require companies subject to the accelerated filing deadlines to disclose in their Form 10-K filings how investors can access company filings. A company will have to disclose:

(a) Whether it makes its periodic reports available free of charge on its Web site no later than the same day such material is electronically filed with or furnished to the Commission;

(b) If the company does not make its filings available on its website, the reasons why;

(c) The company's website address, if it has one; and

(d) Other information regarding availability of the company's filings, including whether the company will provide electronic or paper copies of its filings free of charge upon request.

Comments on these proposals are due within 30 days after publication in the Federal Register.

(2) The Commission has issued for comment its proposed amendments to Form 8-K under the Securities Exchange Act of 1934, requiring companies to report transactions by executive officers and directors. These amendments respond to investors' needs for timely disclosure on EDGAR of transactions and other arrangements relating to executive officers and directors. The proposals would require domestic companies with a class of equity security registered under Section 12 of the Exchange Act to report on Form 8-K information about:

(a) Executive officers' and directors' transactions in company equity securities (including derivative securities transactions and transactions with the company);

(b) Executive officers' and directors' plans and other arrangements for the purchase or sale of company equity securities intended to satisfy the affirmative defense conditions of Exchange Act Rule 10b5-1(c); and

(c) Loans of money to directors and executive officers made or guaranteed by the company or an affiliate of the company.

Generally, reports of transactions and loans with an aggregate value of $100,000 or more would be due within two business days. Reports of transactions under $100,000 and some categories of transactions would be due by the close of business on the second business day of the following week. However, reports of transactions and loans with an aggregate value less than $10,000 would be deferrable until the aggregate cumulative value of unreported events for the same director or executive officer exceeds $10,000.

Comments on these proposals are due within 60 days after publication in the Federal Register.

(D) UNETHICAL BEHAVIOUR IN 4 OUT OF 10 BUSINESSES

Unethical conduct occurred in 41% of Australian and New Zealand organisations that responded to the KPMG Fraud Survey 2002, released on 9 April 2002.

The biennial survey focuses on levels of fraud and corruption in the business community but also asks respondents to provide information on unethical behaviour such as conflict of interest and unauthorized disclosure of information.

The number of businesses reporting unethical conduct in the two years since the previous survey decreased slightly from 46% to 41%.

The survey found the five most commonly reported categories of unethical behaviour were:

Sexual harassment of an employee - 17.7%  
Running a private business during work hours - 15.3%  
Falsely claiming sick leave or absenteeism - 14.0%  
Unauthorised disclosure of information - 11.3%  
Conflict of interest (eg awarding a contract or  
diverting sales to a company in which the employee  
holds a personal interest) - 9.5%

Respondents were asked to nominate factors that contributed most to unethical behaviour in an organisation. The most commonly cited factors contributing to unethical conduct were:

Lack of senior management commitment - 22.1%  
Poor ethical culture in the organization - 18.3%  
Poor ethical culture in the community - 15.2%  
Poor example shown by senior management - 12.9%  
Lack of code of ethics/code of conduct - 9.9%

For further information, contact:

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National Managing Partner   
KPMG Forensic   
Tel: (02) 9335 8232

(E) AUSTRALIA'S LARGE COMPANIES PLAY KEY ROLE IN TRADE SUCCESS

On 9 April 2002 Mr Mark Vaile, Trade Minister, released a detailed study on Australia's top 100 enterprises.

The study has been prepared by the Department of Foreign Affairs and Trade and is titled "The Big End of Town and Australia's Trading Interests".

For copies of the report, see <http://www.dfat.gov.au/publications>, or telephone: (02) 6261 3114.

Some key findings of the study are as follows.

(1) The enterprises under study

- The study brings together available information on the significance for the economy and our trade and foreign investment interests of large companies. The main focus of the study, however, is Australia's 100 largest enterprises ranked on worldwide revenues. The Top 100 companies have also been surveyed for information on their merchandise exports and various ABS data have been commissioned in respect of the Top 100 as a group.  
- The list of top 100 enterprises has in recent years been characterised by constant change, not just in terms of companies dropping out of, or moving up into, the list, but also through acquisitions and disposals of companies or assets, mergers, de-mergers, major restructurings, privatisations and corporate collapses.  
- Weak profit performance and globalisation have been drivers of extensive industry rationalisation in recent years, with a tendency for companies to focus more on their core strengths. The raft of takeovers and industry rationalisations should serve to better position Australian companies in a rapidly globalising international economy.  
- There have been significant changes in recent years in the relative importance of different industries represented by Australia's largest enterprises. The growing significance of service sector companies and lessening relative importance of manufacturing companies amongst Australia's largest companies is clearly evident.

(2) Large enterprises and the Australian economy

- In 1999/2000, large businesses (those employing 200 or more persons or with assets worth more than $200 million) accounted for 52 per cent of the total income and 36 per cent of the total employment of all operating businesses (excluding small agricultural businesses, non-employing businesses and the general government sector).  
- Quite apart from the importance of large enterprises in terms of such indicators as revenue, employment and trade, their importance is apparent on many other fronts. Large companies are important for the health of domestic capital markets. They contribute to the economy's direct and indirect tax base. They are important sources of dividend income for Australian shareholders. They also contribute in a major way to the nation's research and development effort. Because of their business networks, large companies tend to get the best of what the world has to offer. In some cases, they are a vital part of their local communities. Small-to-medium enterprises can also depend significantly on them.  
- The domestically-generated income of the Top 100 represents over half the combined revenue of all large businesses.  
- The Top 100 account for around 20 per cent of the nation's total revenue and 11 per cent of the nation's employment.  
- The Top 100 account for some 70 per cent of the total market capitalization of the Australian Stock Exchange.

(3) Large enterprises and trade

- Large businesses (those with 200 or more employees) contribute around half of Australia's total exports of merchandise.  
- Large mining businesses dominate the exports of the mining industry, while large manufacturing businesses account for over half the exports of all manufacturing businesses. The number of large exporters of manufactures, and more particularly of elaborately transformed manufactures, has grown over the past decade.  
- Set against the traditional focus of foreign multinationals on the domestic market, their increased importance in our exports of manufactures is significant.  
- The top 100 enterprises in Australia export about $50 billion in goods and services, close to a third of our total exports, and are dominant in a number of service export areas.

(4) Large companies and foreign ownership

- Significant and growing levels of foreign involvement in domestic economies are a worldwide phenomenon.  
- The level of direct investment equity held by non-residents as a proportion of total equity on issue has not trended upward over recent years.  
- Inward direct investment has contributed significantly to Australia's economic growth and development, job creation and living standards.  
- Improved competitiveness of the Australian economy over recent years has fostered a more outward orientation on the part of foreign-owned companies, with their exports now significantly greater than a decade ago.  
- Large majority foreign-owned businesses (those with 200 or more employees) account for some two-thirds of the employment and half the turnover of all majority foreign-owned businesses. They also contribute significantly to merchandise exports.  
- Majority foreign-owned companies in the Top 100 accounted for some six per cent of the nation's total revenue in 1999/2000. They also contribute around 20 per cent of Australia's merchandise exports.  
- Foreign direct investment (FDI) in the Top 100 accounted for close to 40 per cent of the total stock of FDI in Australia in June 2000.

(5) Large companies and direct investment abroad

- Large companies dominate direct investment abroad and have been increasingly turning to offshore activity to grow their businesses. Many offshore investors are involved in predominantly non-traded industries.  
- The evidence is that offshore investment has beneficial impacts on the Australian economy, including through dividend streams and the transfer of best practices and technologies. It can also be more and more critical in an era of globalisation.  
- The Top 100 derive almost a quarter of their worldwide revenues from offshore activity. Five Top 100 companies - News Corporation, National Australia Bank, AMP, Rio Tinto and BHP - accounted for around one half of the combined offshore revenues derived by the Top 100 in 1999/2000.  
- Five companies accounted for 73 per cent of the stock of Australian direct investment abroad in June 2000.  
- A number of Top 100 majority foreign-owned companies have sizeable offshore assets and/or substantive regional mandates.

(6) Policy issues

- As a consequence of globalisation and the increasing role played by large multinational companies, government policies in a wide range of domains, notably trade, foreign investment, industry, taxation and competition, are becoming more complex to devise and increasingly interlinked. There is therefore a growing need for trade policy to take account of areas such as competition policy, investment regulation and trade-related aspects of taxation. These issues are already finding their way onto the agendas of multilateral trade talks and are increasingly also being raised in bilateral trade discussions.  
- Perhaps the major contribution the Government can make to the growth of large companies is to provide the right macroeconomic settings and ensure a competitive business environment.  
- The two areas of policy that have come in for comment from sections of the big business constituency are taxation policy and competition policy. The Government has taken a number of important steps to address concerns relating to the tax treatment of both outward and inward foreign direct investment and also undertaken to consult to ascertain the case for any further reforms. It has also foreshadowed an independent review of the competition provisions of the Trade Practices Act and its administration.

(F) REVIEW OF INDEPENDENT AUDITING

On 8 April 2002 Mr Bob Charles, MP, Chairman of the Parliamentary Joint Committee of Public Accounts and Audit announced that the Committee is to review independent auditing by registered company auditors.

In announcing the review the Chairman, Mr Charles, said:

'The spate of recent corporate collapses in Australia and overseas has attracted much public attention and comment. It is a matter of intense concern to the Committee particularly because auditors have been seen to have signed off on the financial health of companies which have subsequently failed.

'While corporate failure is ultimately the responsibility of directors, the community also expects auditors to report fairly and accurately on the financial state of the companies they are auditing. If such failures had occurred in the public sector, the public and the Parliament would have expected the Commonwealth's auditor, the Auditor-General, to be held to account. With respect to the private sector, shareholders and the public have legitimate expectations of the effectiveness of auditors which are clearly not being satisfied.

'The audit function provides independent assurance on the operations and accounts of entities in the private and public sectors, and is very significant in maintaining business confidence, itself vital to our economic performance as a nation. In conducting the inquiry the Committee will seek to determine precisely where the balance lies between the need for external controls through government regulation, and the freedom for industry to self-regulate.'

The closing date for submissions is Friday, 24 May 2002. The Committee will be conducting public hearings on the issues raised in submissions in June and July 2002. For information, contact the inquiry secretary, Mr Adam Cunningham on telephone (02) 6277 2336.

More information about the JCPAA and its inquiries can be found at <http://www.aph.gov.au/house/committee/jpaa/index.htm>.

On 8 April 2002 the Institute of Chartered Accountants in Australia (ICAA) announced that it would take the opportunity to present a submission to the newly announced review on the independence of auditing to the Joint Committee of Public Accounts and Audit.

"However we note that the Federal Government is already reviewing these matters as it formulates its response to The Ramsay Report into The Independence of Australian Company Auditors," Acting CEO of the ICAA, Allen Blewitt said.

Professor Ramsay looked specifically at the issue of industry self regulation and provided recommendations to Government based on his extensive research. "The ICAA broadly agrees with the Ramsay recommendations and responded to the Government request for submissions accordingly," Mr Blewitt said. "In addition as a profession we are already moving on this issue with the Board of the ICAA recently approving a new standard covering the Independence of Auditors which will ensure Australia is in line with current international best practice."

(G) PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES: INQUIRY INTO THE REVIEW OF THE MANAGED INVESTMENTS ACT 1998

The Managed Investments Act 1998 introduced a new structure for managing collective investment schemes so that a single responsible entity (SRE) would carry responsibility for the schemes and any liability for losses. The Act required that a review of the effectiveness of the new regime would take place three years after its implementation. The Government subsequently commissioned Mr Malcolm Turnbull to conduct such a review, which was presented to the Government on 3 December 2001.

The Committee has decided to inquire into the findings of the review and invites interested individuals or organisations to make written submissions responding to the terms of reference. The submissions should be sent by 3 May 2002 to:

The Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
Parliament House  
Canberra ACT 2600

Submissions may address some or all of the terms of reference. The terms of reference for the inquiry and other information about making submissions is available on this website, by telephoning the Secretariat on (02) 6277 3581, or by facsimile on (02) 6277 5719.

The terms of reference are for the Committee to assess the findings of the review by Mr Malcolm Turnbull of the Managed Investments Act 1998, with particular regard to:

(a) the risks to investors in the current arrangements, taking into account the extent to which any lack of independent checks and balances may have contributed to recent financial failures in Australia and overseas;

(b) global best practice in investor protection of managed funds;

(c) the acknowledgment by the review that, under section 1325 of the Corporations Act 2001, a number of parties may be held accountable for member losses;

(d) the rejection by the review of proposals which might conflict with the concept of having only a single entity responsible in the event of member losses;

(e) the review conclusion that scheme operators not have the option of appointing an external corporate entity for compliance purposes, pending ASIC monitoring of compliance performance;

(f) the reasons why the strong growth in managed funds has not resulted in a significant reduction in fees; and

(g) any other relevant matters.

(H) ERNST & YOUNG AND ANDERSEN TO INTEGRATE AUSTRALIAN OPERATIONS

On 28 March 2002 Ernst & Young and Andersen announced they had signed a Memorandum of Understanding to proceed to reach agreement to integrate Andersen Australia into Ernst & Young. The enlarged firm, to be known as Ernst & Young, will be Australia's second largest professional services firm, with revenues in excess of $A700m.

Mr Schwartz, Australia CEO of Ernst & Young, said approval of the integration was subject to the completion of normal due diligence, regulatory approval and partner votes, which would occur during the coming weeks. Subject to the outcome of these arrangements, the new entity would begin operation from mid to late May 2002.

(I) M & A ACTIVITY IN AUSTRALIA OFTEN FAILS TO CREATE VALUE

Only one in every four Australian companies that recently completed a merger or acquisition created shareholder value in the first year after the deal, according to a study released on 27 March 2002 by KPMG Transaction Services.

The new study focused on 73 Australian domestic deals completed in the year to September 2000 and tracked the share price performance of acquirer companies over the following year. The change in share price from pre-deal to one year after the transaction was compared against average price movements in the acquirer's industry segment. This provided an objective measure of whether deals had added or destroyed value for shareholders by benchmarking performance against sector average movement. Companies that performed better than their sector were deemed to have created value (even if the industry sector declined) while those that performed worse than the sector average were deemed to have destroyed value.

Assuming the rationale of an investment is to maximize shareholder wealth, the survey found that only 25% of companies that made an acquisition created value, while 59% suffered an erosion of value and 16% made no difference. In other words, more than half of the companies that undertook an acquisition found the merged group was actually negative to shareholder wealth, while three in every four deals failed to add any value.

More information about the study is available from:

David Nott   
National Partner in Charge   
KPMG Transaction Services   
Tel: (02) 9335 8265  
Mobile: 0412 026 926

(J) IMPROVING FINANCIAL MANAGEMENT, FINANCIAL REPORTING AND CORPORATE GOVERNANCE - FEI RECOMMENDATIONS

(1) Overview

The Financial Executives International (FEI), which represents senior US and international financial executives, has published reforms aimed at strengthening financial management, reporting and corporate governance. Members of the FEI Taskforce which produced the recommendations included senior executives of General Electric, Microsoft, General Motors, J P Morgan, Dow Chemical and Pfizer.

The FEI believes the following factors may have contributed to the recent problems observed in the areas of corporate governance, ethical management, financial reporting and external audits:

- lack of ethical conduct and inappropriate "tone at the top";  
- failure of effective board oversight;  
- lack of financial expertise on audit committees;  
- external audit failure due to compromised independence and failed quality control procedures;  
- overly complex accounting standards;  
- opaque financial reporting; and  
- emphasis on form over substance in applying accounting standards.

The FEI makes recommendations in four areas:

Strengthening financial management and commitment to ethical conduct;

Rebuilding confidence in financial reporting, the accounting industry and the effectiveness of the audit process;

Modernizing financial reporting, and reforming the accounting standards-setting process; and

Improving corporate governance and the effectiveness of audit committees.

(2) Recommendations

(a) Strengthening financial management and commitment to ethical conduct

Recommendation 1: All financial executives should adhere to a specialized code of ethical conduct.

FEI strongly recommends that Congress and the SEC implement regulations that call for stock exchanges and markets to implement this recommendation through listing agreements.

Recommendation 2: Companies should actively promote ethical behavior and provide employees with the means to report perceived violations of ethical standards without fear of reprisal.

FEI strongly endorses practices by which all companies adopt a code of conduct for their employees and conduct regular training sessions to assure understanding and compliance. We believe companies should provide support and broad protection to employees reporting code of conduct violations. Under such a framework, companies should:

- adopt a written code of conduct for all employees;  
- conduct employee orientation and training with respect to the code;  
- provide employees with a mechanism (such as a hotline or help-line) to surface concerns about compliance with laws and regulations;  
- adopt procedures for voluntary disclosure of violations of laws;  
- participate in best practices forums; and  
- inform the public of the active commitment to implement these steps.

Recommendation 3: Qualifications of the principal financial officer and principal accounting officer.

Management, in support of the audit committee and board of directors, should designate a principal financial officer and a principal accounting officer as those terms are used in the Securities Act of 1933. FEI believes the qualifications and roles of such persons should include the following:

- The principal financial officer should be that person with overall responsibility for the finance function within the reporting company, and should have knowledge in all areas of finance including, at a minimum, the requisite knowledge proposed for the financial experts of audit committees. The principal financial officer should be responsible for upholding compliance with ethical standards within the finance function.  
- The principal accounting officer should be a licensed public accountant or possess equivalent knowledge and experience, and should be current and knowledgeable in the understanding of GAAP and the SEC's rules and regulations governing the preparation and audit of financial statements.  
- The principal financial officer should report to the chief executive officer, and the principal accounting officer should report to the principal financial officer. It is further recommended that the principal financial officer and/or the principal accounting officer meet with the audit committee periodically (quarterly) to review significant financial statement issues, including key judgments, estimates and disclosure matters.

(b) Rebuilding confidence in financial reporting, the accounting industry and effectiveness of the audit process

Recommendation 4: Create a new oversight body for the accounting profession staffed with finance and accounting professionals.

This oversight board should oversee the peer review quality control process of the audit firms. Furthermore, the peer reviewers should be accountable to the oversight board for the scope of review, findings, recommendations and corrective actions.

Recommendation 5: Place restrictions on certain non-audit services supplied by the independent auditor. In this regard:

- The independent auditor should no longer provide audit clients with internal audit services or consulting on computer systems used for financial accounting and reporting.  
- Advisory services should be prohibited wherever the audit firm could be put in a position of relying on the work product resulting from such services.  
- Tax advisory and compliance services, acquisition due diligence, audits of employee benefit plans and other statutory audits should be acceptable services for audit clients as they would not normally raise questions of conflict of interest. In the unusual instance where such services could present questions of a conflict of interest, such services should not be provided.

Importantly, in addition to the foregoing, FEI suggests that audit committees approve substantially all large non-audit services. In so doing, the audit committee should consider the impact of such services on the overall independence of the audit firm.

FEI also recommends that the SEC redefine the current classifications of audit and non-audit services to assure that the guidance is clear and that the distinction conveys a complete and meaningful picture to investors in regard to the proper characterization of audit and non-audit activities.

Recommendation 6: Restrict the hiring of senior personnel from the external auditor.

FEI recommends that companies adopt policies that restrict the hiring of engagement audit and tax partners, or senior audit and tax managers, who have worked on the company's audit for a period specified by the board of directors. FEI believes that this period should be no shorter than two years.

(c) Modernizing financial reporting and reforming the accounting standards-setting process

Recommendation 7: Reform the Financial Accounting Standards Board (FASB).

FEI recommends that a "Blue Ribbon Committee" be formed to address FASB reform. The Committee should address the following issues:

(i) FASB Organization

- Board mission statement  
- Size of board  
- Length of board member terms  
- Voting majority  
- Staff effectiveness, accountability and structure  
- Restrictions on board member meetings ("Sunshine Rules")

(ii) Timely Standard Setting

- Timely standard setting with clearly defined priorities, objectives and milestones  
- Agenda management and accountability

(iii) Financial Statement Content

- A process for defining clear long-term objectives for financial statements produced under GAAP  
- Fair value accounting, in particular, needs to be addressed, given the absence of market values in many areas and the potential for such accounting concepts to create financial statement volatility

(iv) Financial Accounting Standards

- Reassess the conceptual framework as the basis for standard setting  
- Assure practical implementation of principle-based standards vs. specific, bright-line rules  
- Impact of planned globalization of accounting standards  
- Review existing standards and disclosures  
- Address the need to increase the participation of the user and investment community and decrease tension with the preparer community

Recommendation 8: Modernize financial reporting.

FEI expresses strong support for the following improvements in financial reporting and recommends that committees be formed promptly to address these matters.

- Improve Management's Discussion and Analysis (MD&A)  
- Implement "Plain English" financial reporting as the new language of professionals involved in investor relations and financial statement preparation.  
- Promote voluntary disclosures of business performance metrics  
- Develop and complement Web-based financial reporting

(d) Improving corporate governance and the effectiveness of audit committees

Recommendation 9: Effective implementation of the 1999 Blue Ribbon Panel Recommendations re audit committee financial experts.

In 1999, the Blue Ribbon Panel on Audit Committee Effectiveness called for all audit committee members to be financially literate and for each committee to have at least one financial expert.

FEI recommends that the NYSE and the NASDAQ set higher standards for audit committee "financial experts." These criteria should call for explicit experience requirements in the credentials of such experts. A financial expert should possess:

- An understanding of Generally Accepted Accounting Principles (GAAP) and audits of financial statements prepared under those principles. Such understanding may have been obtained either through education or experience. FEI believes it is important for someone on the audit committee to have a working knowledge of those principles and standards.

- Experience in the preparation and/or the auditing of financial statements of a company of similar size, scope and complexity as the company on whose board the committee member serves. The experience would generally be as a chief financial officer, chief accounting officer, controller or auditor of a similar entity. This background will provide a necessary understanding of the transactional and operational environment that produces the issuer's financial statements. It will also bring an understanding of what is involved in appropriate accounting estimates, accruals, reserve provisions, etc., and an appreciation of what is necessary to maintain a good internal control environment.

- Experience in the internal governance and procedure of audit committees, obtained either as an audit committee member, a senior corporate manager responsible for answering to the audit committee or an external auditor responsible for reporting on the execution and results of annual audits.

FEI strongly recommends that Congress and the SEC implement regulations that call for stock exchanges and markets to implement this recommendation through listing agreements.

Recommendation 10: Continuing professional education for audit committee members.

FEI recommends that all audit committee members attend continuing education in areas of financial reporting, risk management and/or accounting. Training can be "in-house" or via an outside provider. FEI, the National Association of Corporate Directors or an equivalent entity should establish the minimum content to be covered.

Companies should disclose in the annual audit committee report whether members have undertaken such training. Non-audit committee directors are also urged to attend these sessions.

Recommendation 11: Periodic consideration of audit committee chair rotation.

FEI recommends that boards of directors periodically evaluate the need to rotate the individual holding the audit committee chair. Such evaluation may be done approximately every five years. FEI recognizes that outstanding audit committee chairs are valuable and difficult to replace. Yet there is also benefit in developing successors and additional financial experts on the audit committee. Therefore, rotation and successor development may further strengthen the overall governance mechanisms within the board.

Recommendation 12: Disclosure of corporate governance practices.

FEI recommends that all companies annually report their key corporate governance practices. Current best practice in many companies is to have a governance and nominating committee made up of independent directors.

Further information about the FEI recommendations is available on its website at <http://www.fei.org/>

2. RECENT ASIC DEVELOPMENTS

(A) PRE-FSR LICENCES AND INSURANCE BROKER REGISTRATIONS

On 15 April 2002 ASIC released a guidance paper for holders of pre-FSR licences and insurance broker registrations.

The paper sets out the basic assessment processes ASIC will use to determine whether an applicant is able to legislatively streamline a particular activity.

It contains a 'ready reckoner' that describes some common categories of pre-FSR licences and insurance broker registrations, as well as some anticipated AFS licence authorisations for some of the categories. It also provides some examples of pre-FSR licence variations that ASIC is still able to allow.

Copies of the new guidance paper may be obtained from the FSR page of the ASIC website at <http://www.asic.gov.au>, by emailing ASIC's Infoline on infoline@asic.gov.au or by calling 1300 300 630.

(B) CHANGE OF AUDITOR

On 12 April 2002 ASIC set out its position on an appropriate regulatory response to any requests for consent to change of auditors which may arise as a consequence of the current circumstances confronting Anderson (including any possible merger). ASIC will seek information on the capacity of proposed incoming auditors to carry out the audit in the requisite time and on any potential conflicts they might have in assuming the audit role. In other cases ASIC may accept undertakings for the conflicts to be resolved within a reasonable timeframe. In all cases ASIC will require the appointment of the new auditor to be referred to the company's shareholders for ratification at the next annual general meeting.

Companies requiring further information about ASIC's policy should contact Mr Ron Swinney, ASIC Senior Accountant, on telephone 02 9911 2370.

(C) ACA AND ASIC TEST THE FINANCIAL PLANNING INDUSTRY

On 11 April 2002 ASIC and the Australian Consumers' Association (ACA) announced the commencement of an Australian-wide survey of the financial planning industry.

The survey involves consumer volunteers seeking financial plans from more than 150 financial planners around Australia. Consumer volunteers are being recruited in the April edition of the ACA magazine CHOICE.

The advice received by the consumers will be assessed by an expert panel, which includes experienced financial planners and compliance experts. This exercise repeats similar surveys conducted in 1995 and 1998. The survey will cover the whole industry, including banks, life insurance companies, financial planning firms, stockbrokers and accountants.

The results of the survey will be published in February 2003.

ASIC and ACA again welcomed the involvement of the Financial Planning Association (FPA) in this exercise. The FPA will be involved in both the design of the survey and participation in the assessment panel.

For further information contact:

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(D) ASIC RELEASES CODE MONITORING REPORT

On 27 March 2002 ASIC released its annual monitoring report on compliance with the Banking, Credit Union and Building Society Codes of Practice and the Electronic Funds Transfer (EFT) Code. The report covers the period from April 2000 to March 2001. While the overall incidence of disputes remains low, the report shows a general increase in complaint numbers. For example, complaints under the EFT Code of Conduct rose to 121,434 complaints, or 81 per million transactions, compared to 106,719 complaints, or 64 per million transactions, the previous year.

Almost two-thirds of these complaints (78,909) related to system malfunctions such as shortfalls in the amount of cash given out at an ATM, Most of these were resolved in favour of the consumer. The report shows a 16 per cent fall in complaints about unauthorised transactions, with 25,545 such complaints or 17 per million transactions.

Disputes under the Banking Code rose to 12,668 or 3.28 disputes per million transactions, up from 10,357 or 2.79 disputes per million transactions in the year prior. The largest number of disputes related to EFT, or PIN-based transactions. There were also large numbers of disputes about fees and charges and account debiting and crediting. 40.7 per cent of disputes were resolved in favour of the customer, with 20.8 per cent resolved by mutual agreement.

Complaints under the Credit Union code also increased but those under the Building Society Code fell.

3. RECENT ASX DEVELOPMENTS

(A) LISTING RULE AMENDMENTS FOR FOREIGN COMPANIES

On 8 April 2002 ASX proceeded with Listing Rule amendments which raise the threshold for admission to the Foreign Exempt category. To be eligible, entities must have $A2 billion of net assets, or $A200 million profit after tax in each of the previous three years.

Any entity not meeting either of these criteria may apply to convert to a full ASX Listing, in which case they must comply with all ASX Listing Rules.

To provide for an orderly transition, the amended threshold will commence on 1 June 2002 and take full effect from 1 July 2002.

ASX has encouraged all foreign companies currently listed in the Foreign Exempt category to continue their relationship with ASX by converting to a full ASX Listing. For some entities such a move might be inappropriate, in which case - provided they meet the revised criteria - their Foreign Exempt status will continue.

ASX has written to all Foreign Exempt companies that are affected by the amendments, advising them that ASX intends to proceed with the amendments. The letter outlines certain matters that must be notified to the market by those companies, to ensure that shareholders and the market are fully informed of their intentions.

Those companies who wish to be removed from the official list must inform shareholders of that intention by letter and provide a sale facility for Australian shareholders on the company's primary exchange for a period of six months after removal from the official list.

For further information:

Gervase Greene  
National Manager, Corporate Relations  
ASX  
Tel: 61 2 9227 0464  
Mobile: 0419 496 703

4. RECENT TAKEOVERS PANEL MATTERS

(A) NEW TAKEOVERS PANEL MEMBER

In a media release dated 11 April 2002 the Parliamentary Secretary to the Treasurer, Senator Ian Campbell, announced that prominent Perth commercial barrister Ms Celia Searle had been appointed a member of the Takeovers Panel.

Ms Searle has had more than 15 years' experience with leading WA commercial law firms and for the past three years has worked from Wickham Chambers, specialising in complex taxation, corporate, commercial and superannuation issues.

The Takeovers Panel - formerly the Corporations and Securities Panel - was formed in March 2000 as part of the Corporate Law and Economic Reform Program (CLERP).

Senator Campbell said the Panel has been a significant and measurable success of the CLERP takeover reforms. "Since its inception the Panel has received 56 applications - 20 in 2000, 30 last year and six so far this year," he said. "The average time from application to decision is 14 days, which is a very impressive result given the complexity of issues."

5. RECENT CORPORATE LAW DECISIONS

(A) WHEN WILL THE COURT GRANT AN EXTENSION OF TIME FOR A VOIDABLE TRANSACTION APPLICATION?  
(By Connie Chaird, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Brown v DML Resources Pty Limited (In liquidation) (No 7) [2002] NSWSC 162, Austin J, 13 March 2002

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/march/2002nswsc162.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The liquidators of DML Resources made an application to the Court for orders that transactions between DML Resources and BP Australia were voidable (under section 588FF(1)). The Court ordered that the liquidators could not bring such an application until BP Australia was joined as a defendant to the proceedings. An application brought after BP Australia was joined to the proceedings would occur outside the three year period within which the liquidators must bring such an application. However, the Court exercised its discretion (under section 1322(4)(d)) to allow the liquidators to make a further application for an extension of time (under section 588FF(3)) to bring the original application.

The liquidators made the application for an extension of time, and while BP Australia challenged the application, the Court held that it would grant the liquidators the extension of time for the following reasons:

- the liquidators case against BP Australia was "not hopeless and had some probability of success";  
- the liquidators received legal advice that examinations be conducted prior to the commencement of litigation against BP Australia;   
- the liquidators required funding for litigation against BP Australia and experienced delays in obtaining such funding;  
- the delay did not prejudice BP Australia; and  
- the liquidators did not act unreasonably in the administration of DML Resources.

The Court noted that other factors which may result in such a grant of extension of time include a complicated administration.

BP Australia argued that the liquidators failed to provide adequate reasons for the delay and could have commenced litigation against BP Australia without an extension of time. The Court stated that it does not require liquidators to complete an administration "within the quickest possible time", only that liquidators act reasonably in all circumstances.

It follows that liquidators may not succeed in an application for an extension of time if they act unreasonably in an administration. Additionally, the Court noted that liquidators may not succeed if the delay is prejudicial to the respondent, involves an uncomplicated administration, and litigation would have been fully funded.

(B) LEAVE TO RECOVER POSSESSION OF LEASED PROPERTY DURING ADMINISTRATION  
(Amelia Tooher, [Blake Dawson Waldron](http://www.bdw.com.au))

Canberra International Airport Pty Ltd v Ansett Australia Ltd (Administrators Appointed) and Mark Francis Xavier Mentha and Mark Anthony Korda (as Administrators of Ansett Australia Limited) [2002] FCA 329, Federal Court of Australia, Kenny J, 22 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/march/2002fca329.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

This case concerned a lessor's application pursuant to section 440C(b) of the Corporations Act for leave to recover leased property during an administration. Ansett Australia Ltd leased premises from Canberra International Airport Pty Ltd ("the applicant"). The applicant terminated the lessee's tenancy for a number of breaches of covenants. It argued that the lessee's interests in the premises were forfeited, and but for the operation of section 440C, it would be entitled to immediate possession. Kenny J held that the creditors should be given the full opportunity to consider their options at an imminent creditors' meeting and dismissed the application.

(2) The discretion in section 440C(b)

Section 440C effectively places a moratorium on the power of the lessor to regain possession of property during an administration except with the administrator's written consent or with leave of the Court. The restraint is imposed on a lessor to give the company, in administration, an opportunity to meet the objects of the administration. These are set out in section 435A of Part 5.3A - the objects are to provide for administration in a way that maximises the chances of the company's continuing existence, or if this is not possible, results in a better return for the company's creditors and members. The Court has a broad discretion: see Re Ansett Australia Ltd (Administrator Appointed); Intrepid Aviation Partners VII LLC v Ansett Australia Ltd (Administrator Appointed) (2001) 39 ACSR 255 at 257. The onus is on the applicant to satisfy the Court that leave should be granted: Re Java 452 Pty Ltd (Administrator Appointed); Permanent Trustee Australia Limited (As Trustee) v Stout (1999) 32 ACSR 507 ("Re Java").

In addition to matters in section 435A, the Court must consider the interests of parties in the circumstances of the case. Leave may be given if the lessor establishes that re-entry is unlikely to inhibit the company in meeting the objects of the administration: see In Re Atlantic Computer Systems PLC [1992] Ch 505 at 542. Alternatively, it may be given where the statutory restraint imposed will occasion the lessor loss or detriment of a "relevant kind". A loss or detriment is of a relevant kind where the Court considers it is greater than any benefit or advantage that might ensue to the creditors by reason of the statutory restraint. The outcome may depend on the history of the administration, the conduct of the parties, and whether terms may practically be imposed on a grant or refusal of leave to protect competing interests.

(3) The respondents' case

The administrators opposed the application on two grounds. First, given that it still might be possible to find a purchaser, the lessor's repossession might jeopardise a potential sale. Second, Ansett's creditors were holding their last meeting on 27 March 2002 (within nine days) to resolve whether to enter into a deed of arrangement, wind up, or end the administration. The administrators planned to propose a deed of company arrangement.

(4) The applicant's case

The applicant's case changed several times during the course of the proceedings. The harm suffered by the applicant initially focused upon: (1) the terminal being unused; (2) the applicant's need to improve the conditions for passengers and others; and (3) its need to renovate the terminal. During the proceedings, the emphasis of the harm shifted to safety issues surrounding Virgin Blue's lack of baggage handling facilities. After further refinement and by the end of the hearing, leave was sought on various other grounds.

(a) The lease precluded Ansett from selling its leasehold interest

The applicant submitted that the taking of possession would not, in any practical way, affect the creditors' options at the creditors' meeting because Ansett's leasehold interest (if any) was not capable of assignment without breaching clause 4.3 of the lease. Clause 4.3 provided that:

"...the Tenant may not assign its estate or interests in the Premises or its rights and powers as tenants under this lease if an Event of Default has occurred and has not been remedied or waived."

Kenny J decided it was inappropriate to determine whether the proposed deed of arrangement under Part 5.3A (deemed an "Event of Default" under clause 16.2 of the lease), would bar absolute assignment under the terms of clause 4.3.

Kenny J accepted that the lessee could apply for relief against forfeiture but considered the outcome to be unpredictable. Although the lessee might fail on account of its financial state, it was questionable whether even a creditworthy assignee would succeed in the face of clause 4.3. Further, section 4(5)(c) of the Forfeiture and Validation of Leases Act 1905 (ACT) precludes a grant of relief under statute against a breach of a non-assigning covenant. She noted that relief against forfeiture for breach of a provision of assignment may be obtainable in equity, however, the assignee would be the proper party to apply for relief, and as yet, no such party exists.

Kenny J emphasised the fact that many of the relevant circumstances are not yet ascertained or ascertainable, due to the fact the creditors' meeting has not yet taken place. She considered it "undesirable" to attempt to predict an outcome for applications for relief against forfeiture or the approach of any prospective parties at this stage.

(b) The effect of the applicant's repossession of the terminal

The applicant argued that even if clause 4.3 was not an absolute bar to assignment, its proposed repossession of the terminal would make no material difference to the lessee's chance of success upon an application for relief against forfeiture and subsequent assignment. The applicant made undertakings to this effect.

Kenny J was not satisfied that the applicant taking possession of the terminal would not affect options open to the creditors at the creditors' meeting. She held that the Court should not interfere with the status quo prior to the meeting. Her reasons were as follows:

First, repossession may lead to the creation of third party interests. Although the applicant made various undertakings, including an undertaking to put a third party on notice regarding Ansett's possible claim for relief against forfeiture; Kenny J doubted the sufficiency of the undertaking to ensure Ansett or the assignee's rights for relief against forfeiture were unaffected. Second, the efficacy of the undertakings was doubted. The applicant's undertaking not to make a point of its physical possession of the premises on an application for relief against forfeiture assumed that the right to relief would still exist even after the lessor had entered into possession. The applicant also undertook not demolish the terminal for twelve months. Third, the reasons given above concerning assignment of the leasehold interest. Finally, the imminence of the creditor's meeting made granting leave a less attractive option.

(c) Other arguments raised by the applicant

The applicant also listed a number of other reasons why it shouldn't be kept out of possession. These included Virgin Blue's baggage handling problems; the need for maintenance and repair of the terminal; the length of the administration and its entitlement to some certainty of enjoyment of its proprietary interest.

Kenny J found that the applicant's concerns regarding safety at baggage handling facilities were addressed by the administrators' offering an undertaking to assist. Second, the administrators had already effected some repairs. Further maintenance and repairs were needed, but could wait until after the creditor's meeting, as the applicants offered no evidence that other airlines would use the terminal. Since the applicant, relying on the lease, had requested that the lessee remove all the "works" at the premises, the respondents' argued that the applicant could neither properly require possession of the Terminal in order to make it available for other airlines nor renovate it, while also directing the respondents demolish the Terminal. Third, the applicant had not shown that it had suffered a detriment of any kind that would lead a court to intervene at this stage of the administration. Finally, the applicant would seek confirmation of the administrators' intention to demolish the works at the creditors' meeting. If the administrators were determined to demolish the works, as required under the lease, then the repair and maintenance issues and third party users of the terminal would not be important. This highlighted the importance of the creditors' meeting.

(d) The creditors' meeting

Kenny J held that the creditors should be allowed the full opportunity to consider their options at the impending creditors' meeting. She referred to Byrne J in Re Java at 517 "the imminence of the creditors' meeting and the prospect that they might be asked to consider a proposal for a deed of company arrangement" was a "powerful reason not to disturb the status quo". The intention of the legislation is that creditors be given a full opportunity to consider options and that a lessor should not be permitted to pre-empt that position by disturbing the company's possession of the premises. Her Honour acknowledged the fact that the applicant might suffer some further delay in taking possession.

Further, it was relevant that the applicant would, subject to the lease, be able to exercise its proprietary rights to re-enter the premises and recover possession if it abstained from voting or voted against a deed of company arrangement at the creditors' meeting. It was then open to the Deed Administrator to obtain a restraining order against the lessor under section 444F. However, Kenny J noted the difficulty of such an application in the absence of a creditworthy third party. In any case, the onus would shift from the present applicant to the administrator, and the material before the Court would be different from the present application.

Kenny J dismissed the application and awarded costs against the applicant.

(5) Comment

On a cautionary note, it is suggested that the timing of the application can be critical. Here, the timing hindered the lessor's application, as it was only nine days until the final creditors' meeting and the Court was extremely reluctant to interfere by granting leave under section 440C. Further, the Court regarded the objectives of the administration and the interests of creditors in general, as taking precedence over the rights of a lessor seeking immediate rights of re-entry.

(C) CANCELLING AUDITOR'S REGISTRATION - ADMINISTRATIVE ASPECTS  
(By Alex Vynokur, [Baker & McKenzie](http://www.bakernet.com))

Birdseye v Companies Auditors and Liquidators Disciplinary Board [2002] FCA 280, Federal Court of Australia, Hill J, 19 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/march/2002fca280.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary of application

The applicant, Mr Birdseye, appealed from a decision of the Administrative Appeals Tribunal ("the Tribunal") which affirmed a decision of the Companies Auditors and Liquidators Disciplinary Board ("the Board") that his registration as an auditor under the Corporation Law (as it then was) ("the Law") be cancelled. The appeal was in the original jurisdiction of the Court and was limited to a question of law.

(2) Background facts

On 9 November 1998 a sequestration order was made against Mr Birdseye's estate and in consequence he became a bankrupt. He remained a bankrupt until discharged by operation of the Bankruptcy Act 1966 (Cth) in January 2002.

Mr Birdseye advised ASIC of his bankruptcy and that he intended to make an application to the court for leave to manage a corporation. This notwithstanding, ASIC applied to the Board for cancellation of Mr Birdseye's registration as an auditor on the ground that he was disqualified from managing corporations by virtue of his bankruptcy.

The hearing before the Board took place on 3 May 2001, at which time no application for leave to manage a corporation had been filed. Mr Birdseye sought an adjournment on the basis of his intended application. The Board refused to adjourn the hearing and ordered that Mr Birdseye's registration as an auditor be cancelled. Mr Birdseye then applied to the Tribunal for review of this decision.

The Tribunal was of the view that:

(a) Its role was to consider the question before it at the time the registration was cancelled by the Board and not by reference to evidence obtained thereafter (such as evidence as to the result of Mr Birdseye's application to the court).

(b) Once the Tribunal had found that Mr Birdseye was a bankrupt, it was mandatory for the Tribunal under section 1292(7) to cancel Mr Birdseye's registration as an auditor.

(c) The proceedings in the Court could not affect the outcome for Mr Birdseye, because he would still be a person disqualified from managing corporations under Part 2D.6 of the Law. This being the case it was mandatory that the Board, or on review the Tribunal, cancel or suspend his registration.

(d) The Tribunal had no power to review the decision of the Board to refuse Mr Birdseye the adjournment, for the decision to refuse an adjournment was a procedural decision lacking the necessary quality of finality.

(3) Appeal decision

The decision was handed down by Hill J on 19 March 2002.

His Honour decided the case on the following grounds, considering it unnecessary to review all determinations of the Tribunal:

(a) The Tribunal was correct in the interpretation it gave to section 1292(7) in that it required the Board (or the Tribunal, in the event of an application to the Tribunal to review the Board's decision) if satisfied that the person is disqualified from managing corporations under Part 2D.6 of the Law, to cancel the registration.

(b) On the facts of the case, the only relevant fact to be determined by the Board, or the Tribunal, was whether Mr Birdseye was disqualified from managing corporations generally. He was so disqualified, being an undischarged bankrupt. Consequently, His Honour confirmed that the Board (or the Tribunal in its place on a review) was required to order the cancellation of Mr Birdseye's registration, once it found he was a bankrupt.

His Honour also found that despite the fact that Mr Birdseye had, at the time of the appeal, ceased to be a person disqualified from managing corporations under Part 2D.6 because he has been discharged from bankruptcy, the Board's decision to cancel the registration was still in effect.

Therefore, the application was dismissed and Mr Birdseye was ordered to pay costs.

(D) EMPLOYEES' LEGAL COSTS AS PRIORITY PAYMENTS  
(By Stephen Magee)

In the matter of Pasminco Limited (Administrators Appointed) [2002] FCA 231, Federal Court of Australia, Goldberg J, 9 April 2002.

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/april/2002fca231.html> or  
<http://cclsr.law.unimelb.edu.au/judgments/>

Summary: Injured workers were entitled to priority for their legal costs in pursuing workers' compensation claims against their employer. However, that priority only extends to costs incurred before the commencement of the external administration.

(1) Background

A number of employees were pursuing injury claims against Pasminco Limited. Pasminco was a self-insurer in a number of States. After some of those claims had been settled, Pasminco went into voluntary administration (VA). The administrators asked the Federal Court for directions as to whether the employees' legal costs would be priority claims under section 556(1)(f) (on the assumption that the company entered into a Deed of Company Arrangement in accordance with Schedule 8A).

There appear to have been three sets of circumstances before the Court:

(a) claims disposed of before the VA, where Pasminco was liable for the employees' costs (by agreement or because of a costs order);

(b) claims begun before the VA and which were still continuing (where costs had been incurred both before and after the commencement of the VA); and

(c) claims begun after the VA had commenced.

The administrators' application required the Court to consider a number of issues:

(a) did priority attach to costs incurred before the VA?

(b) what priority - if any - attached to costs incurred after the VA had begun?

The second question led the Court into a consideration of more general issues about legal proceedings during a VA.

The case proceeded on the assumption that any Deed of Company Arrangement entered into would accord with Schedule 8A (so that section 556(1)(f) debts would receive priority payment under the deed).

(2) Costs incurred before the VA

The first issue here was whether the legal costs were "amounts due in respect of injury compensation" within the meaning of section 556(1)(f).

The first hurdle to be crossed was SGIO v Rees, in which Mason J distinguished payments to workers (receiving priority) from payments to other parties, such as premiums payable to a workers' compensation insurer (which were not covered by section 556(1)(f)). The Federal Court conceded that, in the case of Pasminco, payment for the legal costs would ultimately flow to the employees' solicitors. However, "that conclusion should not be allowed to obscure the fact that the primary liability for the payment of those costs and expenses falls upon the workers or their dependants."

The next issue was the nexus between the legal costs and the injury compensation. Here, the Federal Court said that the legal costs were a sine qua non of the injury compensation: "[t]here is a close and significant connection between the right of an employee to recover injury compensation and the costs incurred to vindicate that right. In short, without the incurring of the legal costs, the compensation would not have been payable to the employee."

Those costs were therefore held to fall within the meaning of "amounts due in respect of injury compensation".

Costs had been incurred before the VA in two circumstances:

(a) where claims had been brought to finality before the VA and Pasminco was liable for the costs; and

(b) where claims had begun before the VA and were still progressing.

Costs in the former category appeared to be relatively straightforward: they would have priority under section 556(1)(f). However, costs in the latter category were different. This was because they fell into two separate sub-categories:

(a) costs incurred before the VA; and

(b) costs incurred after the VA began.

Costs incurred before the VA where the litigation was still on foot during the VA would be contingent claims and hence entitled to be submitted for payment under the deed (Schedule 8A clause 6). They would be contingent claims "because of [their] association and connection with the primary claim for injury compensation, even though there has not been any costs order obtained, or agreement reached, for the payment of those legal costs and expenses prior to the commencement of the administration."

However, costs incurred after the VA began were different, as detailed below.

(3) Costs incurred after the administrator's appointment

Schedule 8A requires payment of priority debts, but section 444D(1) limits its operation to claims arising before the VA began. The effect on Pasminco's employees was that those legal costs incurred after the administrator's appointment would not be payable under the deed.

That disposed of any possibility that such costs would have priority as a result of section 556(1)(f). However, the Court then went on to consider whether the administrators would be liable for the costs as "debts [incurred] for services rendered" (section 443A(1)(a)), where the administrators or the Court had given the go-ahead for the proceedings.

There was insufficient evidence about the employees' claims to allow the Court to reach a conclusion on this issue. However, the Court appeared to have doubts about whether the administrators would be liable. If the administrators were not liable, the claims for costs would have to be pursued against the company.

(E) RIGHT TO VOTE BY ATTORNEY AT THE ANNUAL GENERAL MEETING OF A PUBLIC COMPANY  
(By Nghi Tran, [Phillips Fox](http://www.phillipsfox.com))

The New South Wales Henry George Foundation v Booth [2002] NSWSC 245, Supreme Court of New South Wales, Gzell J, 5 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/april/2002nswsc245.html> or  
<http://cclsr.law.unimelb.edu.au/judgments/>

The plaintiff is a company limited by guarantee. Notice was given to its members that its annual general meeting would be held at 2pm on Saturday 15 September 2001. Various members of the company lodged at the registered office, within the requisite time, instruments of appointment of proxies. The first, second and fifth defendant and others attended the meeting each claiming entitlement to be present and to vote under various powers of attorney, each dated 14 September 2001. The powers of attorney were not lodged with the company within the requisite time.

Two rival groups claimed to be the officers of the company. One group had Mr Gilchrist, the chairman of the company immediately before the 15 September 2001 meeting, as a director of the company. The other group had the first, second, third and fourth defendants as directors and the sixth defendant as company secretary.

The question before the court was whether the attorneys were entitled to attend the general meeting and to vote at that meeting. This would decide whether or not the relevant defendants were validly appointed to their respective offices.

(1) Right to vote by attorney

In order to answer that question Gzell J had to determine whether, for the purposes of the Corporations Act 2001 (Cth) ('Corporations Act'), voting by attorney is encompassed within the provisions dealing with voting by proxy. Articles 23 and 24 of the company's constitution provided that members may vote in person or by proxy or by attorney. However, the Corporations Act is silent about voting by attorney. Gzell J examined the history of voting by attorney.

In Harben v Phillips (1883) 23 Ch D 14 at 35-36 Bowen LJ held that there is no common law right on the part of a member of a corporation to vote by proxy. In the United Kingdom prior to 1947, a member of a company had no right to vote by proxy except insofar as the articles of association gave such a right. Later the Companies Act 1947 (UK) and the Companies Act 1948 (UK) provided for the appointment of proxies.

Gzell J noted that voting by attorney is first mentioned in the 1961 uniform companies legislation of the Australian States. For example, Companies Act 1961 (NSW), Table A, article 54 provided for the right to vote by proxy or attorney. A similar provision appeared in Table B, article 37. A similar position arose under the uniform legislation of 1981.

The present position is that Corporations Act, Part 2G.2, Division 6 applies to proxies and body corporate representatives. It says nothing about a member voting by attorney. Because the Table A and Table B concept has been replaced by replaceable rules in the Corporations Act, there is no longer any mention of voting by attorney in the current legislation.

Gzell J rejected the defendants' argument that other legislation (in particular, the Conveyancing Act 1919 (NSW)) may be relevant in determining a member's right to vote by attorney. The first and second defendants were appointed attorneys under an instrument in the form referred to in the Conveyancing Act 1919 (NSW), section 163B. Gzell J held that the Conveyancing Act is not relevant as it deals with the question of whether an attorney is properly appointed rather than whether the attorney is entitled to attend and vote at the general meeting. Gzell J stated that, in the absence of a common law rule that one may vote by attorney, one has to find statutory authority for that proposition, not in the general law, but in legislation relating to corporations.

In Gzell J's view, Corporations Act, Part 2G.2, Division 6 prescribes the ways in which a shareholder may be represented at a meeting of a company's members. It does not simply describe some of the delegates who may act for a shareholder and it is not to be implied that other forms of shareholder representation are permissible. Rather, Division 6 gives statutory force to the permitted methods of representation: by proxy and, in the case of a corporate shareholder, by individual representative. His Honour concluded that articles such as the plaintiff's providing for voting by proxy or attorney must be construed to comply with the relevant Corporations Act provisions or else be struck down as invalid.

Gzell J was of the view that the word 'proxy' in the Corporations Act is sufficiently broad to include an attorney. Therefore, articles in the company's constitution were not invalid merely because they provided for voting by attorney.

(2) Must a proxy or attorney be a member of the company?

In response to the argument that the powers of attorney were invalid, as the donees were not members of the company (in contravention of article 25 of the company's constitution), his Honour instead concluded that an article in the constitution of a public company which requires a proxy to be a member of the company restricts the right granted by statute. This is because section 249X of the Corporations Act is a mandatory rule for public companies. It provides that a member is entitled to appoint a person as proxy, that is, a 'person' may be appointed as a proxy. 'Person' is a word of general import. It is not limited to members of a company. Consequently, Gzell J held that article 25 of the plaintiff's constitution was invalid.

Gzell J then considered sections 250A and 250B Corporations Act. Section 250A(1) identifies the circumstances in which an appointment of a proxy is valid. Section 250B(1) identifies requirements for proxy documents, including that the proxy must be lodged with the company at least 48 hours before the meeting. Sections 250A(2) and 250B(5) provide for the amendment of these requirements by the constitution of a company. That does not mean, however, that the constitution may make provision for a different form of shareholder representation that does not comply with sections 250A(1) and 250B(1).

Article 27 of the plaintiff's constitution required instruments appointing proxies (and related documents) to be lodged with the company within a specified time prior to any meeting or poll. Gzell J held that article 27 extended to voting by attorney, noting that if the company's articles were instead construed as providing for the appointment of attorneys and lodgement of such powers in a manner inconsistent with sections 250A and 250B of the Corporations Act, they would be invalid to that extent. Therefore the failure to lodge the powers 48 hours prior to the meeting involved a contravention of section 250B and the plaintiff's constitution, and hence the relevant defendants were not entitled to attend or vote at the meeting.

(3) Had there been a valid meeting?

Gzell J then went on to consider the second defendant's submission that there had been no valid meeting on Saturday 15 September 2001 at which directors including Mr Gilchrist were appointed.

Shortly after 2pm on Saturday 15 September 2001, Mr Pavic, present by power of attorney, called upon the company chairman, Mr Gilchrist, to open the meeting and announced that the chairman was on the premises but had failed or refused to open the meeting. He then assumed the chair for the purpose of appointing a chairman. He called for nominations. The first defendant was nominated. Mr Pavic put the motion to the meeting and declared it carried. At about 2:20pm, Mr Gilchrist entered the meeting room with a number of police officers. In order to quell argument between the two rival groups, the police required everyone to leave the building. The first defendant announced that he was adjourning the meeting to the Silks Club at 2:45pm. The defendants were unaware that Mr Gilchrist and other members of the company re-entered the building and a meeting was opened at 3:30pm. Mr Gilchrist and others were elected as directors of the company at this meeting.

Article 18 of the company's constitution provided that if the chairman is not present within 15 minutes after the time appointed for holding the meeting, the members present shall elect a chairman for the meeting. Gzell J's view was that the first defendant was not validly appointed chairman of the general meeting. Mr Gilchrist was entitled to chair the meeting unless and until at 2:15pm he was not present. The first defendant's purported appointment before 2:15pm had no effect and, in consequence, he lacked the ability to adjourn the meeting to the Silks Club.

Gzell J was satisfied that the members of the company who attended the meeting at 3:30pm on Saturday 15 September 2001 had acted honestly. Gzell J declared that the meeting convened at 3:30pm was validly convened as the annual general meeting of the company. Gzell J also made a declaration that the group of persons which included Mr Gilchrist were validly elected as directors of the company at the annual general meeting held at 3:30pm on 15 September 2001.

(F) IN WHAT CIRCUMSTANCES WILL AN ORDER FOR WINDING UP BE TERMINATED?   
(By Tammy Kingsley, [Phillips Fox](http://www.phillipsfox.com))

Anderson v Palmer [2002] NSWSC 192, Supreme Court of New South Wales, Barrett J, 20 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/march/2002nswsc192.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The Anderson Group Pty Ltd ('TAG') was formed in 1983 by Mr G Anderson and his then wife Mrs C Anderson. On 3 March 2000 TAG became the subject of an order for winding up on the basis of non-compliance with a statutory demand for a debt of $22,000. Mr Anderson was effectively in charge of the affairs of TAG at the time when it succumbed to the winding up order.

In 1995 Mr and Mrs Anderson separated and the Family Court of Australia ordered Mr Anderson to transfer all his shares in TAG to Mrs Anderson and to cease to be a director of the company. As a result, Mrs Anderson became the sole director and sole shareholder of TAG. The defendant, Mr Palmer was the current liquidator.

(2) The present application

Mrs Anderson applied for an order under section 482 of the Corporations Act 2001 to terminate the winding up of TAG. She did so on the basis that she believed that TAG was solvent and in a state of financial stability sufficient to justify its being released from liquidation and restored to her control. She was also concerned about the ongoing cost of the liquidator's remuneration that was eroding the company's cash resources. Two creditors opposed her application.

(3) The relevant criteria

In considering the application under section 482, Barrett J approved the criteria set out by Master Lee QC in Re Warbler Pty Ltd (1982), although his Honour noted that this should not be regarded as a series of rigid principles. The four most relevant criteria to this case were:

(a) the onus is on the applicant to make out a positive case for a stay of proceedings in a discretionary matter;

(b) the nature and extent of the creditors must be shown, and whether or not all debts have been or will be discharged;

(c) the attitude of creditors, contributories and the liquidator is a relevant consideration; and

(d) the current trading position and general solvency of the company must be demonstrated.

In particular, key issues in this case were:

(a) the capacity of TAG's cash resources, including those immediately convertible to cash in order to meet short term debts;

(b) TAG's capacity to raise money quickly by resort to assets not immediately convertible to cash; and

(c) whether there existed a sufficient financial capacity to create confidence that there would be no relapse into insolvency

The third criteria noted above was also relevant in relation to potential interest payments to creditors.

(4) Accounting of assets and liabilities

Barrett J then considered the company's assets and liabilities, and how they would be applied, in assessing the company's solvency. His Honour confirmed that unless there were cogent grounds that disputed debts were overstated, the court would take those debts into account at their proved amounts.

(5) Deferred creditors item

At the time of judgment, TAG owed Mr Anderson $530,371 and Mrs Anderson $419,653. Both entered into a deed to defer their proofs of debt until determination of these proceedings. They later both provided undertakings to the court that they would not serve statutory demands in respect of those debts.

However, Barrett J observed that refusal to serve a statutory demand is not the same as releasing or forgiving the debt altogether. As they stood, the debts remained financial liabilities which could be exercised after termination of the winding up, especially as they had no fixed maturity date. The payment of those debts would reduce the pool of funds available to other creditors and increase the likelihood of their applying for winding up. Notwithstanding their undertakings, the Andersons would also be able to obtain a judgment upon the liquidated claim and levy execution, which, if returned unsatisfied, would also constitute grounds for winding up. Other grounds for their seeking an order for winding up might also be available (for example, on the basis of evidence which does not resort to the statutory presumption arising from non-compliance with a statutory demand).

Barrett J also noted that as Mr Anderson was no longer a shareholder or director of TAG, he had little interest in its solvency. In light of this, and the failure by the Andersons to attempt to subordinate the debt in a way that would be effective beyond any termination of the winding up, his Honour saw no option but to regard the debts owed to the Andersons as representing an immediate claim upon the company's current cash resources.

(6) TAG's tax position

Although TAG had not lodged a tax return for the last four years, TAG's accountant submitted estimates of TAG's income for certain of those tax years to the court. They did not include the CGT liability arising from the sale of a property owned by the company. In view of the delayed lodgement of the company's returns and the real possibility of penalties for late payment, Barrett J noted that this did not improve the financial prognostication and might also raise a 'public interest' issue in relation to the requested termination of the winding up.

(7) Section 563B: interest

In response to the suggestion that interest is not payable on a debt in winding up proceedings unless specifically claimed, Barrett J observed that the actual words of the Act do not imply that requirement.

His Honour noted that section 563B provides that once all admitted debts have been paid, the liquidator must pay the prescribed statutory rate of interest on all creditors' claims. Once those creditors' claims have been paid, creditors who have a right outside of the Corporations Act are entitled to claim interest out of any available surplus.

Such interest would therefore have to be considered a liability which the liquidator must satisfy out of readily available assets, assuming creditors were to be paid 100 cents in the dollar. However, if the winding up was terminated, the statutory interest element would not become payable. His Honour noted that if and when TAG was released from liquidation, it would not have to pay the interest and therefore such an interest payment may be omitted from the list of the company's potential liabilities.

Also, while some creditors expressed support for the termination of TAG's winding up, Barrett J concluded that none of the creditors had been made aware of the possibility of obtaining interest on debts owed pursuant to section 563B, if the winding up resumed, whereas payment of debts after termination of the winding up would not carry interest unless such a right was conferred under the relevant contract. This was particularly relevant as there was a real possibility of the liquidators obtaining 100 cents in the dollar for all creditors.

(8) Conclusion

TAG's liquid assets were assessed at $1,768,000 and relevant liabilities at $2,280,000. Whilst TAG might have been able to raise further cash resources by eventually converting some of its assets, Barrett J held that at the time of the hearing its liquidity was insufficient to allow winding up proceedings to be terminated. This was notwithstanding his acknowledgment that the costs to the company in relation to the liquidation were significant, and his observation that such costs would probably be lessened if the present regime no longer applied.

(G) PROHIBITED ACQUISITION OF SHARES  
(By Erica Martin, [Mallesons Stephen Jaques](http://www.mallesons.com))

Edensor Nominees Pty Ltd v Australian Securities and Investments Commission [2002] FCA 307, Federal Court of Australia, Hill, Sundberg and Mansfield JJ; 20 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/march/2002fca307.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Facts

On 12 January 1999 the second respondent ("Yandal Gold") served on Great Central Mines Ltd ("Great Central"), a company listed on the Australian Stock Exchange, a takeover offer for all the shares on issue in Great Central and a Part A statement. Yandal Gold was a wholly owned subsidiary of the third respondent ("Yandal Gold Holdings"). 50.1% of the shares in Yandal Gold Holdings were owned by the appellant ("Edensor") and 49.9% by the sixth respondent ("Normandy Consolidated Gold"). The fourth, fifth and seventh respondents were related companies (collectively the "Normandy Group").

On 11 January 1999 Yandal Gold, Yandal Gold Holdings and the Normandy Group entered into a shareholders agreement in relation to the takeover offer. As at 10 January Edensor held 12.56% of Great Central shares and Normandy Mining Holdings held 27.81%. A consequence of the shareholders agreement was that all parties to it became associates of each other and entitled to relevant interests in the shares in Great Central held by the other parties. So on 11 January 1999 Edensor's entitlement to a relevant interest in shares in Great Central increased from 12.56% to 40.37% and the Normandy Group's entitlement increased from 27.81% to 40.37%. On that day Yandal Gold and Yandal Gold Holdings held no shares directly in Great Central, but their entitlement to a relevant interest in Great Central shares likewise became 40.37%.

The takeover offers were sent to shareholders in Great Central and were conditional on Yandal Gold becoming entitled to 90% of the shares in Great Central with not less than 75% acceptance, thereby entitling Yandal Gold to compulsorily acquire the remaining shares under section 701 of the Corporations Law ("the Law") as it then was. The Part A statement recorded that Edensor and Normandy Mining Holdings had informed Yandal Gold that they would not accept the offers applicable to their holdings. Great Central forwarded a Part B statement to its shareholders and recommended that unless a higher offer was made the offers be accepted.

On 15 March 1999 Yandal Gold declared that the takeover offers and any contracts arising from their acceptance were unconditional. On 21 April 1999 Yandal Gold became "entitled" to 94.37% of the shares in Great Central, including the 40.37% referred to earlier. The requirements of section 701 were satisfied and, subject to these proceedings, Yandal Gold was entitled to proceed to compulsory acquisition.

ASIC formed the view that the shareholders agreement had resulted in a contravention of section 615 of the Law, which prohibits the acquisition of shares in certain circumstances. It commenced proceedings against Edensor and the second to seventh respondents ("respondents"). The non-acceptance and retention agreements were also said to be informal agreements, arrangements or understandings between the parties to the shareholders agreement that were not intended to be legally binding, to the effect that Edensor and Normandy Mining Holdings would not accept the takeover offers and would retain their shares for the purpose of the bid.

Declarations were sought that the respondents had breached section 615 in entering into the non-acceptance agreement, the retention agreement and the shareholders agreement. Further, that by issuing and despatching the Part A statement, Yandal Gold had engaged in conduct in trade and commerce that was misleading and deceptive in contravention of section 52 of the Trade Practices Act 1974 (Cth), alternatively section 12DA of the Australian Securities and Investments Commission Act 1989 (Cth) and section 995(2)(b) of the Law.

(2) Legislation

Section 615(1) of the Law provides that a person shall not acquire shares in a company if they are not entitled to any voting shares in the company or are entitled to less than the prescribed percentage of the voting shares in the company and would, immediately after the acquisition, be entitled to more than the prescribed percentage of the voting shares in the company. It also prohibits an acquisition of shares by any person who is entitled to more than the prescribed percentage, but less than 90% of the voting shares in the company who would, immediately after the acquisition, be entitled to a greater percentage of the voting shares in the company than immediately before the acquisition. The "prescribed percentage" is 20%.

Section 51 provides that a person who acquires a relevant interest in shares as a result of a relevant agreement entered into by, or on behalf of a person in relation to those shares acquires the shares for the purposes of section 615(1).

The contravention of section 615 in relation to the shareholders agreement was alleged to arise by reason of section 33. This provides that where a body corporate or an associate has power to vote in respect of or dispose a share, a person shall be deemed to have the same power as the body or associate has - if the person, an associate, a person and associate of the person, or the person and an associate or associates of the person together have, power to vote in respect of not less than the prescribed percentage of the voting shares in the body.

Yandal Gold Holdings' ownership of Yandal Gold and the shareholdings of Edensor and Normandy Consolidated Gold resulted in each of them being deemed, by reason of section 33, to have power to vote in respect of and to dispose of the shares held by Edensor and Normandy Mining Holdings in Great Central, and thus to have a relevant interest in those shares. The contravention of section 615 in relation to the non-acceptance and retention agreements was said to arise by reason of Yandal Gold, Edensor and Normandy Mining Holdings acquiring a relevant interest in the shares in Great Central held by the other respondents by entering into an agreement, arrangement or understanding not to accept the takeover offers and to retain their shares for the purposes of the bid.

(3) Primary judge's decision

The primary judge held that there had been breaches of section 615 of the Law, section 52 of the Trade Practices Act, alternatively section 12DA of the Australian Securities and Investments Commission Act, and section 995(2)(b)(iii) of the Law, and made declarations accordingly. The orders he made included an order that Edensor pay ASIC $28.5 million for distribution on a pro rata basis to the shareholders in Great Central (other than the respondents).

Edensor appealed against these orders.

(4) Bid structure and shareholders agreement

Edensor challenged the primary judge's conclusion that the bid structure agreement conferred power on the parties to exercise control over the disposal of the shares. The Federal Court upheld the primary judge's finding that "control" may be informal, indirect and unenforceable, but must always involve some "true or actual measure of control" over the disposal of the shares and not be control that is "minor, peripheral, or merely hypothetical, theoretical or notional." The Court confirmed that control can be exercisable by means of unenforceable agreements and practices. Therefore the non-acceptance and retention agreements were in breach of section 615.

The appeal then turned on the definition of "acquire" in the shareholders agreement. The Court found that the natural meaning of "acquire" in section 615 of the Law meant simply to obtain a relevant interest which may be an actual or a deemed relevant interest. The Court stated that since a relevant interest can be acquired by an informal and unenforceable arrangement or understanding, it is unlikely that the legislature intended to restrict "acquisition" in the Law to transactions that conferred title or an actual relevant interest.

The Court held that the effect of the shareholders agreement was that the respondents became entitled to a relevant interest in the shares in Great Central held by Edensor and Normandy. An agreement that has that effect is a transaction in relation to those shares. Therefore, the primary judge's finding that Yandal Gold, Yandal Gold Holdings, Edensor and Normandy obtained and acquired relevant interests in shares in Great Central in contravention of section 615 was upheld.

(5) Misleading and deceptive conduct

Once a contravention of section 615 was found, a necessary consequence was that Part A statement was rendered false and thus misleading and deceptive for the purposes of section 52 of the Trade Practices Act, section 12DA of the ASIC Act and section 995(2)(b)(iii) of the Law. Edensor did not appealed against the primary judge's decision in relation to these contraventions.

(6) Relief

The primary judge ordered that Edensor pay ASIC $28.5 million as stated above. Edensor appealed against this sum, arguing that section 737 of the Law does not confer the right to make compensatory orders to mitigate detriment to shareholders. This was dismissed by the Court which stated that section 737(1), which allows the making of "such order as [the Court] thinks just" should be construed to include the power to make an order which results in compensation for those whose interests have been damaged by conduct contravening section 615. This was considered "just" in the eyes of the primary judge and upheld on appeal.

(H) COURT APPROVES RIO TINTO'S COMPULSORY ACQUISITION OF WESTERN AUSTRALIAN DIAMOND TRUST  
(By Jason Lang, [Mallesons Stephen Jaques](http://www.mallesons.com))

Capricorn Diamonds Investments Pty Ltd v Robert John Charles Catto [2002] VSC 105, Supreme Court of Victoria; Warren J; 10 April 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2002/april/2002vsc105.html> or  
<http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary

In an action commenced by Capricorn Diamonds Investments Pty Ltd, a subsidiary of Rio Tinto Ltd, under the compulsory acquisition provisions of Part 6A.2 of the Corporations Act 2001, Warren J approved Rio Tinto's compulsory acquisition of 3% of the units of the Western Australian Diamond Trust at the value of $2.00 per unit. Warren J rejected an argument put by the defendants that the compulsory acquisition provisions were unconstitutional.

(2) Facts

The Western Australian Diamond Trust ("WADT") is a listed unit trust whose primary asset is an interest in the Argyle Diamond Mine Joint Venture. During 2000, WADT was owned as to 58% by a wholly owned subsidiary of Rio Tinto Ltd, Capricorn Diamonds Investments Pty Ltd ("Rio Tinto"), 39% by a wholly owned subsidiary of Ashton Mining Limited, AML Investments Pty Ltd and 3% by minority unitholders including Robert Catto and the other defendants ("Catto"). In November 2000 after a takeover bid in competition with the De Beers Group, Rio Tinto acquired control of Ashton Mining Limited, which had the effect of raising its relevant interest in WADT to 97%.

On 9 May 2001, Rio Tinto issued a compulsory acquisition notice pursuant to section 664C of the Corporations Act in respect of the remaining 3% of units in WADT. The notice specified a price of $2.00 per unit, which was $0.78 above the highest valuation appearing in the independent expert's report accompanying the notice. Unitholders representing 60% of the outstanding units subsequently objected to the compulsory acquisition under section 664E, preventing completion without court approval. Rio Tinto commenced proceedings in the Supreme Court of Victoria arguing that the compulsory acquisition gave fair value to unitholders and seeking the Court's approval of the compulsory acquisition in accordance with section 664F. The Attorney General of the Commonwealth and the Australian Securities and Investments Commission intervened in proceedings to make submissions in support of Rio Tinto's case.

(3) Concept of fair value

Section 664F required Rio Tinto to prove that the compulsory acquisition notice gave fair value for the units in WADT. Section 667C sets out rules for determining fair value, including that the value of the "company as a whole" be assessed and that this value be allocated evenly among securities in a class, with no allowance for a premium or discount.

Catto argued that fair value comprised three elements:

(a) a base value;

(b) the value of "special benefits" accruing to WADT once Rio Tinto acquires 100% ownership (special benefits include items such as elimination of ASX compliance costs, transferral of tax losses, increased confidentiality of business information, favourable corporate restructuring and other potential synergies); and

(c) an additional payment as compensation for the forcible taking of the units.

In regard to the special benefits, Catto argued that the portion of this amount reflected in the price offered to the minority unitholders should be 50%, rather than pro rata to their unitholdings (that is, 3%). In formulating the above components, liberal estimates were to be used and the level at which the units had traded on the ASX was a good indication of their value. (In the preceding 6 months the units had traded at a level well above $2.00.) Applying these principals, Catto argued, gave a fair value of between $2.68 and $3.08.

Rio Tinto argued that no special benefits or additional payment for forcible taking are to be taken into account in determining fair value and that, based on the findings of the independent expert and the expert evidence adduced by them in the present case, fair value was significantly below the $2.00 acquisition price.

After considering the arguments on both sides, Warren J rejected those put by Catto. Warren J found that, as special benefits do not exist until consummation of the proposed acquisition, they cannot be considered to be part of the company as a whole; accordingly, they do not constitute any part of fair value for the purposes of section 667C. Further, to include in fair value an additional amount to compensate for forcible taking (analogous to solatium) would be contrary to the requirement in section 667C(1)(c) that the fair value include no premium.

Fair value of an asset is "its fair equivalent in money ascertained by a supposed sale by voluntary bargaining between vendor and purchaser, each of whom is both willing and able, but not anxious, to trade and with a full knowledge of all the circumstances which might affect value". However, that special benefits are not embodied in the company as a whole follows from the long standing common law principle that the purpose to which property is to be put by the purchaser is not relevant to determining its value on compulsory acquisition. Warren J found that the Gambotto principles did not apply to the present case; the legislative mechanisms in Part 6A.2 ensuring fair dealing and fair value override those principles.

In determining fair value for the purposes of section 667C, the independent expert can adopt the fair market value of the entity's underlying assets as a means of valuing the securities, although there is case law to support the position that in doing so liberal estimates should be made. The relevant time for determining fair value is at or about the time at which the compulsory acquisition notice is lodged with ASIC and sent to unitholders.

The independent expert must disregard individual circumstances relevant to the seller or buyer (such as individual tax position) which might otherwise have an effect on the real value of the transaction to them. Further, notwithstanding the requirement in section 667C(2) for the independent expert to take into account the consideration paid for the securities in the previous six months, where the trading price has risen on the prospect of compulsory acquisition at an inflated price, or if there has been insufficient trading to warrant general conclusions as to the value of the securities, no adjustment to the value otherwise determined is required.

Warren J further noted that, to the extent that special benefits were to be taken into account in determining fair value, section 667C(1) requires their value to be apportioned between all unitholders pro rata to their unitholdings, not on a basis more favourable to the minority.

(4) Distributions to unitholders

After lodgment of the compulsory acquisition notice, WADT made a number of distributions to unitholders which it sought to deduct from the $2.00 payable per unit. Catto argued that Rio Tinto was not entitled to make such a deduction.

Warren J allowed the deduction on the basis that the Court's approval of the compulsory acquisition is effective to transfer the entire interest of the unitholder in WADT as at the date of the compulsory acquisition notice. Accordingly, distributions made subsequently on the units purchased belonged to Rio Tinto.

(5) Constitutional arguments

In the alternative, Catto ran the argument that section 51(xxxi) of the Constitution (relating to the Commonwealth's power to make laws in regard to the acquisition of property on just terms) provided a constitutional guarantee that just terms will be provided for any expropriation of property; to the extent that fair value under section 667C did not include special benefits, it did not provide for "just terms" and was therefore constitutionally invalid.

In rejecting this argument, Warren J noted that a law does not fall within the ambit of section 51(xxxi) if the law merely describes the means appropriate for the achievement of an objective properly within one of the other heads of power in section 51 and the acquisition of property without just terms is a necessary or characteristic feature of the means prescribed. As Part 6A.2 of the Corporations Act falls squarely within the power conferred by section 51(xx) (the corporations power) and compulsory acquisition on unjust terms, if it occurs, is a necessary incident of the means selected to achieve the objectives of Part 6A.2, no question of validity under section 51(xxxi) arises.

As a separate matter, Warren J also noted that section 51(xxxi) does not apply to a law which merely adjusts competing rights of persons in a particular relationship or area of activity. The compulsory acquisition regime in Part 6A.2 is properly characterised as concerned with an adjustment of competing rights as between security holders, rather than acquisition of property.

Warren J also dismissed the argument put by Catto that section 1350 of the Corporations Act, which requires additional reasonable compensation to be paid by a purchaser making an acquisition under the Corporations Act which is invalid under section 51(xxxi) of the Constitution, was insufficient to protect section 667C from invalidity in the event that it fell within the ambit of section 51(xxxi).

(6) Disclosure requirements

As a secondary argument, Catto alleged that the compulsory acquisition notice, and the accompanying independent expert's report, provided inadequate disclosure of the benefits which Rio Tinto was likely to receive on achieving 100% ownership of WADT, relying on certain decisions regarding schemes of arrangement.

Warren J rejected this argument commenting, first, that disclosure requirements for schemes of arrangement differ from those for compulsory acquisition because no "discrete business assessment" is to be made by a unitholder selling its units involuntarily and, second, in terms of potential benefits to be gained from synergies, future plans and matters of speculation are not generally required to be disclosed, especially in the context of a cash payment for the acquisition of securities.

(I) PREJUDICE TO PARTIES v PRINCIPLES OF OPEN JUSTICE: WHEN WILL NON-PARTY ACCESS BE GRANTED TO COURT FILES?  
(By Adam Brooks and Simon Pitt, Herbert Geer & Rundle)

ASIC v Rich [2002] NSWSC 198, New South Wales Supreme Court, Equity Division, Barrett J 18 March 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/march/2002nswsc198.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

The principles of open justice require that access be granted to court files where necessary, so that matters of genuine public interest can be put in the public domain by fully informed media.

These principles must however be tempered with the realisation that, in the early stages of proceedings, there exist untested allegations and potentially prejudicial material, which, if published prematurely could have seriously adverse consequences to a party, leaving no redress in defamation.

In the present case, access to an Amended Statement of Claim in a proceeding was denied to three journalists because of the perceived dangers associated with prematurely releasing untested allegations to the media for reporting. Barrett J decided that sometimes the principles of open justice are outweighed by potential prejudice to parties in a proceeding.

(2) Facts

On 11 March 2002, the Plaintiff, the Australian Securities and Investments Commission ("ASIC") filed an Amended Statement of Claim in the proceedings. On the same day two journalists lodged applications through the court's Public Information Officer for access to the Amended Statement of Claim. An application by another journalist was received the following day. Only one party to the proceeding (the first defendant, Mr Rich), opposed the grant of access sought.

(3) Law

In NSW, the principle of open justice is balanced by the court's inherent jurisdiction to control its own proceedings and access to court documents in a proceeding, so as to protect and further the due administration of justice.

The court exercises its inherent jurisdiction partly through Part 65 Rule 7 of the Supreme Court Rules, which provides that:

"a person may not search in a registry for or inspect any document or thing in any proceedings without the leave of the court".

Practice Note 97 provides:

"Access will normally be granted to non-parties in respect of:

(a) pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential;

(b) documents that record what was said or done in open court;

(c) material that was admitted into evidence; and

(d) information that would have been heard or seen by any person present in open court; unless the judge or registrar dealing with the application considers that the material or portions of it should be kept confidential. Access to other material will not be allowed unless a registrar or a judge is satisfied that exceptional circumstances exist".

(4) Analysis

(a) Other material

In the present case, the document being sought was the Amended Statement of Claim in a proceeding which had not concluded. Therefore it is clearly "other material" as referred to in Practice Note 97 above. The expectation exhibited by the Practice Note is therefore that some exceptional circumstances must be seen to warrant the grant of access.

(b) Exceptional circumstances

The Applicants argued that since:

(i) The proceedings involved a major corporate collapse;  
(ii) Many citizens have suffered losses; and   
(iii) Questions of accountability for large amounts of public company funds will be explored in the proceeding;

the circumstances should be regarded as exceptional.

In citing precedents, Barrett J pointed out that the principles of open justice focus most sharply on the situation where a trial has taken place or at least is in progress. In the present case only an amended Statement of Claim had been filed, which contained allegations in an entirely unchallenged form.

Furthermore, Barrett J noted that, as in the present case, pleadings can be and often are amended. The court file, as it exists in a developing state, cannot be regarded as the equivalent of what will be presented in court if proceedings come to trial.

Barrett J concluded that the potential loss to the public in not disclosing the details of the proceeding was a relevant consideration in assessing the application, but its relevance did not outweigh the prematurity of the allegations to make the circumstances exceptional.

(c) Prematurity

The issue of prematurity is highlighted in a particularly useful way by Santow J in Eisa Limited v Brady [2000] NSWSC 929: His Honour states:

"Clearly if the court were thus to make available to the press prematurely affidavits or pleadings containing damaging allegations not read in court or sufficiently described in open court, this may severely and unfairly prejudice those the subject of these damaging allegations with no necessary redress in defamation."

Barrett J observed that an application for access to documents has not been made at an equivalent stage of a proceeding before. In other cases where proceedings had not concluded, the pleadings were so well advanced that the competing positions of the parties were delineated in a reasonably clear way.

The present case was thus easily distinguished, and it was decided that granting the application would have been a premature release of information.

(d) Public interest

Access to court files and publication of court proceedings, either concluded or at trial, is usually motivated by a very proper desire to place in the public domain matters considered to be of genuine and public interest.

Barrett J makes it clear however that the court should only support this desire by granting non-party access to court files when the issues in the proceeding have been decided upon, or at least tested by an exhaustive exchange of pleadings.

(5) Conclusion

Barrett J held that the application should be refused. He decided that the principles of open justice would not be enhanced or promoted by facilitating media coverage of untested allegations, which had not been (and may never be) aired in court.

He added that such premature access by the media to the untested allegations had the potential to cause serious prejudice to the defendants, who intend to put their countervailing contentions on to the record in due course.

Finally, Barrett J stated that neither the principles of open justice nor the potential prejudice to parties has a priori ascendancy over the other. The issues discussed above must be tested case by case against the overall interests of justice.

6. NEW BOOK ON CORPORATE GOVERNANCE

"Corporate Governance: An Asia-Pacific Critique" is a new book which critically addresses the issues and controversies surrounding the practice of corporate governance in the Asia Pacific region. It draws upon the collective expertise of 25 contributors to present an exposition of the various perspectives of corporate governance. There are country-specific studies of Australia, China, Hong Kong, Malaysia, New Zealand, Singapore and the United States of America.

This book provides the reader with a critical analysis of the future of corporate governance in the region. Of equal importance is its scope and depth, which strikes a balance between the principles of law, economics, finance and accounting.

Further details, including the table of contents, can be found at <http://www.smlawpub.com.hk>

7. RECENT CORPORATE LAW JOURNAL ARTICLES

V Mitchell, 'Has the Tyranny of the Majority Become Further Entrenched?' (2002) 20 Company and Securities Law Journal 74

The Company Law Review Act 1998 and the Corporate Law Economic Reform Program Act 1999 introduced changes which have weakened the powers of minority shareholders whilst strengthening those of the majority. Accompanying this shift in power have been other changes that give a greater role and more responsibilities to shareholders in the overseeing and "policing" of both directors and companies. This, in effect, will give these responsibilities to the majority shareholders.

This article examines the change in the balance of power between the minority and majority (frequently institutional or groups of institutional investors). It then examines how and/or whether the majority (or institutional investors) will exercise these new overseeing or "policing" powers.

The article concludes that the minority is doubly disadvantaged in that not only are their powers being undermined but the increased responsibilities which are meant to be exercised by the majority will at times not be exercised at all. Alternatively, if these responsibilities are exercised, they will be exercised by the majority in their own interests, and as a result, the interests of the minority will be undermined or ignored.

S Rubenstein, 'The Regulation and Prosecution of Insider Trading in Australia: Towards Civil Penalty Sanctions for Insider Trading' (2002) 20 Company and Securities Law Journal 89

Past experience suggests that the investigation of suspected insider trading in Australia is problematic and that prosecution and conviction for breach of the insider trading laws is rare. This article explores some of the issues that arise in respect of the regulation and enforcement of the insider trading provisions of the Corporations Act 2001. The first part of this article deals with the rationales for the regulation of insider trading and considers the key elements required to establish the offence of insider trading. The second part raises some of the practical problems with the enforcement of the insider trading provisions through review of recent case law on insider trading. Several obstacles and difficulties for criminal enforcement of the insider trading laws are identified and explored. The final part considers amendments to the Corporations Act 2001 by the Financial Services Reform Act 2001 to extend civil penalty sanctions to insider trading and whether this is likely to address some of the obstacles and difficulties for criminal enforcement of the insider trading laws.

Note, 'Dual Listed Companies' (2002) 20 Company and Securities Law Journal 114

Note, 'Developments in the Harmonisation of Accounting Standards' (2002) 20 Company and Securities Law Journal 116

Note, 'Lifting the Veil - A Distinctive New Zealand Approach?' (2002) 20 Company and Securities Law Journal 119

Note, 'HYENAs are not Debentures, Securities or Options to Acquire Shares under the Corporations Act 2001' (2002) 20 Company and Securities Law Journal 122

Note, 'Back to the Future? Bigshop 2 and Defensive Tactics in Takeovers' (2002) 20 Company and Securities Law Journal 126

D Morrison, 'When is a Company Insolvent?' (2002) 10 Insolvency Law Journal 4

This article considers the meaning of the terms "solvent" and "insolvent" using the section 588G Corporations Act prohibition against insolvent trading by directors as an exemplar of the difficulties faced by those seeking to understand and apply the test provided for under the section 95A definition of "solvent" and "insolvent". It is suggested that the Corporations Act definition adds little to the practitioner's common law understanding of the terms.

R Copp, 'Corporate Insolvency and the GST: Suggestions for Policy and Law Reform' (2002) 10 Insolvency Law Journal 22

This article analyses some of the most contentious issues involving corporate insolvency and the GST, and suggests practical solutions to these problems. A number of suggestions for law reform, and reforms to Australian Taxation Office practice, are identified. In particular, reform is suggested in relation to the operation of Divisions 72 and 147 of the GST Act, the operation of the margin scheme, the "going concern" exemption, and pre-appointment contracts.

T McGrath, 'The Floating Charge and Void and Voidable Transactions' (2002) 10 Insolvency Law Journal 37

An importance consequence of liquidation is the liquidator's ability to pursue recovery of voidable transactions under section 468 of the Corporations Act; and unfair preferences under section 588FF. What has remained uncertain, is the extent to which the proceeds of these recoveries remain subject to the interests of chargees. Many of the relevant authorities display a lack of consistent reasoning and a questionable analysis of the contractual relationship between the company and secured creditor. Others ignore the distinction between a liquidator's statutory cause of action, and pre-liquidation choses in action vested in the company. This article considers the proprietary nature of the secured creditor's interest, and the extent to which it will extend to future property, including the proceeds of void and voidable transactions. Finally, the article considers whether a material distinction can be drawn between recoveries under section 468 and section 588FF; and monetary and non-monetary recoveries.

D Ash, 'Bankruptcy Notices: Is it Time to Revisit Crowl?' (2002) 10 Insolvency Law Journal 52

In the wake of the Full Federal Court's decision in Australian Steel Company (Operations) Pty Ltd v Lewis [2000] FCA 1915; 109 FCR 33 the question of when a failure to comply with the prescribed form of a Bankruptcy Notice amounts to a failure to meet an essential requirement of the Act remains in practical terms as vexed as ever. It is suggested that it would be appropriate for the High Court, were it invited to consider the issue and were it to accept the invitation, to revisit its decision in Kleinwort Benson Australia Ltd v Crowl (1988) 165 CLR 71.

Note, 'Voluntary Administration - Its Improper Use: Cadwallader v Bajco Pty Ltd' (2002) 10 Insolvency Law Journal 59

Note, 'Voluntary Administration - The Role of the Chair: Young (as representative of the Australian partnership known as Accenture) v Sherman (as admin of Agriculture.com Pty Ltd') (2002) 10 Insolvency Law Journal 61

Note, 'Receivers v Liquidators: Access to Books: Hall (as rec and mgr of One.Tel Network Holdings Pty Ltd) v Sherman (as liq of One.Tel Ltd)' (2002) 10 Insolvency Law Journal 64

Note, 'Insolvent Trading and Voidable Transactions' (2002) 10 Insolvency Law Journal 68

G Moodie and I Ramsay, 'The Expansion of Civil Penalties Under the Corporations Act' (2002) 30 Australian Business Law Review 61

S Choi, 'Promoting Issuer Choice in Securities Regulation' (2001) 41 Virginia Journal of International Law 815

R Blaine, 'Web-based Investment Securities: Should Personal Stock Baskets Be Subject to 1933 Act Registration?' (2001) 80 North Carolina Law Review 353

J Moringiello, 'A Tale of Two Codes: Examining Section 522(F) of the Bankruptcy Code, Section 9-103 of the Uniform Commercial Code and the Proper Role of State Law in Bankruptcy' (2001) 79 Washington University Law Quarterly 863

R Thompson and D Gordon-Smith, 'Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers' (2001) 80 Texas Law Review 261

T Telfer, 'Transplanting Equitable Subordination: The New Three-Wheeling Equitable Discretion in Canadian Insolvency Law?' (2002) 36 Canadian Business Law Journal 36

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- The Revictimization of Companies by the Stock Market Who Report Trade Secret Theft Under the Economic Espionage Act  
- Gap-fillers and Fiduciary Duties in Strategic Alliances  
- Minority Discounts and Control Premiums in Appraisal Proceedings  
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- Malaysia: Share Option Schemes for Employees  
- Singapore: New Code of Corporate Governance  
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N Poser, 'The Stock Exchanges of the United States and Europe: Automation, Globalization, and Consolidation' (2001) 22 University of Pennsylvania Journal of International Economic Law 497

Y Schnorbus, 'Tracking Stock in Germany: Is German Corporate Law Flexible Enough to Adopt American Financial Innovations?' (2001) 22 University of Pennsylvania Journal of International Economic Law 541

M Steinberg, 'Insider Trading, Selective Disclosure, and Prompt Disclosure: A Comparative Analysis' (2001) 22 University of Pennsylvania Journal of International Economic Law 635

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L Al-rimawi, 'A Brief Overview of Underlying Macro Economic Conditions of Arab Capital Markets' (2001) 12 European Business Law Review 241

G Alpa, 'Trading Online and the Protection of the Consumer' (2001) 12 European Business Law Review 244

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N Kuhrer, 'Cross Border Company Establishment Between the UK and Austria' (2001) 12 European Business Law Review 110

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G Liddell, P Liddell and S Lacewell, 'Charitable Contributions in Bankruptcy: An Empirical Analysis' (2001) 39 American Business Law Journal 99

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- Modernising Securities Settlement in the UK  
- The Private International Law of Securities Transactions: A Socio-Economic Analysis  
- Section 312 of the Companies Act (1985): Mercer v Heart of Midlothian plc  
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