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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Seminar (Sydney and Melbourne) – Recent developments in directors’ duties**There has never been more attention given to the important role of the company director.  Recent legislation has imposed new and significant obligations on directors.  There has also been a series of recent court judgments dealing with the duties of directors.  In addition, the Federal Government's Corporations and Markets Advisory Committee has commenced an inquiry into directors' duties and the personal liability of directors.This seminar brings together a panel of leading speakers to provide important perspectives on key developments in directors' duties and will explore the implications of these developments.  The perspectives presented are those of ASIC, company directors, and professional advisors to directors.  Topics covered in the seminar include:          conflicts of interest and directors          the role and responsibilities of directors on board sub-committees         current issues from the perspective of a company director such as the ideal relationship between board and management and lessons from recent case studies involving prominent companies         enforcement issues and directors. **Speakers**Alan Cameron, Chairman, Cameron Ralph Pty Ltd and Company DirectorRod Halstead, Partner, Clayton Utz John Harvey, Company DirectorAndrew Lumsden, Partner, Corrs Chambers WestgarthJan Redfern, Executive Director, Enforcement, Australian Securities and Investments CommissionCharles Rosedale, Partner, Clayton Utz**Dates**August 4, 2004,  Melbourne seminarAugust 11,  2004,  Sydney seminarFor more information (including a registration form), please go to  [http://cclsr.law.unimelb.edu.au/news/](http://cclsr.law.unimelb.edu.au/news/%22%20%5Ct%20%22_new)**1.2 Report on insurance cover for directors and corporate officers**On 22 July 2004, the Corporations and Markets Advisory Committee released a report on directors and officers insurance. The report was prepared in the context of a broader inquiry the Committee is carrying out into aspects of directors’ duties and personal liability.According to the Advisory Committees Convenor, Richard St John:"There is an increasing trend to impose personal liability on directors and other officers for the shortcomings of companies. In considering the practical consequences of this liability regime, it cannot be assumed that all those exposed to personal liability are able to obtain protection through insurance. The availability of insurance cover reflects the markets appreciation of relevant risks."The report provides a snapshot of the availability in the Australian market of insurance cover for the personal liability of directors and other corporate officers. The report notes that the market for D&O insurance has tightened in recent years as the number of insurers and the capacity of the market have declined. It also appears that insurers have placed greater limitations on the coverage of policies offered and that premiums have increased markedly, though the rate of increase may now be levelling out.While the Committees research suggests that most listed companies currently take out some form of D&O insurance, some of them may have reduced their cover in an effort to contain the increasing costs of that insurance. Also, start-up and other small to medium enterprises, and companies in higher risk sectors, have more difficulty in obtaining cover.Copies of the report are available under “what's new” on the [CAMAC website](http://www.camac.gov.au/%22%20%5Ct%20%22_new).**1.3 More Australian companies report on sustainability**The number of Australian companies that report annually on sustainability has doubled, the Minister for the Environment and Heritage, Dr David Kemp, announced on 14 July 2004 in releasing a report on the top 500 Australian companies.The Australian Government's “State of Sustainability Reporting in Australia 2004”surveyed companies in the ASX top 300, the top 100 private companies and the top 100 unlisted public companies. It shows the rate of sustainability reporting by Australian companies has doubled from 57 companies publishing public environmental reports in 2001-02, to 116 publishing sustainability reports in 2002-2003.The environmental component of a sustainability report is considered equivalent to an environmental report. The rate of reporting has increased in the finance and insurance sectors; the electricity, gas and water sectors; the property services sector and the wholesale trade sector.Sustainability reporting, or triple bottom line reporting, is the annual reporting of a company's performance against environmental, social and economic criteria. It can provide strong insights into a company's medium term risk management and financial performance.The “State of Sustainability Reporting in Australia 2004”forms part of the Australian Government's “Australian Sustainability Reporting Library”, a one-stop shop for analysts and other researchers looking for sustainability reports produced by Australian companies. It is the most comprehensive and up-to-date electronic resource of Australian non-financial reporting and is available at [www.deh.gov.au/industry/corporate/reporting/reports/indexhtml](http://www.deh.gov.au/industry/corporate/reporting/reports/index.html%22%20%5Ct%20%22_new).**1.4 US Securities and Exchange Commission votes to propose requirement that hedge fund advisers register under Investment Advisers Act**On 14 July 2004, the United States Securities and Exchange Commission voted to publish for comment proposed new Rule 203(b)(3)-2 that would require hedge fund advisers to register with the Commission under the Investment Advisers Act of 1940. The Commission also voted to propose related rule amendments.The Commission's staff estimate that approximately 40 to 50 percent of all hedge fund advisers are currently registered with the Commission. Registration under the new rule would permit the Commission to:               Collect and provide to the public basic information about hedge funds and hedge fund advisers, including the number of hedge funds operating in the United States, the amount of assets, and the identity of their advisers.               Examine hedge fund advisers to identify compliance problems early and deter questionable practices. If fraud does occur, examinations offer a chance to discover it early and limit the harm to investors.               Require all hedge fund advisers to adopt basic compliance controls to prevent violation of the federal securities laws.               Improve disclosures made to prospective and current hedge fund investors.               Prevent felons or individuals with other serious disciplinary records from managing hedge funds.The proposed new rule would require advisers to "private funds" to register with the Commission by requiring the advisers to "look through" the funds and to count the number of investors (rather than the fund) when determining whether the advisers are eligible for the Adviser Act's exemption for advisers with 14 or fewer clients.A "private fund" would be one that:               would be an investment company but for the exceptions in Sections 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940;               permits owners to redeem their ownership interests within two years of purchase; and                is offered based on the investment advisory skills, ability or expertise of the investment adviser.The proposed rule would contain special provisions for advisers located outside the United States designed to limit the extraterritorial application of the Advisers Act to offshore advisers to offshore funds that have U.S. investors. Comments on the proposed provisions should be submitted to the Commission by 15 September 2004.Further information is available on the [SEC website](http://www.sec.gov" \t "_new). **1.5 APRA releases draft Prudential Standards for business continuity management**On 12 July 2004 the Australian Prudential Regulation Authority (APRA) released a draft Prudential Standard on Business Continuity Management (BCM) for authorised deposit-taking institutions, general insurers and life insurance companies (regulated institutions) for public consultation. Under the proposed Standard, regulated institutions would be required to:                 identify, assess and manage potential business continuity risks to ensure they can continue to meet their financial and service obligations to depositors and policyholders in the event of a material disruption to business operations; and                undertake regular reviews of their BCM framework, including periodic testing and maintenance of their business continuity plan.APRA's Chairman, Dr John Laker, said APRA has undertaken detailed assessments of regulated institutions BCM arrangements for a number of years as part of its regular on-site reviews and has used this experience in formalising prudential requirements in this area. As business operations have become increasingly complex and vulnerable to disruption from external events, effective BCM has become an essential component of a regulated institution's risk management framework, said Dr Laker.'He added that the proposed standard will ensure all regulated institutions adequately address their business continuity risks on an ongoing basis.Comment on the draft standard is invited by 30 September 2004.A copy of the standard is available on the APRA website at: [http://www.apra.gov.au/Policy/Draft-Prudential-Standards-Business-Continuity-Management.cfm](http://www.apra.gov.au/Policy/Draft-Prudential-Standards-Business-Continuity-Management.cfm%22%20%5Ct%20%22_new)**1.6 International Auditing and Assurance Standards Board calls on auditors to plan audits more rigorously**On 12 July 2004, the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) released a revised International Standard on Auditing (ISA) requiring auditors to be more rigorous in the planning of their audits.The revised ISA 300, “Planning an Audit of Financial Statements”, builds on the new audit risk standards issued last year and requires the auditor to plan the audit so that the engagement will be performed in an effective manner. The standard emphasises that planning is a continual and iterative process throughout the engagement and that unexpected events, changes in conditions or other circumstances may lead the auditor to re-evaluate the planned audit procedures.The standard, effective for audits of financial statements for periods beginning on or after 15 December 2004, requires the auditor to establish the overall strategy for the audit that sets the scope, timing and direction of the audit."Audit planning plays a critical role is setting the tone and direction of the audit, and in ensuring that the right resources are allocated to the higher risk areas at the appropriate time. The establishment of the overall audit strategy helps guide the development of the more detailed audit plan and ensures that risk assessment procedures and further detailed audit procedures are appropriately targeted. The revised standard on audit planning provides the necessary requirements and guidance for the auditor to perform this important aspect of the audit and will assist in improving auditor performance," comments John Kellas, IAASB Chairman.**1.7 Criminal and civil charges against Kenneth L Lay, Enron’s former Chairman and Chief Executive Officer**On 8 July 2004, it was announced that criminal and civil charges had been brought against Kenneth L Lay, former Chairman and Chief Executive Officer of Enron Corp.**(a) Criminal charges** On 8 July a federal grand jury in Houston indicted Kenneth L Lay on charges of conspiracy, securities fraud, wire fraud, bank fraud and making false statements. The indictment charges Lay with conspiracy to commit securities fraud, four counts of securities fraud and two counts of wire fraud, one count of bank fraud and three counts of making false statements to a bank. The indictment joins Lay as a defendant in a case pending against former Enron CEO Jeffrey K Skilling and former Enron Chief Accounting Officer Richard Causey. Causey was originally indicted in January 2004, and Skilling was added to the case in February 2004. The new indictment also adds a money laundering conspiracy count and four counts of money laundering against Causey in connection with fraudulent hedging vehicles, and expands certain factual allegations against Causey. The indictment alleges that at various times between at least 1999 and 2001, Lay, Skilling, Causey and other Enron executives engaged in a wide-ranging scheme to deceive the investing public, the US Securities and Exchange Commission and others about the true performance of Enron’s businesses. The alleged scheme was designed to make it appear that Enron was growing at a healthy and predictable rate, consistent with analysts’ published expectations, that Enron did not have significant write-offs or debt and was worthy of investment-grade credit rating, that Enron was comprised of a number of successful business units, and that the company had an appropriate cash flow. It had the effect of inflating artificially Enron’s stock price, which increased from approximately $30 per share in early 1998 to over $80 per share in January 2001, and artificially stemming the decline of the stock during the first three quarters of 2001. The indictment alleges that Lay had a significant profit motive for participating in the scheme. As stated in the indictment, between 1998 and 2001, Lay received approximately $300 million from the sale of Enron stock options and restricted stock, netting over $217 million in profit, and was paid more than $19 million in salary and bonuses. During 2001 alone, Lay received a salary of over $1 million, a bonus of $7 million and $3.6 million in long term incentive payments. Additionally, during the period of 21 August through 26 Oct 2001, Lay sold 918,104 shares of Enron stock to repay advances totaling $26,025,000 he had received from a line of credit extended to Lay by Enron. As a part of the alleged scheme, unrealistic and unattainable earnings goals were set for Enron, based on analysts’ expectations rather than on actual or reasonably achievable business results. When, as expected within the company, Enron consistently fell short of those goals, Lay, Skilling, Causey and others allegedly orchestrated a series of accounting gimmicks designed to make up the shortfall between actual and predicted results. Enron then announced publicly that it had met or exceeded analysts’ expectations when, as Lay, Skilling and Causey allegedly knew, it made its numbers only by engaging in fraud. The indictment also alleges that Lay, Skilling and Causey made false and misleading representations about Enron’s finances and business operations to analysts, at press conferences, in SEC filings and elsewhere. Lay is principally charged for his conduct during the third quarter of 2001. As the indictment alleges, upon Skilling’s abrupt departure from Enron in August 2001, Lay resumed his position as CEO of the company, intensified his oversight of Enron’s day-to-day operations, and took control as leader of the conspiracy. Starting in August, according to the indictment, Lay was briefed extensively about mounting and undisclosed financial and operational problems, including overvaluation of Enron’s assets and business units by several billion dollars. As a result of these and other issues confronting Enron, Lay privately considered a range of potential solutions, including mergers, restructurings, and even divestiture of Enron’s pipelines, assets that Lay considered to be the crown jewels of the company. However, the indictment alleges he failed to disclose Enron’s problems to the investing public and affirmatively misled the investing public about Enron’s financial condition, while falsely claiming that he was disclosing everything that he had learned. For example, the indictment states that during August 2001, Lay participated in Management Committee meetings at which reports were presented showing earnings shortfalls in virtually every Enron business unit, totaling approximately $1 billion. During early September 2001, Lay attended a Management Committee retreat in the Woodlands, Texas, at which the serious problems besetting Enron, including underperforming business units and troubled assets, were further discussed. Among other things, executives discussed the need to take in the third quarter of 2001 at least a $1 billion charge and that Enron had committed an accounting error in the amount of $1.2 billion. The indictment alleges that throughout the remainder of September 2001, Lay engaged in a series of high-level meetings to discuss the growing financial crisis at Enron and the likely impact on Enron’s credit rating. Among other things, Lay knew that the total amount of losses embedded in Enron’s assets and business units was, at a minimum, $7 billion. Lay also knew that Enron’s auditors had changed their position concerning the accounting treatment of four off-balance sheet vehicles called the Raptors, which required Enron to determine in short order whether an acceptable alternative methodology existed or whether, instead, Enron would have to restate its earnings and admit the error. Despite knowing these negative facts, on 26 Sept 2001, in an online forum with thousands of Enron employees, many of whom were investors in Enron stock, Lay allegedly stated that Enron was going to “hit [its] numbers.” Lay allegedly created the false impression that his confidence in Enron’s stock was such that he had increased his personal ownership of Enron stock in the past two months as a sign of his belief in what he was espousing. As the indictment alleges, during the prior two months, Lay actually purchased $4 million in Enron stock while also selling $24 million in Enron stock through nonpublic transactions. The indictment states that in the weeks leading up to Enron’s third quarter earnings release on 16 Oct 2001, Lay determined that Enron could not publicly report a loss in excess of $1 billion without triggering negative action by Enron’s credit rating agencies. Lay thus artificially capped Enron’s losses to that amount. Also during this time, Lay learned that changes to the accounting rules governing goodwill (i.e., the difference between what Enron paid for an entity and the book value of that entity’s net assets) would require Enron to disclose impairments to certain of its assets, including its interest in Wessex Water, a business located in Bath, England. In order to hide the impact of asset impairment, Lay allegedly claimed, falsely, that Enron was committed to engaging in a “water growth strategy,” which would have required Enron to expend between $1 billion and $28 billion in capital investments in the water industry. Lay allegedly knew that Enron had no intention of pursuing such a strategy and did not have the capital to support it. According to the indictment, on 16 Oct 2001, when Enron announced losses of approximately $1 billion, Lay allegedly sought to minimize the import of the reported losses by falsely describing the losses as “nonrecurring,” that is, a one-time or unusual earnings event. Enron also disclosed the same day an approximate $1.2 billion reduction in shareholder equity, which Lay again sought to minimize by falsely attributing it to the unwind of the Raptor vehicles, rather than to an accounting error. According to the indictment, on 12 October, Lay misled a representative of a national credit rating agency about the need to take additional writedowns and the extent of Enron’s goodwill problems. On both 16 October and 23 October, Lay told the investing public that Enron had determined that its goodwill impairment was up to $200 million. However, he failed to disclose the impact on Enron of an additional goodwill impairment of up to $700 million in connection with Wessex. Also on 23 October, Lay allegedly espoused faith in Elektro, a Brazilian power plant which Enron carried on its books as worth in excess of $2 billion. In fact, as Lay allegedly knew, Elektro was overvalued by up to $1 billion. Lay also allegedly distributed materials at the road shows that misleadingly described the value of the international portfolio as $6.5 billion. In reality, as Lay knew, this vastly overstated the true value of the international assets by billions of dollars. These and other schemes alleged in the indictment quickly unraveled, and on 2 Dec, 2001, Enron filed for bankruptcy, making its stock, which less than a year earlier had been trading at over $80 per share, virtually worthless. Lay was also charged in four counts with bank fraud and making false statements to three banks arising out of his obtaining and using four personal lines of credit worth over $60 million. Lay allegedly promised the banks that the loans would not be used to purchase stock. As a result of these false representations, the banks extended far greater loans to Lay than they otherwise would. The indictment alleges that in spite of his promises, Lay repeatedly used the lines of credit to buy the stock. The lines of credit were collateralized mainly by artificially inflated shares of Enron stock and were repaid with the same. In relation to the Enron investigation, thirty-one defendants have been charged to date, including 21 former Enron executives. Eleven defendants have been convicted to date, including former CFO Andrew Fastow and former Treasurer Ben Glisan. To date, the Enron Task Force has restrained more than $161 million in proceeds derived from criminal activity. The investigation is continuing. **(b) Civil charges**Also on 8 July 2004, the United States Securities and Exchange Commission initiated civil charges against Kenneth L Lay, for his role in a wide-ranging scheme to defraud by falsifying Enron's publicly reported financial results and making false and misleading public representations about Enron's business performance and financial condition. The Commission also alleges Lay profited from the scheme to defraud by selling large amounts of Enron stock at prices that did not reflect its true value. The sales also occurred while Lay was in possession of material non-public information concerning Enron and generated unlawful proceeds in excess of $90 million during 2001. Specifically, Lay old over $70 million in Enron stock back to the company to repay cash advances on an unsecured Enron line of credit. In addition, while in possession of material non-public information, Lay amended two program trading plans to enable him to sell an additional $20 million in Enron stock in the open market. Lay's proceeds from the sales constitute illegal gains resulting from his scheme to defraud.In this action, the Commission is seeking disgorgement of all ill-gotten gains, civil money penalties, a permanent bar from acting as a director or officer of a publicly held company, and an injunction against future violations of the federal securities laws. The Commission, subject to the approval of the Honorable Melinda Harman, US District Court Judge, filed a Second Amended Complaint seeking to add Lay to its pending action against Jeffrey K Skilling, Enron's former President, CEO and Chief Operating Officer, and Richard A Causey, Enron's former Chief Accounting Officer. The proposed amended complaint charges Lay with violating, and aiding and abetting violations of, the antifraud, periodic reporting, books and records, and internal controls provisions of the federal securities laws, Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934, and Exchange Act Rule 10b-5; and for aiding and abetting the violation of Sections 13(a), and 13(b)(2)(A) and (B) of the Exchange Act, and Exchange Act Rules 12b-20 and 13a-11. **1.8 UK Financial Services Authority (FSA) undertakes a fundamental review of projections**On 5 July 2004 the United Kingdom Financial Services Authority published a discussion paper which takes forward the fundamental review of the role the regulator plays and the standards it expects the industry to adopt with regard to projections. Projections are the means by which firms give their customers information about the potential future returns and associated charges from a wide range of investment products. These projections are currently governed by a prescriptive regulatory regime originally devised about 15 years ago. The paper, “Projections review – the case for change”, also sets out some broad options for change to provide consumers with better information about potential future returns. The objective of the review is to devise a system that:                provides information that is better understood by consumers and improves their decision making;               provides information about potential returns and their variability, but aims for simplicity in presentation;                ensures firms do not provide speculatively high projections; and               where possible, allows more flexibility in the system and gives firms greater responsibility for working out the assumptions used to illustrate the potential returns on their products.The work on projection rates will form part of the wider review of the information received by consumers. As part of that wider review, the FSA is putting further development into a Key Facts document which aims to simplify the information it requires firms to give to their customers and to ensure that risks associated with a product are explained clearly and effectively. This work will also include a look at whether there is a practical and consumer-friendly form of standardised risk indicator which can be adopted. Responses on the broad options set out in the paper should be received by 5 October 2004. The paper is available on the [FSA website](http://www.fsa.gov.uk" \t "_new). **1.9 Inquiry into Australia’s corporate insolvency laws**On 1 July 2004, Senator Grant Chapman, (Liberal, SA) Chairman of the Parliamentary Joint Committee on Corporations and Financial Services, announced that the Committee has published its report “Corporate Insolvency Laws: a Stocktake”.“Witnesses appearing before the Committee were concerned to improve the integrity, accountability and efficiency of Australia’s insolvency laws in the public interest”, Senator Campbell said.“In formulating recommendations the Committee placed importance on encouraging early intervention in the affairs of companies in financial difficulties and restoring companies to profitable trading where practicable; protecting the interests of creditors and, in particular, employees in circumstances of financial difficulty and corporate malpractice,” he said.“Akey theme of our recommendations is promoting the good management of companies and deterring malpractice and, in particular, abuses of the corporate form and insolvency procedures generally”, he said.The report covers numerous aspects of Australia’s insolvency laws including:               the statutory and administrative context of insolvency proceedings in Australia;               the appointment, removal, functions and qualifications of administrators and liquidators;               the duties of directors in an insolvency context;               the operation of the voluntary administration scheme over the decade of its operation and contrasts it with the US model;               the rights of creditors under the various insolvency procedures focusing on creditor participation in the VA scheme;               the cost of external administrations and the problem of assetless administrations;               the issue of unlawful phoenix company activities;               issues that have been raised concerning the reporting and consequences of suspected breaches of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default);               matters relating to the treatment of, and priority afforded to, employee entitlements;               issues concerning the operation of deeds of company arrangement;               technical and other issues raised in submissions that do not fall neatly within the scope of other chapters, but are of continuing importance for the efficient operation of the insolvency system; and               cross border insolvency.The Report is available on the Committee’s website [http://www.aph.gov.au/senate/committee/corporations\_ctte/index.htm](http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm%22%20%5Ct%20%22_new) or from the secretariat, 02 6277 3541.**1.10 The changing role of the CFO**In June 2004, the Institute of Chartered Accountants in Australia (ICAA) and KPMG published a survey of the views of Chief Financial Officers of Australia's largest companies. The three key themes identified in the survey are:                compliance work is currently dominating CFO's time;                the pressure for more CFO involvement in strategic and commercial work is a continuing trend; and                people issues are prominent, including acute awareness of the many relationships that CFOs must manage and the quality and well being of the finance team.The survey is available on the ICAA website at: [http://www.icaa.org.au/upload/download/CFOofthefuture.pdf](http://www.icaa.org.au/upload/download/CFOofthefuture.pdf%22%20%5Ct%20%22_new)**1.11 Trends in Australian and New Zealand internal auditing**In June 2004, the Institute of Internal Auditors in Australia and New Zealand and Ernst & Young published a survey of trends in internal auditing in Australia and New Zealand. 100 of the largest companies in the two countries responded to the survey.The key results of the survey are as follows:(a) There is an almost unanimous agreement on the key focus area for Internal Audit, with 95 per cent of respondents indicating that "Assurance of Internal Control and Risk Management Processes and Systems" is a major focus for their Internal Audit function.(b) 66 per cent of total respondents are involved in the implementation of the ASX Principles of Good Corporate Governance.(c) 47 per cent of respondents have increased the size of their Internal Audit functions over the last twelve months.(d) Only 25 per cent of respondents have had an independent peer review of their Internal Audit function in the last two years.(e) 65 per cent of New Zealand private sector respondents have Audit committees that satisfy the requirements of the updated New Zealand Stock Exchange Listing Rules.(f) Only 45 per cent of respondents report directly to the Chairman of their Audit Committee, although this is generally recognised as being reflective of best practice.(g) Two thirds of all Internal Audit staff have a financial background, and spend 56 per cent of their time on the delivery of planned audit engagements.(h) 81 per cent of respondents have part or all of their Internal Audit activity delivered by an external provider. (Co-sourced 50 per cent: IT audit 12 per cent: completely outsourced 19 per cent).(i) 74 per cent of respondents use AS/NZS 4360:1999-Risk Management as the basis for developing their audit plans.(j) 49 per cent of respondents have adopted or modified a Big 4 Firm methodology.(k) 51 per cent of respondents do not use automated audit technologies.The survey is available on the Ernst & Young website at: [http://www.ey.com/global/download.nsf/Australia/AABS\_InternalAuditSurvey\_June2004/$file/Internal%20Audit%20Survey%20(June%2004).pdf](http://www.ey.com/global/download.nsf/Australia/AABS_InternalAuditSurvey_June2004/%24file/Internal%20Audit%20Survey%20%28June%2004%29.pdf%22%20%5Ct%20%22_new)**1.12 Governance principles for charities**In June 2004, the UK Institute of Chartered Secretaries and Administrators (ICSA) published "Principles of Good Governance for Charities", a new set of draft guidance intended to raise standards of governance in the charity sector. The draft principles have been released to the charity sector as part of a consultation process. Louise Siveter, Assistant Director of the ICSA Policy Unit, said: "Following an internal review of the principles, feedback has been very positive and the ICSA is encouraged by the comments received so far. There is continuing support for the guidance, and it is hoped that the principles will be adopted as an aid to improving the performance, effectiveness and governance standards in the not-for-profit sector." The purpose of the ICSA Principles of Good Governance for Charities is to provide charitable organisations with clear guidance as to what constitutes good corporate governance in the sector and provide plain and concise pointers for all charities wishing to implement the underlying principles of sound governance.The draft principles are available on the [ICSA website](http://www.icsa.org.uk/%22%20%5Ct%20%22_new).**1.13 The effects of dual-class ownership on ordinary shareholders**The Wharton Business School has published an article on the effects of dual-class ownership of shares. The article notes that when Google announced in April that it would go public this year, it was also announced that there would be an issue of a class of super shares to ensure that the founders keep control. Each of the Class B shares reserved for insiders will carry 10 votes, while the ordinary Class A shares sold to the public will have just one vote each - a common ratio among the approximately 600 dual-class companies. The largest such companies are Berkshire Hathaway Inc., Viacom Inc., Comcast Corp., Cox Communications Inc. and Columbia Hospital Corp. Super shares are designed to give specific shareholders voting control, and in most cases these shares are not publicly traded. Shareholders-rights groups have long complained that dual-share systems violate the key one-share, one-vote principle. Do these arrangements really undermine the interests of people who own ordinary single-vote shares? Or do they help stabilise companies by insulating against takeover attempts and other disruptive events, as their proponents claim? The answers have important implications for the vast majority of companies that issue just one class of shares, because they shed light on another, broader question: Do ordinary shareholders benefit when a company's executives, directors and founders own large blocks of shares?The article addresses these questions and is available on the [Wharton website](http://knowledge.wharton.upenn.edu/%22%20%5Ct%20%22_new).**1.14 Sarbanes-Oxley implementation survey**Jefferson Wells International and the US Institute of Internal Auditors (IIA) have published a survey of 200-plus internal auditors regarding Sarbanes-Oxley implementation. The survey results shed light on compliance progress, internal controls gaps and the crucial role of the internal audit function as the Act continues to be interpreted and implemented by corporate America.In March, the Public Company Accounting Oversight Board placed great emphasis on the value of internal audit functions that are “highly competent” and “independent from company management” when it finalised the auditing standard that guides external auditors in their attestation of internal controls over financial reporting and financial statements.The vast majority of survey respondents indicated that their internal audit functions are heavily involved in Sarbanes-Oxley Act compliance initiatives, which for the most part still have significant ground to cover before Section 404 deadlines begin to take effect in November. A primary reason for that sluggish progress is a lack of internal audit resources, which was the most significant compliance challenge identified by survey respondents.To address that challenge, half of the respondents rely on co-sourcing relationships with external service firms. More might consider following suit given the fact that 92 percent of respondents have identified gaps in their organisation’s internal controls framework. Other results focus on:                **Compliance challenges:** Besides resource constraints, problems with communications and documentation represent the most significant challenges identified by respondents.                **Types of gaps:** Lack of process control-related documentation is the most frequently cited internal controls gap.                **Internal audit role and nature:** Fifty three percent of internal audit functions have direct Sarbanes-Oxley project management responsibility.                **Use of compliance software:** Nearly all companies are using some form of software to support their compliance activities.                **Role of external auditor:** A surprising number of companies risk an onslaught of last minute remediation work due to limited direction and/or support from their external auditors.The survey is available on the [Jefferson Wells website](http://www.jeffersonwells.com" \t "_new). **1.15 Study of audit and non-audit fees at US companies**Glass, Lewis & Co., a US research firm, has released a study of audit fees paid in 2003 and 2002 by more than 2250 public companies in the United States. The report reviews fees paid, trends in audit fees and how Glass Lewis recommends investors view audit fees when they vote their proxies. The audit fee study's key findings include:• Audit fees at some companies have declined without a reasonable explanation (e.g., Limited Brands, PG&E, Rite Aid, Monster Worldwide, ImClone Systems, Allergan, Synopsys, Trizec Properties, Wind River Systems, and Rayonier) or remain relatively low (e.g. Wal-Mart, Exxon, ChevronTexaco, ConocoPhillips).• Overall, fees paid for the audits of financial statements of the Fortune 500 have increased 16% from 2002 to 2003, The increase in fees is not that significant considering during this same time period, the revenues and assets of the Fortune 500 companies surveyed increased 9% and 10%, respectively, and inflation increased 2.3%. (By comparison, companies outside the Fortune 500 saw audit fees increase 22% from 2002 to 2003).• Fees paid to the auditors for tax work as a percentage of audit fees have decreased from 57% in 2002 to 43% for Fortune 500 companies in 2003. In fact, 126, or over a quarter of those companies paid their auditors less than 10% of their audit fees for tax work in 2003 while 94 had done so in 2002. The numbers were slightly different for companies outside the Fortune 500.• Cisco, Ross, Staples, U.S. Bancorp, and Illinois Tool Works are among 43 companies in the Fortune 500 that paid their auditors tax fees that exceeded the total amount of the fees for performing the audits of their financial statements. In the survey overall, 192 companies of the 2250 paid tax fees that exceeded audit fees.• Fees paid to auditors for other types of consulting continue to drop with the exception of Deloitte & Touche(DT). In 2003, on average, the Fortune 500 paid consulting fees to their auditors of $.14 for every dollar paid for audits. This was down from $.41 in 2002. (Non-Fortune 500 companies, on average, spend significantly more on consulting fees per dollar of audit fees).• The independence of auditors may be suspect at 20 companies that paid their auditors more for other types of consulting than they did for their audits in 2003. These companies include Nextel, Nike, McKesson, Walgreen, and Washington Mutual. This defies the trend as 1476 companies paid their auditors nothing for other consulting and another 506 companies paid amounts that were less than 10% of the audit fee.• Companies that disclosed they had retained their auditors to provide services that some believe may impact their independence, such as financial system information design and implementation, appraisal and valuation services, and legal services include IBM, Altria, AT&T, Ross, Merrill Lynch, Johnson & Johnson, and Nike.• The amount paid to auditors for audit-related work such as consulting on internal controls, surprisingly declined from 27% of the audit fees in 2002 to 26% of the audit fees in 2003.• Some companies within their industry had significantly low audit fees for the size of the company. These included Sherwin-Williams, Golden West Financial, Winn-Dixie, Owen and Minor, Brinker International, NVR, Progressive, EchoStar, Plains All American, Wal-Mart, Kohls, and Walgreen. An appendix to the report shows outliers within each industry by audit fees as a percentage of revenue and assets.• The amounts paid to auditors for the audits of financial statements have increased but not significantly more than the growth in the operations of the companies themselves.• For certain services, some auditors have greater levels of conflicts than others, is a conclusion of the study, such as PricewaterhouseCoopers (PwC) in tax services and DT in consulting. DT's insistence on retaining its consulting practice has unquestionably led to what investors may well perceive as a greater level of conflict for the companies they audit. Overall, based on the fees paid, KPMG has the lowest level of conflicts according to the study.  |
| **2. Recent ASIC Developments** |
| **2.1 ASIC facilitates shorter Statements of Advice**On 21 July 2004, the Australian Securities and Investments Commission (ASIC) announced the release of a new class order, [CO 04/576] Statements of Additional Advice, to facilitate shorter Statements of Advice (SOAs) where the adviser has an ongoing relationship with the client. [CO 04/576] provides relief to permit Statements of Advice (SOAs) to 'incorporate by reference' certain information that the client has already received in a previous SOA.The class order has been issued as part of further guidance from ASIC about how it expects licensees (and their representatives) to prepare their SOAs: see Item 2.2 of this Bulletin.'The class order will benefit consumers and industry by facilitating the provision of shorter disclosure documents. This promotes the objective of clear, concise and effective disclosure and should make it easier for consumers to read and understand the information provided to them', ASIC Executive Director of Financial Services Regulation, Mr Ian Johnston said.'It will also help avoid the unnecessary duplication of information already provided to consumers and, in many cases, will result in documents consisting of no more than a few pages.'The class order provides that when an adviser gives an existing client a further SOA (called a Statement of Additional Advice), that document can 'incorporate by reference' information previously given to that client in the original SOA, provided certain conditions are met. The conditions are designed to prevent consumer confusion and ensure that the adviser's potential liability for the disclosure document is not diminished', Mr Johnston said.In short, ASIC expects a Statement of Additional Advice to be dated and to:               inform the client that it must be read with the original SOA;               contain the new advice (and supporting information) provided since the original SOA;               highlight any changes since the original SOA; and               repeat any required warnings and the additional information required if recommending a replacement of one product with another. (These are particularly important pieces of consumer information and therefore must be included in both the original SOA and the Statement of Additional Advice.)If the client requests it, a copy of the original SOA must be provided free of charge.The class order does not affect or reduce the requirement to give appropriate advice. The obligation of the adviser to comply with the suitability rule (s945A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)) when providing personal advice to clients is unchanged. Copies of the class order can be obtained from ASIC's Infoline by calling 1300 300 630 or from the ASIC website at [http://www.asic.gov.au/co](http://www.asic.gov.au/co%22%20%5Ct%20%22_new).**2.2 ASIC provides further guidance on Statements of Advice**On 21 July 2004, the Australian Securities and Investments Commission (ASIC) provided further guidance on how it expects licensees (and their representatives) to prepare Statements of Advice (SOAs). The guidance should assist industry in producing SOAs that are clear, concise and effective, as required under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). This guidance complements earlier guidance issued by ASIC as part of its implementation of the [Financial Services Reform Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default).ASIC has also announced the release of a new class order, [CO 04/0576] Statements of Additional Advice, to facilitate shorter SOAs in the context of an ongoing client relationship: see Item 2.1 of this Bulletin. This class order will allow the production of documentation that in some cases consists of no more than a few pages.'Statements of Advice are intended to help consumers make an informed decision about whether or not to follow the advice provided by their financial adviser. This advice should take into account the consumer's specific needs. ASIC therefore expects these documents to be easy to read and understand', ASIC Executive Director of Financial Services Regulation, Mr Ian Johnston said. 'However, we recognise industry concerns about the volume of documentation currently being produced and have issued this guidance to clarify our expectations in relation to the provision of clear, concise and effective SOAs', Mr Johnston said. The guidance forms part of ASIC's ongoing commitment to facilitate and promote the production of clear, concise and effective disclosure in SOAs and other disclosure documents: see Media Release [MR 04/062] FSR disclosure to be clear, concise and effective and Information Release [IR 04/11] ASIC's approach to regulation of financial services: breach notification and disclosure. **Clear, concise and effective SOAs**When preparing SOAs, advisers should keep the following in mind:1. ASIC believes that the existing SOA provisions are very flexible, and expects that advisers will take a flexible approach to their SOAs. For example, ASIC expects them to generally provide short and simple SOAs in relation to short and simple advice.2. Extraneous information (i.e. information that the law does not actually require to be included in the SOA, such as detailed research) should not be included if it results in the SOA not being clear, concise and effective. Where extraneous information is included, it should be clearly distinguishable from the mandatory information.3. The clear, concise and effective obligation does not mean that information required by the SOA content provisions can be left out. Rather, the clear, concise and effective obligation affects the way that an adviser presents the required information. This includes trying to present the information in as brief a manner as reasonably possible, without compromising its accuracy.4. The most important information in an SOA should be highlighted, e.g. in an executive summary that summarises the most important information and indicates where more detail can be obtained. This is especially important where the SOA is long (say, more than 10 pages).5. The longer the SOA, the more important will be the inclusion of navigational aids such as a table of contents.6. Legal, industry or technical jargon should be avoided, especially where advice is provided to relatively unsophisticated clients.7. There is no one 'correct' or 'ideal' format for an SOA – the law provides flexibility in tailoring the format and presentation to the particular information needs of consumers. In this regard, consumer testing can help advisers assess the effectiveness of various disclosure formats.Advisers should also refer to guidance ASIC has already issued about disclosure documents: see Policy Statement 168 Disclosure: Product Disclosure Statements (and other disclosure obligations) [PS 168], which includes the Good Disclosure Principles, and Policy Statement 175 Licensing: Financial product advisers – conduct and disclosure [PS 175].Further information is available on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.3 Audit notifications under CLERP 9**On 20 July 2004, the Australian Securities and Investments Commission (ASIC) announced details of its procedures for dealing with new audit notifications required as a result of the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) (CLERP 9).The new procedures have been put in place as part of the new notification requirements for registered company auditors, audit firms or audit companies, arising from the expansion of auditors' duties under CLERP 9.These changes are necessary to ensure that ASIC can streamline and address these matters on a timely basis, as strict time periods apply to these notifications and for the resolution of the matters reported.Under amendments made to the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) by CLERP 9, auditors must report certain matters to ASIC. These include matters where the auditor has reasonable grounds to suspect a significant contravention of the Act, or if someone has attempted to mislead or interfere in the proper conduct of the audit. See section 311 of the Act and the revised ASIC Practice Note 34 issued on 1 July 2004, which is available from the [ASIC website](http://www.asic.gov.au" \t "_new).Auditors must also notify ASIC of certain conflicts of interest as soon as the auditor becomes aware of the relevant circumstances. These matters need to be resolved and ASIC needs to be notified within a prescribed time period or the auditor, audit firm or audit company will cease to be the auditor of the entity and be removed from the database as auditor of the entity by ASIC. See section 324 of the Act.ASIC has developed a fast track process for dealing with these notifications and such notices can be either emailed to auditor.notification.team@asic.gov.au or mailed to the Auditor Notification Team, Corporate Finance Division, Australian Securities and Investments Commission, GPO Box 9827, Brisbane QLD 4001. This will enable ASIC to respond to these matters within the required timeframes.The changes noted above take effect immediately.**2.4 Stop orders on prospectuses**On 14 July 2004, the Australian Securities and Investments Commission (ASIC) announced that in the last three months, it has placed 11 interim stop orders and 3 final stop orders on defective prospectuses that were seeking to raise more than $300 million from investors.ASIC also extended the exposure period on another three prospectuses and obtained further disclosure from the issuers during that period and did not need to place an interim stop orders on these prospectuses.In 2003-04, ASIC protected the public from investing a total of $2.2 billion in defective prospectuses. 'ASIC continues to undertake a risk-based review of selected fundraising documents to ensure that investors have adequate information upon which to make their investment decisions', said Mr Richard Cockburn, ASIC's Director of Corporate Finance.'We are disappointed that some of the issues uncovered in ASIC's review should have been dealt with in the due diligence process associated with the prospectus. 'If we continue to see fundraising documents with defects of the type listed below we may need to recommend further action be taken against the directors and others responsible to change the unsatisfactory behaviour', he said.The three final stop orders were issued with the consent of the relevant company after they decided not to proceed with the particular fundraising, rather than seeking to address the disclosure deficiencies.One of the most common defects identified between March and June 2004 was the use of financial forecasts that did not have a reasonable basis. This is despite Policy Statement 170: Prospective Financial Information having now been in the market place for nearly two years.A prospectus should only include prospective financial information if there are reasonable grounds for its inclusion. To demonstrate such reasonable grounds, an issuer must be able to point to some facts or circumstances existing at the time of publication of the information in the prospectus on which the issuer in fact relied which are objectively reasonable and which support the information.Other common defects related to:               The adequacy of financial information disclosed in the fundraising document. In two instances, for example, offer information statements contained no financial information at all.               Issuers raising money from the public to run investment businesses without holding an Australian Financial Services Licence. Such activity is prohibited under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).                The existence of current material litigation not being disclosed in the fundraising document.               Insufficient disclosure concerning key terms of material contracts in the fundraising document.               Inadequate disclosure about past breaches of the Corporations Act. One issuer for example, did not disclose that ASIC obtained final orders in the Supreme Court of Queensland in relation to an illegal fundraising conducted by it. ASIC considers this is information that investors and their professional advisers would reasonably require to make an informed assessment of whether to invest in the fundraising.               The inclusion of statements where companies implied that they would be seeking a listing on a financial market in the future. Such statements are prohibited under the Corporations Act unless an application for listing is made to the relevant financial market within the statutory timeframe.ASIC intends that publication of the various defects identified in fundraising documents will assist issuers and the advisers who prepare fundraising documents to adequately discharge their duties.**2.5 ASIC provides relief for payments into insurance brokers section 981B accounts**On 9 July 2004, the Australian Securities and Investments Commission (ASIC) announced interim class order relief until June 2005 that permits insurance brokers to pay monies that are received in a single payment from a client into an account that must be established and maintained under section 981B of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).The relief, which is provided under Class Order [CO 04/673] *Insurance brokers trust accounts under s981B*, will only apply where the insurance broker holds an Australian Financial Services (AFS) licence and reasonably believes that at least part of the payment constitutes client monies.Generally, a licensee may only hold client monies or monies that relate to client transactions in a section 981B account. Non-client monies, such as remuneration payable to the broker, or monies not connected with a financial service or the client's financial product, must not be paid into these accounts.To rely on the interim relief, an AFS licensee must:1. be an insurance broker. This is defined to be the holder of an AFS licence who is authorised under the licence to provide financial services relating to insurance products and who, in providing those services, predominantly acts on behalf of intending insureds;2. reasonably believe that the payment may comprise, in whole or in part, monies to which subsection 981A(1) of the Act applies;3. take all reasonable steps to identify non-client monies within five business days of such monies being paid into the account and, if the licensee is not able to so identify such monies within the first five business days, it must continue to take all reasonable steps to identify the monies; and4. pay out of the account any monies that the broker has identified as non-client monies as soon as reasonably practicable, and in all cases, within five days of identifying the monies.ASIC is of the view that it will generally be reasonable for an insurance broker to believe that a payment may comprise client monies if it was paid in connection with a financial service provided by the broker or a financial product held by the broker's client. This is because under the Act, brokers are under a duty to separate their financial services business from any non-financial services business they may also carry on. ASIC has decided to grant this relief on an interim basis, until 30 June 2005. This will give brokers time to take immediate steps to ensure that their compliance measures and systems adequately address any risks that non-client monies will be mixed with client monies.This class order revokes Class Order [CO 04/189], a class order that provided for limited relief to allow the payment of 'mixed monies' that the broker knew to contain a mixture of client monies and non-client monies. [CO 04/673] also allows for the payment of such 'mixed monies' into a section 981B account and therefore supersedes [CO 04/189].**2.6 Appointment of ASIC Deputy Chairman**On 8 July 2004, the Treasurer, the Hon Peter Costello MP, announced the appointment of Jeremy Cooper as Deputy Chairman of ASIC for a five year term. Mr Cooper was, until recently, a partner with the law firm Blake Dawson Waldron. The Treasurer also announced the reappointment of Professor Berna Collier as a Commissioner for a four year term.**2.7 ASIC announces interim position on transaction costs for managed investment scheme constitutions**On 8 July 2004 the Australian Securities and Investments Commission (ASIC) announced its interim position on transaction costs for registered managed investment scheme constitutions.Transaction costs are amounts added to the acquisition price of an interest in the scheme, or deducted from the proceeds when a member withdraws an interest from the scheme, by the scheme's responsible entity. The purpose of imposing transaction costs is to ensure that scheme members who are not buying or selling interests in the scheme at a particular point in time are not disadvantaged by the scheme bearing costs associated with the need to buy and sell scheme assets in order to satisfy applications made for the issue or withdrawal of interests in the scheme*.*In effect, such costs are borne by the members whose entry to or exit from the scheme cause the expenses to be incurred, rather than being borne by the scheme members as a whole.**Interim relief**Until 31 December 2004, ASIC will consider granting relief, on a case-by-case basis, to remove the need for the scheme constitution to contain a mechanism that is certain, complete and independently verifiable for calculating the transaction costs component of the price of an interest in the scheme. It will be a condition of the relief that the basis for calculating the transaction costs be disclosed in the Product Disclosure Statement (PDS) for the scheme. **No-action position**Until December 2004, ASIC will take a no-action position with respect to any existing scheme constitutions that do not make adequate provision for the transaction costs component of the price. This no-action policy is subject to the limitations associated with no-action positions, as stated in paragraphs [PS 108.14], [PS 108.16] and [PS 108.18] of Policy Statement 108 No-action letters.**Consultation during interim period**From now until December 2004, ASIC will consult with the managed funds industry on a proposal to grant ongoing class order relief which will not require a scheme constitution to make adequate provision for the transaction costs component of the price of an interest in certain circumstances. ASIC will release a document which sets out the proposal in detail and seeks consultation on a future date.**Other issues concerning pricing in scheme constitutions**ASIC is aware that some responsible entities consider that there are a range of other circumstances where it is not practicable to specify the issue price or the withdrawal price in the constitution without the responsible entity exercising some discretion. The current exceptions available under ASIC Class Order [CO 98/52] *Relief from the consideration to acquire constitutional requirement* do not assist in those circumstances. For example, responsible entities have raised with ASIC issues such as valuation methodology/timing and recognition of provision for doubtful debts. ASIC will consider, on a case-by-case basis, any application for interim relief to enable a scheme to be registered where the constitution permits the issue of interests at a price that is not independently verifiable. Such applications would need to demonstrate that it would be unreasonable to remove any discretions of the responsible entity affecting the price. **Background**Paragraph 601GA(1)(a) of the *[Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)* (the Act), as modified by [CO 98/52], requires the scheme constitution to make adequate provision for the consideration to acquire an interest in the scheme with only certain defined exceptions that allow the responsible entity to determine the price. ASIC interprets the expression 'adequate provision' to mean that the amounts associated with the acquisition of interests in the scheme must be independently verifiable. Under subsection 601GA(4) of the Act, if members have a right to withdraw from the scheme, the constitution must specify the right and this would include entitlements on withdrawal, such as the price to be paid to the member. ASIC considers that if a provision of a scheme's constitution allows the responsible entity a discretion to determine any part of the issue price or the price paid to a member upon withdrawal, then the constitution does not comply with section 601GA. Further discussion of ASIC's interpretation of section 601GA appears in [Policy Statement 134 Managed investment schemes: Constitutions](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps134_pdf" \t "_new).Paragraph 601EB(1)(e) of the Act allows ASIC to refuse to register a scheme if the constitution does not meet the requirements of section 601GA.ASIC is aware that the constitutions of a number of registered managed investment schemes may not comply with section 601GA because the responsible entity retains a discretion as to the transaction costs amount added to the acquisition price, or subtracted from the price paid upon withdrawal. ASIC understands that a number of responsible entities do not consider it to be practicable to specify in the scheme's constitution a mechanism (which is certain, complete and independently verifiable) for calculating the amount attributable to transaction costs. This is because the constitution would need to be amended if the allowance for transaction costs changed. Further, a number of responsible entities consider that it is not practicable to specify the means by which an allowance for transaction costs will be calculated without allowing some estimation by the responsible entity.ASIC has previously given interim relief upon application on a case-by-case basis. To ensure there will be no disruption to existing practices, ASIC will continue to provide interim relief until 31 December 2004, during which time it will engage in public consultation regarding the appropriate form of any ongoing relief. ASIC notes that, in exercising any discretion with respect to transaction costs permitted by the interim relief, the responsible entity will still be subject to the duties imposed by section 601FC of the Act. **Relief applications**Responsible entities which seek interim relief with respect to transaction costs or other elements of the price of interests from ASIC should apply to the FSR Applications Manager. Applications, which must address [Policy Statement 51 Applications for relief](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps51_pdf" \t "_new)and refer to the interim policy set out in this Information Release, can be sent to the following e-mail address: fsr.applications.manager@asic.gov.au. Responsible entities do not need to make an application to obtain the benefit of the no-action policy stated above. **2.8 ASIC issues four CLERP 9 policies**On 1 July 2004 the Australian Securities and Investments Commission (ASIC) issued two policy statements and two practice notes to explain the new requirements of the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) (CLERP 9). The CLERP 9 policies issued are:                Policy Statement 180: Auditor registration[PS 180]                Revised Practice Note 34: Auditors' obligations: reporting to ASIC[PN 34]                Revised Practice Note 66: Transaction-specific disclosure[PN 66], and                Revised Policy Statement 173: Disclosure for the on-sale of securities and other financial products[PS 173].'ASIC welcomes the important reforms that CLERP 9 makes to corporate reporting and disclosure laws', said Mr Malcolm Rodgers, ASIC Executive Director of Policy and Markets Regulation. 'We are issuing these CLERP 9 policies today to give as much notice as possible about how ASIC will administer the CLERP 9 provisions. We have concentrated on developing policy for requirements in CLERP 9 that will have an immediate effect. 'In particular, we have established an online registration system to support the new registration process for individual company auditors, and for companies to apply for registration as an authorised audit company. 'We will launch this new system when the final CLERP 9 regulations are made, as certain matters concerning the registration of auditors will be covered by the regulations', Mr Rodgers said.Information will be available from ASIC's website [www.asic.gov.au](http://www.asic.gov.au/clerp9%22%20%5Ct%20%22_new)when the regulations are made.The CLERP 9 policies are in 'proof' form and are based on the CLERP 9 legislation as passed by the Parliament on 25 June 2004. Before finalising the policies, ASIC will review them in light of the final form of the CLERP 9 legislation and regulations, and any further industry comment. Until the policies are issued in final form, ASIC will apply the policy set out in these 'proof' versions.A more detailed summary of ASIC's CLERP 9 policies is provided below. In April 2004 ASIC set out its policy proposals in three policy proposal papers (PPPs) - *Auditor registration, Audit and financial reporting obligations and Product disclosure*. **(a) Issues raised in the PPPs but not dealt with in the policies**Two issues raised in the PPPs are not covered by ASIC’s CLERP 9 policies. **'Clear, concise and effective' presentation of prospectuses**The CLERP 9 Act requires disclosure documents (such as prospectuses) produced under Chapter 6D of the *[Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)* (the Act) to be 'clear, concise and effective'. This mirrors the requirement for Product Disclosure Statements. ASIC does not propose to give any further guidance on the clear, concise and effective presentation requirement for prospectuses at this stage. ASIC will provide further guidance on this topic in due course based on its regulatory experience.Until that work is completed, ASIC will have regard to the guidance in ASIC Policy Statement PS168 *Disclosure: Product Disclosure Statements (and other disclosure obligations)* on 'clear, concise and effective' disclosure and ASIC will apply its existing stop order policy in regard to breaches of the clear, concise and effective requirement.**Financial reporting and audit relief powers**Where an application is made to ASIC seeking relief from any CLERP 9 audit or financial reporting obligations (where ASIC does not have a more specific relief power), ASIC will apply its existing policy on relief as set out in PS 43: *Financial reports and audit relief*. ASIC is reviewing PS 43 as part of its general policy update program and expects to release an updated version of PS 43 in the next few months.**(b) Summary of the CLERP 9 policies****PS 180: Auditor registration**Policy Statement 180: *Auditor registration* sets out ASIC’s approach to the registration of an individual as a company auditor or a company as an authorised audit company. PS 180 specifies the evidence that must be given to ASIC to satisfy it that an applicant for registration as a company auditor:                has completed the educational requirements specified in s1280(2A) of the Act or has equivalent qualifications and experience                meets the prescribed practical experience requirements set out in regulations or an approved competency standard, and                is capable of performing the duties of an auditor and is otherwise a fit and proper person.PS 180 also sets out the process ASIC will follow in assessing an application for approval of a competency standard.PS 180 states that ASIC will impose conditions (as permitted by the regulations) on the registration of individual company auditors at the time of registration and that ASIC will impose a condition on the registration of an authorised audit company that the company notify ASIC if it becomes aware that it is no longer eligible to be registered.ASIC cannot register an authorised audit company unless the company is owned and controlled by registered company auditors, the company has adequate professional indemnity insurance (see ASIC PPP: *Authorised audit companies: insurance arrangements* issued on 16 June 2004), and the company is not in external administration.**PN 34:** **Auditors' obligations: reporting to ASIC**ASIC has revised PN 34 to provide guidance on the reporting obligation for auditors in s311 of the Act by including factors that ASIC considers might be relevant to determining when a suspected contravention is 'significant'. ASIC has also revised PN 34 to take account of changes since it was last reviewed in 1994, particularly to include guidance on the requirement that an auditor have 'reasonable grounds to suspect' that a contravention has occurred. **PN 66: Transaction-specific disclosure**ASIC has revised PN 66 to provide guidance on how ASIC will administer the new provisions allowing the issue of a transaction-specific product disclosure statement. It primarily provides guidance on new provisions introduced under CLERP 9. This practice note also discusses when ASIC will use a new power to exclude an entity from relying on the transaction-specific PDS provision.**PS 173: Disclosure for on-sale of securities and other financial products:** ASIC has revised PS 173 to give:                secondary sales relief for stapled securities;               technical relief to allow people relying on some accounting class orders to use the CLERP 9 on-sale exemptions;                some further guidance about particular instances where ASIC will grant individual secondary sales relief taking into account recent ASIC relief decisions.PS 173 also discusses when ASIC will use a new power to exclude people from using the legislative secondary sales exemptions under CLERP 9.**2.9 ASIC and ASX sign supervisory Memorandum of Understanding**On 1 July 2004 a new agreement to improve the efficiency of market supervision by minimising overlap and increasing regulatory cooperation was signed by the Australian Securities and Investments Commission (ASIC) and the Australian Stock Exchange (ASX).The new Memorandum of Understanding (MOU) recognises that ASIC and ASX have complementary roles in relation to the oversight of the market and clearing and settlement facilities offered by ASX, and the conduct of brokers and listed entities. The new MOU replaces three existing MOUs entered into by the then Australian Securities Commission and the ASX between 1992 and 1997.The MOU sets out, in a more streamlined manner, expectations in relation to the supervisory activities that each party is required to undertake to meet their statutory obligations. For the first time, the MOU will be a public document. Greater transparency about the communication and cooperation between ASIC and ASX should reinforce confidence in the market and streamline procedural requirements for users. It should also strengthen the market's confidence that it is supervised by a system that is both robust and flexible, and able to meet both the needs of business and the legitimate expectations of investors.The full text of the MOU is available from [ASIC's website](http://www.asic.gov.au" \t "_new) or the [ASX's website](http://www.asx.com.au" \t "_new).**2.10 ASIC and FRC sign Memorandum of Understanding**An agreement to cooperate and exchange information has been signed by the Australian Securities and Investments Commission (ASIC) and the Financial Reporting Council (FRC).The Memorandum of Understanding (MOU) will assist the two agencies in discharging their responsibilities in relation to the auditor independence requirements of the CLERP (Audit Reform and Corporate Disclosure) legislation (CLERP 9).While ASIC and the FRC have different roles in relation to auditor independence, the MOU recognises that both have information that will be complementary to their respective roles.The FRC is responsible for the oversight of the auditing and accounting standard setting, and monitoring and assessing the nature and overall adequacy of the auditor independence arrangements and audit-related disclosure. ASIC is responsible for surveillance, investigation and enforcement of the responsibilities of companies and auditors in relation to financial reporting, including the enforcement of auditor independence requirements contained in the *[Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)*.The MOU sets out the information to be shared between the agencies, including regular reports to be provided by each agency to the other, the confidentiality obligations of each agency, and the agencies' agreement to hold regular liaison meetings and consult about policy issues. Greater communication and cooperation between ASIC and the FRC should ensure that the auditor independence provisions in the CLERP 9 legislation are administered smoothly and effectively.The full text of the MOU is available from [ASIC's website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.11 Stapled securities**On 29 June 2004 the Australian Securities and Investments Commission (ASIC) provided guidance on some regulatory issues arising from the increased use of stapled securities in the Australian market.Stapled securities are where two or more different securities are contractually stapled so that they cannot be sold separately. Stapling is commonly used to provide investors with access to returns through the use of tax-effective structures.Where one of the stapled securities is not subject to Chapter 6 of the *[Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)*, this can make the application of takeovers law uncertain. Where one of the stapled securities is a security of a foreign corporation, it has the potential to see different takeovers laws apply if bids are made in different countries for one of the stapled securities. Australian takeover laws apply to voting shares of companies with 50 or more members incorporated in Australia and to units in listed managed investment schemes established in Australia. They do not apply to foreign companies securities, although a foreign law may regulate takeovers affecting those components of a stapling.ASIC recommends that issuers proposing offers of stapled securities should ensure that their disclosure to investors is adequate and specifically deals with issues such as:                whether the stapling can be undone and, if so, in what circumstances                will the stapling be effective to allow compulsory acquisition of one of the stapled securities which may not be the subject of a formal takeover bid?                whether all of the stapled securities are subject to the same laws and, if not, what is the expected outcome if there was a conflict, for example a bid launched in different countries for individual parts of the stapled securities.ASIC has previously provided guidance to the market in the context of takeovers involving stapled securities (see [Information Release 99/014](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ir99-014_pdf" \t "_new): *Takeovers involving stapled securities*) and relief that may be available to facilitate a bid. **2.12 Scamseek spider catches web scams and schemes**Illegal scams and schemes promoted on the Internet will now be easier to identify, following the launch of Scamseek, an Internet-document classification system, developed with the assistance of the Australian Securities and Investment Commission (ASIC).The technology has been developed to assist enforcement agencies identify websites illegally promoting financial schemes or individuals providing investment advice in breach of the law, which have previously been identified through manual searches.A web spider performs a 24 hour, 7 day a week search of the Internet for potential scam sites.Scamseek can:                assess and aggregate the risk associated with information on a website;                identify people and companies mentioned within the text; and                mark sites that are above the acceptable risk threshold for further analysis.'The Internet has become an increasingly popular tool for illegal schemes operators to promote their schemes because of the wide number of people it can reach in a very short space of time, without ever having direct contact with investors', ASIC Director of Enforcement, Mr Keith Inman said.'Prior to the development of Scamseek, ASIC would manually trawl the internet for financial advice by unregistered advisors, and illegal investment schemes, financial services scams, and stock market tipsters attempting to manipulate the price of shares. This process was labour- and time-intensive.'Scamseek has now automated this process and allows ASIC to trawl the Internet to more quickly identify and act against schemes operating in breach of the law', Mr Inman said.Scamseek was first announced in February 2003. Results from trials conducted using Scamseek have been positive, and a number of suspicious websites have been identified as potential scams or illegal schemes. ASIC recently took action against Gramax Investment Club for allegedly operating unlicensed investment clubs promoted via the Internet (refer ASIC [Media Release 04-178](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/04-178%2BASIC%2Bacts%2Bagainst%2BVanuatu%2Binvestment%2Bclubs%2Band%2BAustralian%2Bdirectors?openDocument" \t "_new): *ASIC acts against Vanuatu investment clubs and Australian directors).*Scamseek has also helped ASIC identify some further websites which may be operating in breach of the law, against which ASIC will consider taking enforcement action.ASIC piloted the first version of Scamseek on 15th October 2003. The audit trial produced immediate results, and led to an enhanced version of the system. The enhancements included:                more research on the linguistics of scams so the team could better model the language usage;                more research into the artificial intelligence techniques used to classify the documents; and                a greater analysis of the different types of scams being promoted to produce a richer classification scheme.The additional investment by the partners improved both the reach and the accuracy of the system. It increased the variety of scams that could be recognised by 75 per cent, increased its performance accuracy on recognising unseen data by 20 per cent and the productivity of the system is significantly greater than the manual system that it has replaced. **2.13 Valuing options for directors and executives**On the 28 June 2004 the Australian Securities and Investments Commission (ASIC) issued revised guidelines on how Australian listed companies should disclose the value of options when disclosing directors' and executive officers' emoluments in their annual directors' reports.Under the guidelines, the option values will be disclosed in line with the requirements of the new accounting standard AASB 1046 'Director and Executive Disclosures by Disclosing Entities' (AASB 1046).AASB 1046 contains requirements for disclosure of director and executive remuneration in the notes to the financial statements for years ending on or after 30 June 2004. It provides an appropriate basis for valuing options and allocating their value over time.The previous ASIC guidelines were based on the International Accounting Standards Board's exposure draft ED 2 'Share Based Payment', which had also been issued as ED 108 by the Australian Accounting Standards Board.There are some differences between the approaches under the previous guidelines and these revised guidelines, particularly in relation to the treatment of market-based performance conditions, so directors will need to review the methods of calculation. 'ASIC continues to expect all listed companies to comply with their legal obligations. If it comes to our attention that the full remuneration, including option values, is not disclosed, we will consider action against directors', ASIC Chief Accountant, Mr Greg Pound said. 'ASIC's revised guidelines provide a single, consistent method of determining the option values included as an individual's remuneration in the directors' report and the notes to the financial statements', he said.The guidelines are available on [ASIC's website](http://www.asic.gov.au" \t "_new). **2.14 Next steps on dollar disclosure**On 25 June 2004 the Australian Securities and Investments Commission (ASIC) provided information on upcoming ASIC work in the area of disclosure, following the publication of the revised dollar disclosure regulations.'Consumers need clear disclosure of fees, costs and benefits to make informed decisions about financial products. Domestic and international research has consistently shown that disclosure in dollars is the most effective approach', ASIC Executive Director of Financial Services Regulation, Mr Ian Johnston said.The dollar disclosure regulations (known as 'batch 8') were made on 24 June 2004 and are available from [http://scaleplus.law.gov.au](http://scaleplus.law.gov.au" \t "_new). The regulations commence on gazettal and provide for a six-month transition period. Licensees (and their representatives) and product issuers will be obliged to disclose various fees, benefits, costs and interests as amounts in dollars in the following documents from 1 January 2005:                Statements of Advice (SOAs);                Product Disclosure Statements (PDSs); and                periodic statements.The regulations provide that these matters need not be disclosed as amounts in dollars where ASIC makes a determination that, for a compelling reason, dollar disclosure is:                not possible;                unreasonably burdensome (including for a specified period of time); or                contrary to client interests.ASIC plans to release a policy proposal paper during July or August canvassing how it will approach the dollar disclosure obligations, together with how it proposes to use its power to make dollar disclosure determinations. The paper is likely to discuss:                how it will administer the dollar disclosure provisions;                how applications for ASIC determinations will be assessed by ASIC; and                in what situations ASIC might consider issuing dollar disclosure determinations on a class basis.ASIC notes that the Government announced a fees and charges disclosure package, including a single-figure fee measure, on 16 June 2004 (see Item 1.6 of the June 2004 issue of the Corporate Law Bulletin).ASIC will take into account any implications this new package of proposed regulations may have for the implementation of the dollar disclosure obligations when developing its policy on the dollar disclosure obligations. This will include considering the effect of the Government mandating the use of ASIC's revised fee disclosure template (issued on 16 June 2004; see [ASIC Media Release 04-192, ASIC releases revised fee disclosure model](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/04-192%2BASIC%2Breleases%2Brevised%2Bfee%2Bdisclosure%2Bmodel?openDocument" \t "_new)).'ASIC expects licensees and product issuers to already be planning how they will comply with the dollar disclosure obligations. The six-month transition period exists for licensees and product issuers to make any necessary adjustments to their systems, processes and documents so that they can comply with the dollar disclosure obligations', Mr Johnston said. |
| **3. Recent ASX Developments** |
| **3.1 Changes to responsible executive regime**ASX is introducing changes to the responsible executive regime relating to qualification and ongoing training requirements. Details are contained in [Circular 291/04](https://www.asxonline.com/intradoc-cgi/idc_cgi_isapi.dll/291c_04.pdf?IdcService=GET_FILE&dID=10051&dDocName=ASX013088&allowInterrupt=1&viewInline=1&Rendition=Web) dated 10 June 2004 and [Circular 356/04](https://www.asxonline.com/intradoc-cgi/idc_cgi_isapi.dll/356c_04.pdf?IdcService=GET_FILE&dID=10316&dDocName=ASX013316&allowInterrupt=1&viewInline=1&Rendition=Web) dated 14 July 2004.**3.2 Disciplinary results**ASX has released a new guidance note explaining the process of imposing disciplinary penalties by ASX’s disciplinary tribunals. The guidance note is designed to assist market participants and their advisors to understand what factors are taken into account in imposing and setting penalties for breaches of ASX’s market rules. Details can be found in [Circular 275/04](https://www.asxonline.com/intradoc-cgi/idc_cgi_isapi.dll/275c_04.pdf?IdcService=GET_FILE&dID=9956&dDocName=ASX013029&allowInterrupt=1&viewInline=1&Rendition=Web" \t "_new) with attached [Guidance Note](https://www.asxonline.com/intradoc-cgi/idc_cgi_isapi.dll/275at_04pdf?IdcService=GET_FILE&dID=9957&dDocName=ASX013030&allowInterrupt=1&viewInline=1&Rendition=Web" \t "_new) dated 3 June 2004.**3.3 Proposed Listing Rule Amendments – Revision of JORC Code**ASX issued an [Exposure Draft](http://listedcompanies.optin.com.au/cgi-bin/Lots?rin=15137888-1023212&campaign=00q&linkid=00h" \t "_new) at the beginning of June outlining proposed Listing Rule amendments to be considered in conjunction with the draft revised JORC Code. The JORC Code is the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves and sets out minimum standards, recommendations and guidelines for reporting on mining and exploration activities by ASX listed entities.A number of submissions have been received in response to the Exposure Draft and these are currently being reviewed by both JORC and ASX. JORC anticipates that a number of changes will be made to the draft JORC Code before it is finalised. It is expected that due to the number of submissions and requests by several stakeholders for an extension of time, the rule amendments will now take effect in September. |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Kaefer Technologies Ltd 02: Panel declines to commence proceedings**On 21 July 2004, the Takeovers Panel announced that it had considered the application (the Application) by Gerald Francis Pauley and Gordon Bradley Elkington (the Applicants) dated 12 July 2004 alleging unacceptable circumstances in relation to the affairs of Kaefer Technologies Limited (Administrators appointed) (KAE). The Panel has decided not to commence proceedings in relation to the Application.**(a) The Application***Parties and alleged unacceptable circumstances*KAE is a company listed on the official list of the Australian Stock Exchange Limited (ASX). Its principal activities include the manufacture and installation of insulation products and the provision of engineering services for mining and industrial services. On 22 April 2004, the directors of KAE appointed voluntary administrators (the Administrators) under section 436A of the *[Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)* [(Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482).The Applicants, who are shareholders of KAE, alleged that unacceptable circumstances arose because:(a) the Administrators proposed to sell the assets of KAE and its subsidiaries to Kaefer Isoliertechnik GmbH & Co KG (KG), a major shareholder of KAE; and(b) the proposed sale (and the contractual terms of the proposed sale) by the Administrators of the assets of KAE and its subsidiaries to KG would be finalised without shareholder approval in contravention of Rule 10.1 of the ASX Listing Rules and section 208(1) thereby denying shareholders of their voting rights in respect of approving the proposed sale.*Orders sought*The Applicants sought an order from the Panel that any substantial sale of assets from KAE to KG be subject to the approval of shareholders other than KG, and that no such sale be executed or implemented until such approval has been given. **(b) Discussion**Mr Pauley (one of the Applicants) is a member of the committee of creditors in relation to the administration of KAE. Mr Pauley was informed in a briefing paper issued before the last meeting of that committee (9 July 2004) that the Administrators were at an advanced stage in negotiations with an interested party for the sale of the assets of KAE and its subsidiaries which was expected to be finalised shortly. The Applicants were concerned that the sale would proceed at a price which would provide no return to shareholders (although it would provide a full return to the trade creditors of KAE and its subsidiaries and a price might be obtained for the listed shell in a subsequent transaction). The Applicants believed that the assets were to be sold to KG. In addition, the briefing paper indicated that the relevant terms of the sale agreement would be announced to ASX upon the agreement being finalised. In their Application, the Applicants drew the Panel’s attention to the possibility that Listing Rule 10.1 of the ASX Listing Rules and section 208(1) (both dealing with related party transactions) may apply to the transaction. The Applicants asserted that the Panel should intervene to enforce Listing Rule 10.1 and section 208(1) because the transaction would have the effect of a takeover without any offer being made to shareholders or other shareholder participation. If the sale were to proceed, the Applicants alleged that this would result in a transfer of assets of KAE to a related party at a price substantially below the independent valuation of KAE and in contravention of Listing Rule 10.1 and section 208(1). Subsequent to the Application being made, the Panel noted that an announcement was made by KAE to ASX on 15 July 2004 stating that a sale agreement had been finalised whereby, among other things:(a) Kaefer Integrated Services Pty Ltd (KIS) (a wholly owned subsidiary of KAE) would acquire KAE’s patents, plant and equipment and current assets; and(b) KG would acquire KAE’s shares in KIS.Upon considering the Application and preliminary submissions provided by the Applicants, KAE and KG, the Panel decided not to commence proceedings. The Panel makes the following comments:(a) The materials provided to the Panel did not identify any circumstances relating to KAE that were unacceptable as a result of their effect on an acquisition or proposed acquisition by a person of a substantial interest in KAE as that concept is used in Chapter 6 (ie. a substantial interest in voting securities of KAE), or of their effect on the control or potential control of KAE in the sense used in Chapter 6 (ie. control as conferred by control over voting securities), or because they gave rise to a contravention of the takeover provisions. (b) The Panel’s jurisdiction does not extend to regulating the affairs of companies in administration or conduct of company administrators under Part 5.3A. Any alleged impropriety in the conduct of a company administration is a matter for ASIC and/or the courts. Such an action may be brought by ASIC, in its discretion, or by disaffected shareholders or creditors. (c) The Panel considers that it may intervene in an administration under Part 5.3A if the administration was a device to allow parties to attain a goal relating to control through voting power without a bid, scheme of arrangement, substantial acquisition or other transaction involving shareholder participation. In such circumstances, it would be open to the Panel to require the parties to seek to attain their goals in ways which did not exclude the shareholders. The Panel previously decided that this was not case in this situation. Nothing which has been submitted subsequently by the Applicants caused the Panel to take a different view in the context of the Application.**(c) Decision** Accordingly, the Panel decided not to commence proceedings in relation to the Application under Regulation 20 of the [ASIC Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56757" \t "default).**4.2 Takeovers Panel releases revised guidance notes**On 20 July 2004, the Takeovers Panel announced that it had issued a number of revised Guidance Notes and has posted these revised Guidance Notes on its [website](http://www.takeovers.gov.au" \t "_new). The Guidance Notes which have been revised are:Guidance Note 2: Reviewing Decisions;Guidance Note 3: Making Rules;Guidance Note 4: Remedies and Enforcement;Guidance Note 5: Restraining the Dispatch of Documents;Guidance Note 6: Minimum Price Requirement - s621(3) & (4);Guidance Note 8: Matter Procedures;Guidance Note 9: Costs Orders; andGuidance Note 10: Public Consultation. The amendments which have been made to the revised Guidance Notes are minor in nature. These amendments include updating legislative references, inserting references to Panel decisions and generally expanding upon existing explanations and guidance where appropriate. The aim of conducting the revision of these Guidance Notes was not only to improve them by making them more useful to users, but to seek to ensure that the Guidance Notes reflect current Panel practices and thinking. **4.3 Rivkin Financial Services Ltd: Panel declines to commence proceedings**On 19 July 2004, the Takeovers Panel announced that it had considered the application by Sofcom Limited (Sofcom) dated 8 July 2004 (the Application) alleging that unacceptable circumstances exist in relation to the affairs of Rivkin Financial Services Limited (RFS). The Panel has decided not to conduct proceedings in relation to the Application.**(a) Background** The Application alleges that unacceptable circumstances arise out of several transactions, involving principally share swaps between entities that appear to have some pre-existing relationships, which Sofcom asserts have resulted in the effective control of RFS passing to a small group of shareholders (who have no previous connection with RFS). The transactions the subject of the Application are summarised below.*Acquisition by Alan Davis Group Pty Ltd*On 17 June 2004, Alan Davis Group Pty Ltd (Alan Davis Group) bought approximately 7.3 million ordinary shares in RFS from Mr Rene Rivkin, for $1.6 million. Alan Davis Group paid $200,000 on completion, with the balance payable on deferred payment terms. Alan Davis Group lodged an ASIC form 603 with ASX on 21 June 2004 notifying its initial substantial holding in RFS. The form 603 attached a copy of the agreement with Mr Rivkin, which set out the terms on which the RFS shares were sold to Alan Davis Group and mortgaged back to Mr Rivkin to secure the balance of the purchase price.Mr Rivkin lodged an ASIC form 605 with ASX dated 21 June 2004 notifying his ceasing to be a substantial holder in RFS. *Replacement of the RFS Board*Prior to the transactions described in the Application, the RFS Board comprised Messrs Jordan Rivkin, Shannon Rivkin, David Croll and Spiros Dassakis. On 18 June 2004, RFS announced that Mr Dassakis had resigned as a director. On 21 June 2004, RFS announced that following the acquisition of a substantial interest by Alan Davis Group, the directors had appointed Mr Alan Andrew Davis as a director and chief executive officer of RFS. On 2 July 2004, RFS announced that Messrs Jordan Rivkin, Shannon Rivkin and David Croll had retired from the RFS Board. In the same announcement, RFS announced that Messrs Lawrence Chartres and George Lister had been appointed to the Board. Mr Lister is a director of Alan Davis Group. *Acquisition of interest in Network Limited*On 2 July 2004, RFS issued 5 million RFS shares and paid $1 million cash to Network Limited (Network), as consideration for the issue to RFS of 10 million shares in Network under a mutual subscription agreement. RFS also made available to Network a loan of $1 million. On the same day, Network purchased the business and assets of No 1 Media Group Pty Ltd, owned by Mr Bill Cole and Mrs Maureen Cole. Consideration was paid by the allotment of 3.5 million Network shares and 3 million Network options to a company named Cole Kablow Superannuation Pty Ltd (ColeKablow). The 3.5 million Network shares were then purchased from Cole Kablow by RFS, who issued 3.34 million RFS shares to Cole Kablow as consideration.As a result of the above transactions (the 2 July Transactions) and the previous acquisition of RFS shares by Alan Davis Group:               RFS holds 13.5 million shares in Network, representing 16.4% of Network’s issued share capital;               Alan Davis Group holds approximately 7.3 million shares in RFS, representing 7.3% of RFS’ current issued share capital;               Network holds 5 million shares in RFS, representing 4.98% of RFS’ issued share capital; and               Cole Kablow holds 3.34 million in RFS, representing 3.3% of RFS’ issued share capital.The details of the 2 July Transactions were disclosed in announcements made by both RFS and Network on 2 July 2004. RFS also lodged an ASIC form 603 notifying their initial substantial holding in Network on 6 July 2004. RFS’ form 603 attached a copy of the mutual subscription agreement between Network and RFS, as well as the share sale agreement between Cole Kablow and RFS. *Pre-existing relationships*The Application identified the following pre-existing relationships between Alan Davis Group, Network and Cole Kablow:                Network is the sole agent representing advertising billboards which are owned by Alan Davis Group;               both Mr Davis and Mr Lister hold shares in Network. According to the ASIC form 603 lodged by RFS in relation to its initial substantial holding in Network on 2 July 2004, Mr Davis holds 13,850 shares in Network and Mr Lister holds 38,000 shares (each holding being less than 0.05% of Network’s issued share capital); and                Cole Kablow has the same registered office and principal place of business as Network. Cole Kablow was also a holder of shares in Network prior to the transactions on 2 July 2004. According to the list of Top 20 Shareholders in Network’s 31 December 2003 Annual Report, Cole Kablow held 1,102,639 Network shares (approximately 1.3% of Network’s issued capital).The Application does not allege any connection between Mr Chartres and the Alan Davis Group.**(b) Panel’s consideration of the Application***Disclosure of relevant interests*The Panel does not consider that the relationships and shareholdings of Alan Davis Group, Network or Cole Kablow described in the Application, either alone or when taken together, are sufficient to support an inference that any or all of those persons are associates, within the meaning given in subsection 12(2) of the *[Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)* [(Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482) (the Act), in relation to the affairs of RFS. The fact that Messrs Davis and Lister and Cole Kablow hold small parcels in Network does not support a conclusion that any of them, or Alan Davis Group, are associates of Network (which would require them to disclose Network’s 4.98% holding in RFS as part of their own substantial holding in RFS). Similarly, there is no indication in the Application or any of the publicly available materials that would indicate that they are otherwise able to control the voting or disposal of the RFS shares held by Network. Had the Application contained sufficient information to support an inference that any or all of Alan Davis Group, Network or Cole Kablow were associates for the purpose of subsection 12(2) in relation to RFS, and that there had therefore been insufficient disclosure regarding their respective relevant interests under section 671B of the Act, then the Panel may have decided to commence proceedings to investigate further. As indicated in the Panel’s decision *Village Roadshow Limited* [2004] ATP 4, the Panel considers any contravention of the substantial holding and tracing notice provisions in Chapter 6C to be contrary to the policy objectives of section 602, namely that shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company. If the Application had indicated that there had been inadequate responses to disclosure notices issued under section 672A of the Act (which can be given by the company or by ASIC, either of its own accord or upon a member’s request) in respect of RFS (as was the case in *Village 01*), the Panel may have commenced proceedings. However, based on the circumstances described in the Application, the Panel is unable to conclude that the market has been misinformed regarding the identity of persons acquiring substantial interests in RFS.*Cross-shareholdings of RFS and Network*The Application did not raise any evidence regarding the mutual subscription agreement between RFS and Network that would support an inference that RFS had any ability to control the voting or disposal of the RFS shares held by Network which would give RFS a relevant interest in those shares, or that RFS and Network were associated in relation to those shares. The Panel does not approve of cross-shareholdings between companies which have the effect of impeding an efficient, competitive and informed market for control of either company. However, on the facts presented in the Application, the Panel cannot infer that Network’s 4.98% holding in RFS has such an effect. In any event, the shareholding in RFS appears to be widely dispersed and so any person minded to seek control would not appear to be confronted with an insuperable blocking stake. The Application did not provide any evidence which would have supported a finding that RFS had control over the voting or disposal of the Cole Kablow parcel of RFS shares, or that Cole Kablow was associated with RFS in relation to that parcel.*Disclosure of cessation of relevant interest*The Application asserts that Mr Rivkin’s form 605 notice regarding his ceasing to be a substantial holder in RFS may have been wrong, as Mr Rivkin retains security over the RFS shares sold to Alan Davis Group for the balance of the purchase money. This security is not disclosed in Mr Rivkin’s form 605.The Panel notes that Mr Rivkin’s security may not constitute a relevant interest, if the exception in subsection 609(1) of the Act (for a security taken by a lender in the ordinary course of business) applies. The Panel does not consider it necessary to investigate the ASIC form 605 lodged by Mr Rivkin, because irrespective of whether or not Mr Rivkin continues to have a relevant interest by reason of the security, the existence of the security granted to Mr Rivkin has not been concealed and does not give rise to unacceptable circumstances.*Changes to the RFS Board*Based on the material provided in the Application, the Panel does not consider that the appointment of 2 associates of Alan Davis Group to the RFS Board, together with the retirement of 3 existing members of the Board, can constitute unacceptable circumstances, having regard to the control or potential control of RFS. Previous Panel decisions (such as *Grand Hotel Group* [2003] ATP 34 and more recently *St Barbara Mines Limited 02* [2004] ATP 12) have clearly stated that the Panel will not generally treat issues about the composition of a company’s board as control issues for the purposes of section 657A of the Act, unless an accumulation of voting power was involved in contravention of section 606 or without proper disclosure under Chapter 6C. The Application does not support an inference of any relevant accumulation of voting power. A consistent approach was taken in *Online Advantage Limited* [2002] ATP 14, in which the co-ordinated replacement of the target board and sale of 53% of the shares in the target company supported the inference that the buying of the shares had been (at least in part) by associates.*Requisition of Meeting and Frustrating Action*The Application noted that the changes to the RFS Board and the transaction with Network took place after Sofcom had served RFS with a notice pursuant to section 249D of the Act requisitioning a general meeting of RFS to consider the removal of Mr Davis and Mr Shannon Rivkin as directors and the election of 3 Sofcom nominees as directors of RFS. The Panel understands that the circumstances relating to Sofcom’s requisition notice are currently the subject of Federal Court proceedings. The Application asserted that the various transactions between Network and RFS, in particular RFS’ investment in Network, are inconsistent with RFS’ previous investment strategy and represent a substantial change to RFS’ existing business operations. The Panel is not satisfied that RFS’ investment in Network is inconsistent with its previous business practices, as in its Annual Report for 2002 – 2003, RFS records a profit of $4 million on the sale of a substantial investment in Rebel Sport. However, even if an inconsistency with RFS’ previous business practices were established, that does not indicate that unacceptable circumstances exist.Had the transactions which were the subject of the Application taken place following notification to RFS of a genuine potential offer under Chapter 6 of the Act, the Panel may have been minded to commence proceedings and review those transactions more closely, in order to ensure that they did not constitute frustrating action of a sort which would be unacceptable. However, activities undertaken by a company after receiving a notice from shareholders requisitioning a meeting, while potentially raising issues regarding directors duties, do not have the same effect on the market for control of the company as activities undertaken after notice of a genuine takeover offer. **(c) Decision**Accordingly, under Regulation 20 of the [ASIC Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56757" \t "default), the sitting Panel decided not to conduct proceedings on the Application. **4.4 St Barbara Mines Ltd: Panel declines to commence proceedings**On 2 July 2004, the Takeovers Panel announced that it had considered the application by Strata Mining Corporation Limited (Strata) dated 29 June 2004 (the Application) alleging unacceptable circumstances in relation to the affairs of St Barbara Mines Limited (St Barbara). The Panel has decided not to commence proceedings in relation to the Application.**(a) The Application**St Barbara is a listed Australian gold producer. It has been listed on the official list of the Australian Stock Exchange Limited since May 1969. Strata is a substantial holder of St Barbara ordinary shares with voting power of 5.61%. Resource Capital Fund II LP (RCF) is the largest shareholder of St Barbara with voting power of 22.6%. RCF’s principal activity is the management of private equity funds which invest in development and growth stage mining companies.RCF increased its shareholding in St Barbara from 7.68% to 22.6% following a general meeting of members of St Barbara on 25 November 2003, at which the members approved the issue on 28 November 2003 of 95,684,932 fully paid ordinary shares in St Barbara to RCF (the St Barbara Shares). The issue of shares arose from a share subscription agreement (the Share SubscriptionAgreement) entered into between RCF and St Barbara on or about 6 October 2003 to convert approximately $7.6 million of debt owing by St Barbara to RCF under a financing facility into equity. The issue price of the St Barbara Shares was $0.08. On or about 24 May 2004 (about six months after the issue of the St Barbara Shares and about 9 months after the debt for equity swap was agreed to by RCF and St Barbara), RCF exercised its powers under section 249D of the *[Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)* [(Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482) (the Act) by serving a notice requiring St Barbara to call a general meeting to vote on resolutions to remove two directors of St Barbara and replace them with RCF nominees. The general meeting requisitioned by RCF is scheduled to be held on 20 July 2004. In its Application, Strata alleged that unacceptable circumstances arose because:                the information provided to the St Barbara board and shareholders in the notice of meeting concerning the resolution at the 25 November 2003 general meeting to issue the St Barbara Shares to RCF was defective contrary to paragraph 602(b)(iii) and item 7 of section 611. In particular, Strata alleged that RCF did not notify the board of directors or shareholders of St Barbara that it would seek to use its position as an increased shareholder in St Barbara to seek to obtain control over the management of St Barbara; and                RCF’s failure to disclose its intentions regarding the replacement of the two directors to control the St Barbara board and the subsequent issue of the St Barbara Shares to RCF disregarded the policies of Chapter 6 that the acquisition of control in voting shares in a listed company takes place in an efficient, competitive and informed market.Strata sought a declaration of unacceptable circumstances and a final order that at the general meeting of St Barbara to be held on 20 July 2004 (as requisitioned by RCF), RCF be prohibited and estopped from exercising the voting rights of the St Barbara Shares in respect of the proposed resolutions to remove the two directors and replace them with RCF nominees, and that in respect of these resolutions, RCF’s holding be taken to be as it was prior to the issue of the St Barbara Shares. **(b) Discussion**It is important to note at the outset that the Panel is generally reluctant to intervene in general meeting matters as they are not typically the type of “control” issue which concerns the Panel. The Panel considered the decision in Grand Hotel where the sitting Panel considered whether to commence proceedings in relation to a complaint of defective disclosure in a notice of meeting provided to members of Grand Hotel where it was proposed to replace the responsible entity of the Grand Hotel Trust. The sitting Panel in that matter stated:“51. The notice of meeting (and more generally the meeting to which it related) did not relate to a control transaction, as "control" is used to define the policy of Chapter 6 of the Act.52. Chapter 6 is essentially concerned with situations in which control of the general meeting is changed, by acquiring relevant interests in securities or acquiring voting power by creating associations. Chapter 6 is not designed to prevent security holders from using their votes to replace the management of companies and trusts, unless they enter voting arrangements in relation to them which contravene section 606 (the 20% threshold) of the Act.”The Panel saw no reason to depart from the approach in Grand Hotel*.* The Panel did not think that the interests of an efficient, competitive and informed market were served by intervening in the efforts of a shareholder to change the management of a company, unless those efforts involved an acquisition of voting power in breach of the Act or otherwise created unacceptable circumstances. In deciding whether to conduct proceedings on the Application, the Panel considered whether Strata made a case that unacceptable circumstances had arisen in connection with the acquisition of RCF’s 22.6% shareholding. In particular, the Panel asked whether there was evidence in the Application to support a finding that at the time of the 25 November 2003 general meeting, RCF already intended to change the composition of the St Barbara board and that it had failed to disclose this to shareholders. Although Strata is merely a shareholder in St Barbara, the Panel formed the view that the Application contained no persuasive evidence and notably no correspondence between the St Barbara directors and RCF evidencing RCF’s intentions and the development of its intentions in relation to changing the composition of the St Barbara board since October 2003. The Panel noted that the Share Subscription Agreement did in fact contemplate the restructuring of St Barbara’s board by the appointment of an independent non-executive chairman and that this was disclosed to St Barbara shareholders (although this was not in fact done). Accordingly, the Panel was satisfied that none of the material before it gave any support to a view that either:                RCF had an intention as at either the date that the notice for the 25 November 2003 general meeting was finalised or the date of that meeting to replace the board of St Barbara;                 the conduct of RCF in providing the information in the notice of meeting for the 25 November 2003 general meeting and subsequently requisitioning a general meeting proposing to replace certain directors,gave rise or could have given rise to unacceptable circumstances in relation to St Barbara in the sense used in Chapter 6 of the Act. **(c) Decision**In consideration of the above, the Panel decided not to commence proceedings in relation to the Application under Regulation 20 of the [ASIC Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56757" \t "default). **4.5 Village Roadshow Ltd: Conclusion of panel proceedings without making declaration**On 1 July 2004, the Takeovers Panel announced that it has concluded the proceeding (the Proceeding) arising from the application (the Application) from Boswell Filmgesellschaft mbH (Boswell) dated 15 June 2004 alleging unacceptable circumstances in relation to the affairs of Village Roadshow Limited (VRL) and in particular, VRL’s on-market buy-back of ordinary shares, which was initially announced on 28 May 2004 (the Buy-back). The Application was described in more detail in the Panel’s previous announcement dated 15 June 2004. The Panel considered that at the time of the Application, holders of VRL ordinary shares had not been given enough information to enable them to assess the merits of the Buy-back, and that as a result, the acquisition of shares under the Buy-back would not take place in an informed market.The Panel invited VRL to provide further information to the market in order to alleviate the Panel’s concerns. VRL accepted this offer by making an announcement on 1 July 2004 (1 July Announcement) which provided additional information in relation to the Buy-back. The 1 July Announcement was reviewed by the Panel prior to its release. The Panel also invited comments on the 1 July Announcement from the other parties to the Proceeding.At the Panel’s request, VRL agreed that it would not acquire any shares under the Buy-back until one trading day after the release of the 1 July Announcement, in order to allow the market adequate time to digest its contents.Following the release of the 1 July Announcement, the Panel concluded the Proceeding on the basis that it was not necessary or appropriate to make a declaration of unacceptable circumstances and that no order was required. |
| **5. Recent Corporate Law Decisions** |
| **5.1 Use of unsecured group funds to meet insolvency test**(By Melissa Anstey, Mallesons Stephen Jaques)Lewis v Doran [2004] NSWSC 608, New South Wales Supreme Court, Palmer J,9 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc608.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc608.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Resolutions passed by a group of companies to effect a debt restructure were alleged to be in breach of directors’ duties and to be voidable as insolvent transactions.It was held that there was a proper purpose in effecting the debt restructure and accordingly, there was no breach of directors’ duties. It was further held that the debt restructure did not amount to an insolvent transaction as the relevant company was not insolvent as at the date alleged. The Court held that in considering the solvency of the relevant company it was appropriate to take into account the funds provided to the company by other members of its corporate group. The test of insolvency is no longer restricted by the qualification that the relevant debtor be able to pay debts “from his own monies”.**(b) Facts** The first plaintiff (Liquidator) was appointed liquidator of the second plaintiff, Doran Constructions Pty Ltd (Constructions). Constructions carried on a construction business and was a member of a group of companies (Doran Group) which carried on both property holdings and construction businesses. The first to fourth defendants were directors (the Directors) of the Doran Group companies. Constructions was a wholly owned subsidiary of the sixth defendant, Doran Constructions (Australia) Pty Ltd (DCA) which was in turn a wholly owned subsidiary of the fifth defendant Doran Holdings Pty Ltd (Holdings).On 1 November 1994 resolutions (Resolutions) were passed by Constructions, DCA and Holdings the effect of which was to restructure debt in the Doran Group. Pursuant to the Resolutions, Holdings agreed to repay to Constructions a loan of $4.1m, Constructions agreed to lend $4.1m to DCA and DCA agreed to pay $4.1m to Holdings as part payment of a loan (the Restructure). The minutes of meeting of the Directors of each of Constructions, DCA and Holdings provided that the purpose of the Restructure was to ‘tidy up the balance sheets’ of the companies. The Directors contended that the purpose of the Restructure was to separate the financial affairs of the property holdings companies in the Doran Group from the financial affairs of the building and construction companies. This, it was submitted, would make it easier for Holdings to obtain finance for the Doran Group.The Liquidator contended that the purpose of the Restructure was improper and in breach of the Directors’ duties to Constructions. The Liquidator submitted that Constructions was insolvent on the date the Resolutions were passed, the Directors were aware of its insolvency and impending litigation against Constructions and, in light of this, implemented the Restructure to protect Holdings (a company of substance) against the impending litigious claim (that is, by depriving the Liquidator of the right to claim repayment of Holdings’ debt to Constructions).It was further contended by the Liquidator that Holdings, through the Directors, knowingly assisted the breaches of fiduciary duty by the Directors and was involved in their breaches (under section 232 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)). The Liquidator also contended that the Restructure was an uncommercial transaction (under section 588F of the Corporations Act) and voidable (under section 588FE(4) of the Corporations Act).On 18 July 1995 Constructions gave a charge over its assets to secure further indebtedness to Holdings (the Charge). The Liquidator alleged that as at the date of the Charge, Constructions was insolvent and that the Charge was an unfair preference (under section 588FA of the Corporations Act) and voidable (under section 588FE(4) of the Corporations Act).**(c) Decision** **(i) Insolvency**Although the Court found that the Directors were aware of the impending litigation against Constructions, it was held that the Directors did not have an improper purpose in effecting the Restructure. Based upon evidence received from the Doran Group’s financial advisor and solicitor, the facts indicated that the purpose of the Restructure was not to avoid a litigious claim but to separate the financial affairs of the Doran Group as contended by the Directors. Accordingly, in effecting the Restructure, the Directors did not have the improper purpose of protecting Holdings’ assets from the reach of Constructions’ creditors.It was held that the Directors did not fail to act in the best interests of Constructions, as the purpose of the Restructure was not an improper one. Further, in seeking professional advice in relation to the Restructure, the Directors did not lack appropriate care and skill in the discharge of their duties.On the question of Constructions’ solvency, Palmer J considered the definition of insolvency in section 95A of the Corporations Act. It was noted that the predecessors to section 95A defined insolvency as an inability to pay the debtor’s debts “from his own monies” but that these words are omitted from section 95A. The Court considered whether the omission of the words “from his own monies” removes the qualification from the definition of insolvency altogether and accordingly, whether or not a debtor’s ability to obtain funds by means of unsecured loans may be taken into account when assessing insolvency. Prior to the enactment of section 95A, the weight of authority supported the view that the requirement of a debtor to be able to pay “from his own monies” in order to demonstrate solvency excluded from consideration the debtor’s ability to obtain unsecured funds.Palmer J considered the only two decisions relating to section 95A, which specifically considered the effect of the omission of the critical words from the section; Geraldton Building Co Pty Ltd v Woodmore (1992) 8 ACSR 585 (Western Australian Supreme Court, Master Bredmeyer) and Harrison v Lewis (2001) 19 ACLC 566 (Victorian Supreme Court, Justice Mandie). The former case held the law had changed from its predecessor sections and that a pre-existing loan to the relevant company, which was secured over a third party’s assets, could be considered an asset available to the company to meet the solvency test. The latter however, held that the law had not changed from its predecessor sections and accordingly, the company’s use of a credit facility in the name of a director (and secured over that director’s assets) was not taken into consideration to defend its insolvency. Palmer J noted however, that the conclusion of insolvency in the latter case was ultimately based upon the particular facts of that case.Palmer J held that section 95A leaves the Court free to determine the question of insolvency absent the qualification that existed prior to section 95A. It was held that the question of insolvency ought to be decided by the Court as a question of “commercial reality” having regard to the particular facts of the case.Palmer J considered the Court’s task of determining a company’s solvency both retrospectively (as in the present case) or prospectively (where a company is sought to be wound up in insolvency). It was held that, in the case of retrospective insolvency, the Court has the benefit of hindsight and accordingly, may take into account whether as at and after the alleged date of insolvency, the company actually paid all of its debts as they fell due, including by use of unsecured funds made available to it by a third party. It was noted however, that where insolvency is considered prospectively, a Court may be reluctant to rely upon an assertion that a third party is prepared to provide unsecured funds. It was noted that it is not that a Court will never take into account unsecured funds in such a situation, rather, a Court will consider “as a matter of commercial reality” the willingness of a party to lend without security (for example, by virtue of a pre-existing course of conduct).It was held therefore that section 95A has changed the pre-existing law as to the definition of insolvency and now requires the Court to decide whether a company is able, as at the alleged date of insolvency, to pay all of its debts as they become payable by reference to the “commercial realities” of the situation. The facts of this case demonstrated that:               Constructions’ 1 November 1994 balance sheet did not evidence insolvency;               leading up to 1 November 1994 there was no conduct on the part of Constructions usually commensurate with insolvency; and               Constructions did in fact pay all of its debts as they became due for almost three years from the date of the alleged insolvency (it did not matter that Constructions was assisted by other Doran Group companies).Accordingly, it was held that Constructions was solvent as at 1 November 1994.For similar reasons, it was also held that Constructions was solvent on 18 July 1995 (when the Charge was given).**(ii) Insolvent and uncommercial transaction**As it was held that Constructions was not insolvent as at 1 November 1994 and that it did not become insolvent by reason of the Restructure, there was no evidence to suggest that resolving to effect and effecting the Restructure was an insolvent transaction and therefore voidable. For similar reasons it was held that the Charge was not voidable as an insolvent transaction.Palmer J provided obiter comments that the Restructure was not an uncommercial transaction. Having regard to Holdings’ position in the Doran Group as the “banker”, providing money to the subsidiaries as required, the continuing financial welfare of Holdings was of material benefit to Constructions. On the authority of Equiticorp Finance Ltd (in liq) v Bank of New Zealand (1993) 32 NSWLR 50, it was accepted that a transaction which provides a direct benefit to one company in a group may provide an indirect benefit for another.**5.2 Use of the oppression remedy to prevent the holding of a special general meeting**(By Nicola Charlston, Mallesons Stephen Jaques)Turnbull v NRMA [2004] NSWSC 577, New South Wales Supreme Court, Campbell J, 25 June 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswsc577.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswsc577.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The directors of NRMA, in their capacity as members, brought an action under the oppression provisions in sections 232 and 233 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“Act”) to prevent a meeting requisitioned by members under section 249D of the Act being held and a resolution proposed under section 249N of the Act being considered at NRMA’s next general meeting. The meeting was requisitioned and the resolutions proposed as a result of an industrial dispute which was settled prior to the holding of the special general meeting. The court held that it was within its powers under section 232 and 233 to order that the special general meeting not be held and the resolution not be considered. The holding of meeting and inclusion of the resolution in the business of NRMA’s next general meeting was held to be contrary to the interests of members of NRMA as a whole, as the reason for the calling the meeting and putting forward the resolution had disappeared and considerable expense would be incurred if the meeting were to go ahead. **(b) Facts**The directors of NRMA, in their capacity as members, sought orders that:                      a special general meeting of NRMA’s members called in response to a requisition by members under section 249D of the Corporations Act not be held. The requisition was to call a meeting to consider resolutions to amend NRMA’s constitution by including objects which were protective of the employment conditions of patrolmen and other employees of NRMA; and                      a resolution under section 249N of the Corporations Act which sought to amend the text of the resolutions set out in the section 249D requisition, not be included in the business of NRMA’s next occurring general meeting.The orders sought by the directors arose under sections 232 and 233 of the Corporations Act. Section 232 allows the court to make an order under section 233 if:(a) the conduct of the company’s affairs; or(b) an actual or proposed act or omission by or on behalf of a company; or(c) a resolution, or proposed resolution, of members or a class of members of a company;is either:(d) contrary to the interests of the members as a whole; or(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.Section 233 provides that the court may make any order under that section that the court considers appropriate in relation to a company, including orders regulating the conduct of the company’s affairs in the future, restraining a person from engaging in specified conduct or requiring a person to do a specified act.The circumstances from which the application arose related to two prior judgements of Campbell J in NRMA v Parkin [2004] NSWSC 296 and NRMA v Parkin (No 2) [2004] NSWSC 496. NRMA had been engaged in negotiations concerning the terms of employment of patrol officers employed by it, most of whom were members of the Australian Manufacturing Workers Union (AMWU). The Assistant State Secretary of the AMWU (Mr Parkin) had been involved in the conduct of the negotiations. The industrial dispute which was the impetus for the requisition was resolved on the basis that an Enterprise Bargaining Agreement (EBA) was to be entered into. NRMA agreed to accept the EBA on the condition that the court made the orders sought in this case and NRMA received an undertaking from the AMWU that they would not make any further request under section 249D or any notice under section 249N of the Act which related to the terms and conditions of employment of NRMA patrol officers or other people who provide roadside assistance to NRMA members. Mr Parkin therefore requested the NRMA board, on behalf of the AMWU and the patrol officers, not to proceed with the special general meeting and not to incur any further costs in relation to the meeting. It was established that the AMWU was the sole driving force behind the requisition and the section 249N resolution. There were no known requisitionists who had in their own interests, independent of the AMWU and the patrol officers it represented, to have the resolutions the subject of the requisition put to the special general meeting and passed. Each of the directors of NRMA, as well as Mr Parkin, expressed the view that it was not in the best interests of NRMA members for the time, expense and other resources of the company to be spent on a special general meeting that no longer had any purpose. Although some expense had already been incurred in preparing for the calling of the special general meeting, the cancellation of the meeting would result in cost savings of approximately $1.83 million.The plaintiffs contended that the case was one which fell within the circumstances in which the court could grant relief under sections 232 and 233 because the calling of the special general meeting was a proposed act by the company, as required by section 232(b), and the resolutions referred to in the requisition and the section 249N notice were proposed resolutions of members, as required by section 232(c). Further, the calling of the meeting and the passing of the resolutions were contrary to the interests of the members of NRMA as a whole and so fell within section 232(d) and, in the circumstances, were oppressive to, or unfairly prejudicial to, or unfairly discriminatory against, the members of NRMA and so fell within section 232(e). **(c) Decision** In determining whether the court could grant the relief requested and, if so, whether it was appropriate to do so in the circumstances, Campbell J considered a number of issues**.****(i)** **Is “contrary to the interests of the members as a whole” a separate basis for the court’s intervention and is the construction of section 232 affected by its part heading?**Campbell J considered in some detail previous cases relating to sections broadly analogous to sections 232 and 233, concentrating on the change in the wording of the provisions over time. While previous sections had contained a composite test, Campbell J held that changes made to the present form of section 232 and 233 made it clear that the ground of being “contrary to the interests of the members as a whole” in section 232 was intended to be an independent one to the ground of being “oppressive, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity”. The court also considered whether the construction of section 232 was affected by its part heading “Oppressive conduct of affairs”. It was held that, while headings in statutes could be taken into account in determining the meaning of a provision where the provision was ambiguous, in this case the difference in the wording of section 232 from the previous legislation made it clear that “contrary to the interests of members as a whole” was a ground on which the court could make an order under section 233, independently of whether the conduct was oppressive to, unfairly prejudicial to, or unfairly discriminatory against a member or members. The part heading could therefore not be used to limit the meaning of section 232(d).**(ii) The interaction of section 249D with sections 232 and 233**The court noted that it had repeatedly been held that the obligations of a director to call and arrange a general meeting in the circumstances set out in section 249D could be modified by an order of the court under section 1322 of the Act. Campbell J considered that, by similar reasoning, the wording of section 249D could also be made subject to the possibility of the court making an order under sections 232 and 233.**(iii) Extent of the court’s powers under section 233**Campbell J noted that while there was authority for the predecessor of section 232 and 233 being used to make an order that a company meeting be held, it was a more significant exercise of power to decide that a company meeting, which would otherwise be held, ought not to be held. Campbell J considered the gradual widening over time of the type of order which the court can make under section 233, and concluded that an order that a meeting not be held fit comfortably within the scope of the power in section 233, specifically section 233(1)(c) which allows “an order regulating the affairs of a body corporate”. **(iv) Should the power be exercised?**Having established that the court had the power to make the orders sought, Campbell J turned to the question of whether that power should be exercised in the circumstances, noting that it was likely to be only in a very rare case that a court would decide to order that a company meeting validly requisitioned need not be held, or that a resolution validly proposed need not be put to a meeting. However Campbell J concluded that the present case was a case where it was appropriate to exercise the power as:               the settlement of the industrial dispute meant that the entire point of calling the meeting had gone away and there was no longer anyone who wanted to propose or speak in favour of the motions;               allowing the holding of the meeting and the proposing of the resolutions would involve large expense;               no one had been able to point to any power other than sections 232 and 233 under which the court would be able to intervene to not require the meeting to be held;               if the power of the court under sections 232 and 233 were not exercised in the present circumstances, it would mean that “the court would be deciding it should stand and watch while a large amount of work was done, members were sent and asked to consider documents and over $1.8 million was spent, all for no purpose”.Campbell J was therefore satisfied that it would be contrary to the interests of the members of NRMA as a whole for the meeting procedure to continue any further and ordered that the special general meeting not be called or convened in response to the requisition under section 249D and that the resolution under section 249N not be included in the business of NRMA’s next occurring general meeting. **5.3 Non-receipt is not tantamount to non-delivery for the purpose of serving a statutory demand**(By Sarah d'Oliveyra, Phillips Fox)Perpetual Nominees v Masri Apartments; Perpetual Nominees v AUS Constructions [2004] NSWSC 500, New South Wales Supreme Court, Austin J, 9 June 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswsc500.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswsc500.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case clarifies when a statutory demand is validly 'served' in accordance with section 109X of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act'), for the purpose of section 459F(2)(b) of the Act and within the broader context of Part 5.4 of the Act. In this case, Perpetual Nominees ('Perpetual') made application to the Court under section 459P of the Act for the winding up of Masri Apartments ('Masri') and AUS Constructions ('AUS') (together, 'the defendants'), on the basis that it would be 'just and equitable' for the Court to do so under section 461(1)(k). In particular, Perpetual sought to rely on the presumption of insolvency arising under section 459C(2)(a) of the Act, which states:"The Court must presume that the company is insolvent if, during or after the 3 months when the application was made:(a)        the company has failed (as defined in section 459F) to comply with the statutory demand…"Section 459F relevantly provides:"(1) If, as at the end of the end of the period for compliance with a statutory demand, the demand is still in effect and the company has not complied with it, the company is taken to fail with the demand at the end of that period.(2)              The period for compliance with a statutory demand is:…(b)…21 days after the demand is served."In its defence, Masri claimed that Perpetual could not rely on the presumption of insolvency under section 459C(2)(a) of the Act, because the statutory demand was not served on Masri at its registered office and therefore was not 'served' for the purpose of the Act.Section 109X(1) of the Act states that a document may be served on a company by, inter alia, "leaving it at or posting it to, the company's registered office". Upon application of section 29(1) of the [Acts Interpretation Act 1901 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "default) and the principles governing a change of address of registered office under section 142(3) of the Act, Austin J held in favour of Perpetual, despite the fact that the defendants did not receive the statutory demand. **(b) Facts**On 5 March 2004, Perpetual's solicitors obtained the defendants' registered addresses from the Australian Securities & Investments Commission ('ASIC'). On 10 March 2004, Perpetual's solicitors arranged for a statutory demand to be posted by pre-paid post to the defendants at their registered offices (as at 5 March 2004), together with a letter and an affidavit in support of the statutory demand, in compliance with section 459E of the Act ('the statutory demand'). It was claimed at the hearing that the defendants never received the statutory demand. In particular, Masri claimed that it first received notice of Perpetual's application for winding up upon receipt of the originating process for winding up ('the originating process') in April 2004.It was revealed during the course of the hearing that Perpetual's solicitors became aware of the defendants' change in registered address on 19 April 2004. Perpetual's solicitors were aware that the change was effective from 11 March 2004. However, rather than arranging for delivery of another statutory demand, Perpetual's solicitors filed and served the originating process at the new registered address (at least in Masri's case).Masri subsequently contended at the hearing that Perpetual could not rely on the presumption of insolvency under section 459C(2)(a) of the Act, arising out of failure to comply with the statutory demand, because the statutory demand was not served on Masri at its registered office and therefore was not 'served' for the purpose of the Act.**(c) Decision**Austin J held that Perpetual was entitled to rely on the presumption of insolvency under section 459C(2)(a) of the Act because the statutory demands were properly served and not complied with by the defendants.In particular, Austin J made the following findings:               Section 29(1) of the Acts Interpretation Act 1901 (Cth) ('the Acts Interpretation Act') applies to the Act by virtue of section 5C(1) of the Act.               The Acts Interpretation Act states that service is deemed to be effected by "properly addressing, prepaying and posting the document as a letter, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post".               The defendants' change of address took effect on the seventh day after the notice of change of address was lodged (11 March 2004), in accordance with section 142(3) of the Act.               Therefore, on 10 March 2004 (the date upon which the statutory demand was posted), the statutory demand was 'served' in accordance with the Act, as interpreted in accordance with the Acts Interpretation Act.By way of dicta, Austin J noted the absence of any bad faith on the part of Perpetual's solicitors in posting the statutory demand to the old address. Furthermore, Austin J granted the defendants leave to make application in the Corporations List in relation to the order for winding up. Austin J's finding applied equally to AUS (the second defendant in the consolidated proceeding). He noted that both matters raised identical factual scenarios except that in AUS' case, the originating motion was delivered to the incorrect address. However, Austin J considered AUS to have waived its entitlement to rely on improper service in relation to the originating process because it filed a notice of appearance and appeared by counsel at the hearing. **5.4 Reinstatement of a company following ASIC deregistration cannot be subject to conditions**(By Rohan Bartlett, Phillips Fox)Anglo Coal (Drayton Management) Pty Ltd [2004] NSWSC 604, New South Wales Supreme Court, Barrett J, 5 July 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc604.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/july/2004nswsc604.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**An application was made to reinstate a company that had been deregistered. The plaintiffs were attempting to pursue a legal claim that required access to the formerly registered company's insurance, although it was not certain that the insurance actually existed. Barrett J found that reinstatement was appropriate, but rejected conditions suggested by ASIC.**(b) Facts** O&K Australia Pty Ltd was deregistered by ASIC under section 601AB of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), indicating that the company's annual return was at least six months late, no other document had been lodged within 18 months and there was no reason to believe that the company was carrying on business. No active investigation was conducted by ASIC. Rather, it could be categorized as an administrative cleansing of the register.An order was sought by the plaintiffs to reinstate the registration of the company under section 601AH(2). This was in order to pursue a possible claim of misrepresentation or misleading and deceptive conduct against the company. The company was a wholly owned subsidiary of an overseas corporation. This corporation had engaged in correspondence with the plaintiffs over the possibility of the company having had relevant insurance upon which the plaintiffs could claim against.**(c) Decision** Having regard to the possibility of claimable insurance, and to the fact that the initial deregistration was administrative in nature, Barrett J was satisfied that it was “just”, in terms of section 601AH(2)(b), that the registration be reinstated.As the company was a wholly owned subsidiary of another corporation, his Honour noted that he had no reservations about the fact that reinstatement would cause the former directors to go back into office, as any difficulties that arose could be resolved by the parent company. A letter from ASIC was tendered, stating that the application for reinstatement would not be opposed, provided that the reinstatement was "for the limited purpose disclosed”. Barrett J held that the legislation does not provide for such conditional reinstatement, citing a similar decision by McGill DCJ of the District Court of Queensland in Queensland Building Services Authority v Dragonstone Pty Ltd [2004] QDC 078. It was held that there can either be reinstatement or no reinstatement and, as the plaintiffs had adequately made out their case for relief, there should be reinstatement in this case.**5.5 Acting in concert**(By Stephen Magee)Bateman v Newhaven Park Stud Ltd [2004] NSWSC 566, New South Wales Supreme Court, Barrett J, 29 June 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswsc566.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/june/2004nswsc566.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Simply being members of the same family (or members of the same board) doesn't constitute "acting in concert" for the purposes of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). **(b) Facts** Newhaven Park Stud was going to do a selective buy-back. One of the shareholders selling back was RJ Kelly. Newhaven's directors (the majority of whom were RJ Kelly's brothers) recommended the buy-back and indicated they would vote in favour of it. Under section 257D(1)(a), neither RJ Kelly nor his associates could vote in favour of the buy-back. The buy-back resolution was duly passed. A group of shareholders wanted to oppose the buy-back (and a related sale of Newhaven assets) under section 232 (the oppression remedy). They applied for an interlocutory injunction to prevent the buy-back (and the sale of Newhaven assets) being completed. The plaintiff shareholders alleged that one of the shareholders voting in favour - JWK Nominees - was an associate of RJ Kelly (within the meaning of section 15(1)(a)), for a number of reasons. The most important was that RJ Kelly and his brothers were the directors and shareholders of JWK Nominees. This pattern of ownership, said the plaintiffs, gave rise to a strong inference that JWK Nominees was acting "in concert" with RJ Kelly within the meaning of section 15(1)(a). The plaintiffs also argued that an interlocutory order was necessary to preserve Newhaven's assets pending a full trial.**(c) Decision** The Court dismissed the plaintiffs' arguments. Its main point was that section 15 requires persons to act together in relation to the relevant matter (unlike sections 11 or 13, which create associates out of relationships). The relevant matter in the case of section 257D(1)(a) is the voting on the special resolution to approve the buy-back.In this case, the plaintiff hadn't shown any concerted actions by RJ Kelly and the other Kellys in relation to the vote. The relevant test, said the Court, could be expressed in various disparate ways:               was there an understanding between RJ Kelly and JWK Nominees as to their common purpose or object in relation to the matter of voting?                was there knowing conduct resulting from communication between RJ Kelly and JWK Nominees on the matter of voting?                was there a consensual adoption of an understanding common to RJ Kelly and JWK Nominees on the matter of voting?                was there some mutual contemporaneous engagement in relation to that matter?The Court also pointed out that the parties' actions might be explicable as "no more than spontaneous and independent action on the part of each". That was, in fact, the explanation that the Court preferred:               the mere fact of family relationship was irrelevant;               the fact that RJ Kelly's brothers voted in favour of the buy-back showed that they believed that it was in the best interests of Newhaven shareholders, which would explain why they also directed JWK Nominees to vote in favour;               RJ Kelly was a minority on the JWK Nominees board, so he couldn't make JWK Nominees vote the way he wanted - and there was no reason for him to try to do so, given that the other directors were already going to vote in favour of the buy-back.The Court concluded that:"In the absence of any direct evidence of actual communication as to voting intentions or of common intentions actually and knowingly shared (as distinct from coinciding) in relation to the section.257D(1)(a) special resolution of 26 May 2004, I am not satisfied that there is any serious question to be tried as to whether R J Kelly was, as envisaged by section.15(1)(a), acting in concert with JWK Nominees Pty Ltd “in respect of” the matter of voting on that resolution."The Court also rejected the argument that an interlocutory order was necessary to preserve Newhaven's assets. The assets being sold belonged to Newhaven, not to its shareholders, so the plaintiff shareholders couldn't claim an interest in them. In addition, the range of remedial orders allowable under section 232 was such that completion of the buy-back and asset sale could not be said to render the full trial nugatory:" If the directors or interests associated with them were shown to have profited improperly, there might be an order for an account of profits: Fexuto Pty Ltd v Busnjak Holdings Pty Ltd (2001) 37 ACSR 672. Another possibility is an order that the company itself purchase the plaintiffs’ shares at a price reflecting reversal or neutralisation of the effects of the oppression: section 233(1)(e). There might be an order that the shareholders who have benefited from the oppressive conduct, being parties to the proceedings, buy the plaintiffs’ shares at a price not reflecting any depressing effect of the oppression: section 233(1)(d). There might even be an order that the beneficiaries of the oppression sell their shares to the plaintiffs: Re Brenfield Squash Racquets Club Ltd [1996] 2 BCLC 184."**(d) Comment**The "acting in concert" element of the associate definition is a perennial issue in practice, but there is little judicial guidance as to its meaning. This case is a useful contribution to the relevant case law.**5.6 Discretionary examination of persons about a corporation: application by a liquidator**(By Lindsay Mackay, Freehills)In the matter of Norman’s Wines Ltd (receivers and managers appointed (in liq); Harvey v Burfield [2004] SASC 171, Supreme Court of South Australia (Full Court), Mullighan J, Gray J, Vanstone J, 10 June 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/june/2004sasc%201711.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/june/2004sasc%201711.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case considered the scope for orders by a liquidator for examination of persons under section 596B of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the ‘Act’). Division 1 of Part 5.9 of the Act enables liquidators and other eligible applicants to apply to the Court to summon persons who have been concerned in the affairs of a corporation that is under external administration to give information about that corporation’s affairs. Specifically section 596B provides for the Court to exercise a discretion to summon persons who are not “examinable officers” of the corporation, but may be able to give information about the corporation’s examinable affairs. Examination of “examinable officers” is dealt with under the mandatory examination provisions in section 596A. In this case the liquidators had applied for orders to examine the company’s auditors. The persons to be examined had applied to have the orders set aside and were appealing against the refusal of the judge to set aside the orders. The majority of the Supreme Court of South Australia dismissed the appeal, finding that there was no reason for the examination orders to be set aside on the grounds that the liquidators had applied for the orders for an improper purpose. The fact that a creditor’s action against the auditors might also benefit from the examination did not of itself make the liquidator’s purpose one that was foreign to the purpose of the legislation. An offer by the Examinees to cooperate with the liquidator’s investigations did not make examination unnecessary because the examination afforded benefits to the liquidators beyond that of the offer to cooperate.**(b) Facts** The liquidators for Normans Wines Limited (in liq) (‘Normans’), a listed wine company, applied to the Court to make orders for the examination of members of the company’s auditors, Deloitte Touch Tohmatsu, (collectively ‘Examinees’) and for the production of documents by these members and by Deloitte. The largest creditor, Sandhurst Trustees Limited (‘Sandhurst’), the trustee for unsecured note holders in Normans, had filed proceedings against Deloitte for alleged breaches of common law and statutory duties. The Examinees and Deloitte applied to set aside the examination and production orders alleging that:               the liquidators had applied for examination for improper purposes as their sole or dominant purpose was to aid the case of Sandhurst;               the liquidators did not have a legitimate interest in assisting the note holders to recover damages;               the liquidators did not make full and frank disclosure; and                the liquidators were not entitled to obtain orders for their examination where the Examinees had made an offer to cooperate in the investigations.**(c) Decision** **(i) Section 596B**Under section 596B, the Court has the discretion to summon a person to be examined, even though they are not an officer of the corporation, where they have been concerned in the examinable affairs of the corporation or may be able to give information about the corporation’s examinable affairs. The party applying to the Court to exercise this discretion, in this case the liquidator, must establish by affidavit that the examinee is able to give information about the examinable affairs of the company and that the examination is for a purpose that this section “is designed to serve”. If the order has been obtained for a purpose outside what the section is designed to serve or where there has not been full disclosure, then the order is set aside or stayed as a misuse of the power.The Court found that the purpose of Part 5.9 of the Act is to provide a liquidator with the means of discovering the assets of a corporation, their whereabouts, the identity of creditors, the extent of the liabilities of the corporation, reasons for the demise of the corporation and whether there are any civil or criminal offences that could be prosecuted. As the power amounts to a statutory intrusion into common law rights (the right to silence and privacy) there are strict safeguards on the exercise of this power. These include the requirement to file an affidavit and make full and frank disclosure to the Court of all matters which may impact upon the decision to examine someone. The affidavit is not available for inspection by the examinee unless the Court orders it to be disclosed. Therefore there is a particularly heavy onus on the applicant to make full and frank disclosure. The Court has a discretion to order the production of the confidential affidavit but the examinee will need to establish a good reason. The examinee is not permitted to have the affidavit disclosed merely to “fish” for a case, but once an arguable case is shown, the discretion will normally be exercised in favour of the examinee.**(ii) Was the application made for an improper purpose?**The Court found that the Examinees, as the auditors and taxation and accounting advisors of Normans, could be expected to be in a position to provide relevant information about the examinable affairs of Normans. The fact that Sandhurst in their action against Deloitte had a similar interest to the liquidators did not of itself make out an arguable case of improper purpose. **(iii) Did the liquidators satisfy the disclosure obligations?**The appellants contended that the liquidators had failed to disclose to the Court that Sandhurst had issued proceedings against Deloitte, that there was an agreement between the liquidators and Sandhurst and that the same firm of solicitors was engaged for both the liquidators and Sandhurst. The Court rejected this claim considering that adequate disclosure had been made on these points. The majority outlined the reason for the confidentiality of the affidavits as to allow the liquidator to keep the issues about which examination is sought confidential from the Examinees to prevent the examinee from defeating the purpose of the examination. Therefore for the Court to exercise its discretion to disclose these materials, the examinee must already be able to show an arguable case and not merely rely on potentially being able to construe an argument on the basis of the information to be disclosed.In this case the liquidators had referred to the contents of the confidential affidavits in subsequent open affidavits. The issue was whether this amounted to a waiver of the confidentiality of the affidavits. The majority found that the liquidators had not acted inconsistently with the filing of the confidential affidavits. Gray J dissented on this point, considering that principles of waiver of legal professional privilege should be applied to find that the case of the Examinees was unfairly prejudiced and the contents of the affidavits should be disclosed to the Examinees and the application to set aside the order for examination should be reconsidered on the basis of any material information coming to light.**(iv) Effect of the offer to cooperate**The Examinees had made an offer to the liquidators to cooperate in their investigations and argued that this offer meant that the orders for examination were unnecessary. The Court found that the contents of the offer to cooperate fell far short of the advantages to the liquidators of ordering examination. The offer to cooperate had been left open ended and was made general in terms and therefore was an illusory promise. The advantages of a formal examination including an unqualified commitment to respond to questions that might be asked and verification of information on oath were not implied in the offer to cooperate.The majority suggested that in some circumstances such an offer to cooperate might render examination inappropriate, but this would be in cases where the enquiries were of a limited scope.**5.7 Discretionary examination of persons about a corporation: application by a trustee authorised by ASIC**(By Lindsay Mackay, Freehills)Sandhurst Trustees Ltd v Harvey [2004] SASC 157, Supreme Court of South Australia (Full Court), Doyle CJ, Perry J, Bleby J, 8 June 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/june/2004sasc157.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/june/2004sasc157.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case involved a similar application to the previous case (item 5.6 of this issue of the Bulletin), this time by Sandhurst Trustees Limited as an entity authorised by ASIC in writing to make an application under Division 1 of Part 5.9 of the Act. Again the Examinees (Deloitte and specific members of Deloitte engaged in the auditing of Normans) had applied to have the application for examination to be set aside and in this case had been successful. Sandhurst now appeals this decision. The case involved the similar issue to the previous case of whether the application had been brought for an improper purpose and also a secondary issue of whether the trust deed appointing Sandhurst as trustee for the holders of unsecured notes in Normans prevented Sandhurst from bringing an application for examination under section 596B.**(b) Facts** Sandhurst Trustees Limited was the trustee for holders of unsecured notes in Normans pursuant to a trust deed. As outlined in the facts of the previous case, Sandhurst had instituted proceedings alleging that Deloitte owed a duty of care to Sandhurst because they knew that as trustee they would rely on the performance of Deloitte’s audit function and that Deloitte was in breach by providing unqualified audit opinions, by failing to report matters and further that the prospectus issued was misleading. Sandhurst had not yet served notice of these proceedings on Deloitte. ASIC authorised Sandhurst to make application under Division 1 of Part 5.9 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (including section 596B). Sandhurst then applied for orders for examination and production of documents for the Examinees, similarly to the liquidators in the previous case. The Examinees applied to have these set aside. The master made orders setting aside the orders for examination and production of documents, finding that the trust deed did not authorise Sandhurst to apply for the examination and production orders. Sandhurst now appeals this decision.**(c) Decision** The issue in this case was the scope of the discretion conferred by section 596B and whether there are circumstances in this case for exercising this discretion. A secondary issue was whether the deed was capable of depriving Sandhurst of the power to apply for the orders.**(i) Scope of section 596B**The purpose of the provision was indicated by the words of section 596B(1)(b): to gather information about the examinable affairs of the corporation with a view to exposing misconduct or provide information that would advance the external administration of the corporation. The Court quoted from previous decisions and emphasised that there be a uniformity of approach and that the Court should not depart from this line of authority.The Court drew the following general conclusions from the authorities:               the discretion under section 596B is very wide;               the fact that the examination might give an advantage to a particular creditor or person or even if it was made at the instance of that creditor or person does not lead to the conclusion that it was made for an improper purpose;               however the power is not to be exercised where the sole purpose is to benefit an individual with a claim or where the applicant has no legitimate interest in bringing the application; and               where a creditor is the applicant for an order for examination, the examination must have the potential to serve the purpose of the legislation: either by assisting the liquidation or assisting in the identification or prosecution of misconduct.**(ii) Should the Court exercise its discretion to order examination in this case?**The Court found that in this case the examination had been ordered for the purpose of determining whether the Examinees were in breach of their duty to Normans and might result in information of legitimate interest to ASIC, regulators of the auditing profession and the liquidator of Normans, and therefore was a purpose contemplated by section 596B. The examination might expose misconduct by Deloitte, and Sandhurst as a trustee had a legitimate interest in exposing that misconduct. The examination might also provide evidence for a possible claim by Normans or Sandhurst against Deloitte and therefore might enhance the prospect of the note holders recovering from Normans or might reduce the claims against Normans if the note holders claims could be partially satisfied by relief against Deloitte. At the very least the examination would provide information to enable Sandhurst to advise the note holders whether Sandhurst should proceed with their action against Deloitte. The orders might also result in the disclosure of information of general relevance to the liquidator of Normans.The Court suggested that there was no reason why the order should be refused because there was cooperation between Sandhurst and Normans unless it would cause Deloitte to suffer unnecessary inconvenience or expense or would subject them to unnecessary examination and that this issue could be dealt with when the examination takes place.**(iii) Does the trust deed prevent an application under section 596B?**The Court found that Sandhurst had the capacity to exercise the powers in section 596B. In reaching this conclusion, the Court referred to and agreed with the proposition in Re Italo-Australian Centre (1999) 30 ACSR 388 that a deed of arrangement could not curtail the extent of the powers conferred under section 596B.However, the Court found it necessary to consider whether the provisions of the deed in this case made it an inappropriate case in which to exercise its discretion as the deed might provide reasons why the applicant had no legitimate interest in applying for the orders. The Court suggested that the capacity in which the applicant acts might be relevant to the decision of whether or not an order for examination should be made. Here the Court found that the powers of Sandhurst were not found exclusively in the deed, s1056 of the Act provided that Sandhurst had the power to submit proposals to the note holders. This necessarily implied that Sandhurst had the power to inquire into breaches by Normans which might provide a basis for a proposal to protect the note holders’ investment. The Court reasoned that this implied the capacity to exercise the powers of investigation conferred by section 596B.In obiter the Court suggested however that Sandhurst’s claim against Deloitte for breaches of duty would face serious obstacles because under the trust deed it was difficult to show that Sandhurst had suffered loss or that Deloitte was engaged to exercise professional skills for the benefit of Sandhurst. The Court suggested that this action provided a tenuous basis for examination orders because it was difficult to see how the action could succeed. However the examination orders were sustainable on the broader bases outlined above.**5.8 Valuing a shareholding pursuant to an oppressive conduct order**(Jonathan Stewart, Blake Dawson Waldron)Smith Martis Cork & Rajan Pty Ltd v Benjamin Corporation Pty Ltd [2004] FCAFC 153, Full Court of the Federal Court of Australia, Wilcox, Marshall and Jacobson JJ, 10 June 2004The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/june/2004fcafc153.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/june/2004fcafc153.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Introduction**This case was an appeal from the decision of Carr J in Benjamin Corporation Pty Ltd v Smith Martis Cork & Rajan Pty Ltd [2003] FCA 1471. The case concerned Smith Martis Cork & Rajan Pty Ltd ("the Company") which was acquired by its namesakes in 1991. In 1992 or 1993 these individuals transferred their shareholdings in the Company to their family trusts. Mr Martis' shareholding was held through Benjamin Corporation Pty Ltd ("Benjamin"). The Company carried on a financial planning and investment advice business. Each of the Company's namesakes were authorised representatives of the Company. In that capacity each was paid eighty percent of the gross fees earned from servicing his or her own clients, less a deduction for direct expenses. The rest of the Company's earnings were paid out to the shareholders through salaries and expenses. No dividend was ever declared or paid on the shares. **(b) The decision at first instance**On 10 May 2002, Martis was excluded from the management of the Company. Carr J held that his exclusion amounted to conduct that was oppressive to, unfairly prejudicial to, or unfairly discriminatory against Martis. Carr J, exercising the discretion conferred by sections 232 and 233 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), ordered that Benjamin's shares be acquired by the other shareholders at a fair price (under section 233(e)). Carr J's valuation was based on the Spencer v Commonwealth(1907) 5 CLR 418 principles of what a willing but not anxious buyer would pay to a willing but not anxious seller. However, Carr J had increased the price to be paid for Benjamin's shares, based on his acceptance of the evidence of an expert, by adjusting for the way the Company distributed its income through the gross fee system, salaries and expenses rather than dividends. Carr J effectively increased the sum attributable to the Company's earnings in the calculation of future maintainable earnings which in turn led to a higher price than would otherwise be paid. The price for Benjamin's shares was set at $737,000. **(c) The appeal**Carr J's finding of oppressive behaviour, and the order that the shares be compulsorily purchased by the other shareholders, were not disputed on appeal. Instead, the appellants argued that Carr J's valuation constituted a miscarriage of his discretion as it was not a fair price for Benjamin's shares. In particular, they argued that the price to be paid for Benjamin's shares should not reflect the benefits derived by Martis personally.The Full Court reviewed the legal authorities for the exercise of the discretion conferred by section 233 of the Corporations Act and held that the authorities clearly establish that the court has a wide discretion as to the appropriate remedy to be awarded and, if compulsory purchase of shares is ordered, as to the mode of valuation of those shares. The only restriction on the way price may be calculated under this discretion is that it must be a proper exercise of judicial discretion.The Full Court held that the exercise of the discretion was proper. They affirmed Carr J's decision that considered Martis' benefits in the valuation of Benjamin's shares on three bases:                Section 232(e) is wider that its predecessor and permits a Court to look through Benjamin to benefits derived by or though the efforts of Martis from the Company for the purpose of calculating fair value.                The purpose of the order under section 233(e) is to compensate the oppressed shareholder for the oppression. This is done by ordering the other members to purchase the oppressed shareholder's shares at a price fixed by the court that is the fair value of those shares in all the circumstances. Marits' benefits were a circumstance that must be considered.                The loss of Martis' advantage of benefiting from the generous eighty percent commission by the oppressive conduct could not reasonably be denied from affecting the price of Benjamin's shareholding. The Full Court stated that to not take Martis' benefits into consideration in undertaking the valuation of Benjamin's share would be to effectively deny compensation for the oppression suffered. **(d) Conclusion**For these reasons, the Full Court held that there was no error of principle in Carr J's determination of the fair value of the shares held by Benjamin Corporation and, thus, the discretion did not miscarry.**5.9 Are unfair contract claims for redundancy compensation provable claims in a winding up?**(By Fiona Hammond, Blake Dawson Waldron)Buckingham v Pan Laboratories (Australia) Pty Limited (in liquidation) [2004] FCA 597, Federal Court of Australia, Jacobson J, 13 May 2004The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fca597.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fca597.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The Federal Court of Australia has followed the decision in Silbermann v One.Tel Ltd (2002) 20 ACLC 846 ("One.Tel") in finding that an unfair contract claim is not a provable claim against a company under section 553 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act").**(b) Facts**The four applicants sought leave to commence or continue proceedings against the respondent in the Industrial Relations Commission of New South Wales. The applications were made under section 471B of the Act.The applicants were former employees of the respondent whose employment had been terminated on the ground of redundancy on 2 October 2003. On 23 May 2003, the respondent had appointed administrators under section 436A of the Act, and liquidators were appointed on 23 September 2003 following a resolution of the creditors under section 439C.The applicants each filed a summons for relief in the Industrial Relations Commission on 7 November 2003. Each claimed an order under section 106 of the [Industrial Relations Act 1996 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4496" \t "default) ("IR Act") declaring the applicant's contract of employment to be unfair, and an order that the contract of employment be varied to include a clause ordering the respondent to pay an amount for redundancy over and above the amount paid on termination of employment. Two of the summonses sought an order that the purported termination for redundancy was not bona fide.Each applicant also sought to claim, in the alternative, an order that they be paid compensation under section 89 of the IR Act on the ground that their termination was unfair.**(c) Decision**The applications for leave to continue the proceedings in the Industrial Relations Commission of New South Wales were refused with costs.**(i) Section 106 of the IR Act**The question was whether a claim under section 106 of the IR Act is a future claim in the sense referred to in section 553(1) of the Act.Jacobson J followed the decision of Gzell J in One.Tel in finding that a claim under section 106 of the IR Act cannot be characterised as a "future claim" which may be admitted to proof in a winding up. In that case, Gzell J held that a claim under section 106 of the IR Act by former officers of a company for a declaration that their contracts of employment were unfair insofar as they failed to provide indemnity against credit card liability was not a provable claim against the company under section 553 of the Act. His Honour was of the view that the conclusion reached by Gzell J in One.Tel was correct, as it is supported by two authorities of the New South Wales Court of Appeal (Fisher v Madden (2001–2002) 54 NSWLR 179 and Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd (1992) 28 NSWLR 443), and also by authorities concerning the need for leave to proceed.His Honour stated the fundamental principle that leave is necessary to ensure that no person will gain an advantage to which they are not properly entitled. His Honour also stated the principle underlying the law of insolvency that upon the making of a winding up order, the rights of all parties, including creditors, crystallise. The assets of the company are to be realised and distributed among the existing creditors. Jacobson J referred to Commercial Banking Co of Sydney Ltd v George Hudson Pty Ltd (in Liq) (1973) 131 CLR 605, in which Menzies J stated the "deeply rooted principle of company law that, when liquidation has commenced, one creditor should not be assisted by the court to improve its position vis-à-vis other creditors."His Honour held that it would be inconsistent with these fundamental principles for a claim under section 106 of the IR Act to be characterised as a "future claim" which may be admitted to proof in a winding up. His Honour perceived section 106 to give the Industrial Relations Commission a wide discretion to alter, retrospectively, the rights of existing creditors which have already crystallised on liquidation. His Honour was of the view that the power to alter those rights would flow from a finding of unfairness in a claim made by a person to whom no obligation is owed at the relevant date. Jacobson J held that it cannot have been the intention of the legislature that a claim to the exercise of such a jurisdiction would be a future claim admissible to proof against a company under section 553(1) of the Act.**(ii) Lack of bona fides**His Honour did not grant leave to commence or continue a claim of lack of bona fides because the evidence did not demonstrate a serious question to be tried. Rather, the evidence consisted "merely of bald assertions" that the relevant applicant was immediately replaced by another named person.**(iii) Section 89 of the IR Act**Jacobson J did not grant leave to pursue the claims under section 89 of the IR Act for a number of reasons, including that the claims were all out of time under section 85(1) of the IR Act, and that the claims were not future claims within section 553(1) of the Act for the same reasons as claims brought under section 106(1).**5.10 For a transfer of undertakings and liabilities as part of a scheme of arrangement, the transferee company must be a party to the transferor’s application to the court**(By Anna Chung, Corrs Chambers Westgarth)Royal Victorian Institute for the Blind Limited v RBS.RVIB.VAF Limited, in the matter of Royal Victorian Institute for the Blind Limited [2004] FCA 735, Federal Court of Australia, Finkelstein J, 9 June 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/june/2004fca735.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/june/2004fca735.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The Federal Court considered whether, for a transfer of undertakings and liabilities, the transferee company in relation to the transferor’s scheme of arrangement must be:               a party to that scheme; and               a party to the application to a Court for the transfer of such undertakings and liabilities pursuant to section 413(1)(a) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).The Federal Court held that, for a transfer of undertakings and liabilities, a transferee company does not need to be a party to the transferor’s scheme of arrangement if the legal rights of the creditors and members of the transferee company are not affected by the transferor’s scheme. However, the Federal Court held that to transfer such undertakings and liabilities pursuant to section 413(1)(a) of the Corporations Act, the transferee company must be a party to the application to the Court for such an order. **(b) Relevant law**Section 413(1)(a) of the Corporations Act provides that a Court may, either by the order approving the arrangement or by a later order, provide for “the whole or a part of the undertaking and of the property or liabilities of the transferor” to be transferred to the transferee company for the purposes of, or in connection with a scheme of arrangement. **(c) Facts**The Royal Victorian Institute for the Blind Limited, Royal Blind Society of New South Wales and Vision Australia Foundation, all companies limited by guarantee, (Plaintiffs) proposed a reconstruction by several schemes of arrangement. The Plaintiffs applied to the Federal Court to convene meetings of the Plaintiffs’ members to consider, and if thought fit, approve the schemes.The object of the reconstruction was to amalgamate the Plaintiffs’ undertakings into one, so that they may attract more funding, and provide services to the blind and vision impaired with greater efficiency at a reduced cost.Under the proposed schemes:               the undertaking of the Plaintiffs would be taken over by a new entity, RBS.RVIB.VAF Limited (Transferee Company); and                the members of each Plaintiff would agree to have their memberships cancelled and to become members of the Transferee Company.An unusual element of these schemes was that the Transferee Company was not a party to any of the schemes and not a party to the application to the Federal Court for the transfer of the Plaintiffs’ undertakings and liabilities to the Transferee Company. Membership of the Transferee Company would be effected by a deed poll made by the Transferee Company in favour of the Plaintiffs and their members rather than the schemes themselves.**(c) Decision****(i) Does the Transferee Company need to be a party to the Plaintiffs’ schemes?**The Federal Court held that it is not necessary for the Transferee Company to be a party to the Plaintiffs’ schemes or for there to be a scheme for the Transferee Company because the legal rights of the creditors and members of the Transferee Company are not affected by the schemes. In coming to this view, the Federal Court noted that the scheme procedure is available to a company limited by guarantee, which has no share capital. Furthermore, the consents of the creditors and members of the Transferee Company were not required at any stage of the implementation of the arrangements and the Transferee Company’s involvement could be secured by a separate contract. **(ii) Does the Transferee Company need to be a party to the application?**Although the Transferee Company did not need to be a party to the Plaintiff’s schemes, the Federal Court held that the Transferee Company must be joined as a defendant to the application to transfer the Plaintiff’s undertakings and liabilities. The reason being it is the presence of the Transferee Company as a party which gives the Court jurisdiction to make the order.  |
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