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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Project officer positions - Centre for Corporate Law and Securities Regulation**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne has advertised several project officer positions. These positions have a research focus. Several positions may be available depending upon the applications received. They are:  1.      A part-time (0.5 EFT) continuing position 2.      A full-time contract position for 6 months to 12 months 3.      Several part-time positions (0.4, 0.6 or 0.8 EFT) for 6 to 12 months.  More information about the positions is available at [http://www.hr.unimelb.edu.au/jobs/](http://www.hr.unimelb.edu.au/jobs/" \t "_new) under "general staff vacancies".  **1.2 Continuous disclosure seminar - Sydney - 8 June 2004**  On 8 June 2004, the Centre for Corporate Law is holding, in Sydney, an important seminar on continuous disclosure.   On 20 May, ASIC released its guide on how it will use its proposed infringement notice power to enforce compliance with the continuous disclosure rules. The seminar is therefore very topical.  Australia’s continuous disclosure regime is regarded as critical to an informed market and the confidence of investors. However, concerns have arisen about whether the ASX Listing Rule requires disclosure prematurely and thereby disadvantages companies. In addition, the Federal Government, as part of the [CLERP 9 Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default) which is currently before Parliament, proposes to give ASIC its own fining power in relation to breaches of the continuous disclosure obligations. This proposal has been strongly opposed by key groups such as the Institute of Company Directors, the Business Council of Australia, Chartered Secretaries Australia and the Law Council of Australia. Among other issues, the seminar will address these concerns and also explore how ASIC proposes to use its new fining power.  This seminar will address:           When is information “ripe for disclosure” and what consequences flow from getting it wrong          ASX’s perspective on promoting a culture of disclosure          ASIC’s policy on exercising its power to issue infringement notices for breaches of the continuous disclosure regime          A company’s perspective on how it will address its continuous disclosure obligations under the new regime.  The speakers are:           Jane Couchman, General Counsel, Perpetual           Luise Elsing, Manager, Companies, Australian Stock Exchange          Fiona Gardiner-Hill, Partner, Freehills          Jennifer O’Donnell, Executive Deputy Director, Policy and Markets Regulation, Australian Securities and Investments Commission  For more information, please go to  [http://cclsr.law.unimelb.edu.au/news/](http://cclsr.law.unimelb.edu.au/news/" \t "_new)  **1.3 Political donations - a matter for shareholders says ASA**  An Australian Shareholders’ Association (ASA) media release dated 20 May 2004 states that the board of ASA has adopted a policy statement opposing political donations by companies. The policy goes on to say that where such donations have been made, there should be discussion of them at the next AGM.  ‘Decisions about contributions to political entities are the prerogative of shareholders, not directors,’ said ASA chairman, John Curry.  The policy was adopted after lengthy consultations with ASA members. Support for it was widespread, though there was also a strongly expressed minority view that companies should be allowed the freedom to counter the contributions by trade unions to political entities. However, it was noted that the independence of the democratic process has been strengthened by the introduction of the system of government funding of political parties.  ASA believes that it is legitimate for companies to express their views to government and opposition groups, but donations for political purposes taint the democratic process by creating an expectation of favours in return. ‘Whether the expectation is real or simply perceived, it is not in the interest of democracy,’ said Mr Curry, ‘and companies that make political donations must fully consult with their shareholders.’  Editor’s note: The Centre for Corporate Law published a research report on political donations by companies in 2000. It is on the website of the Centre for Corporate Law at [http://cclsr.law.unimelb.edu.au/research-papers/index.html](http://cclsr.law.unimelb.edu.au/research-papers/index.html" \t "_new)  **1.4** **The Bond Market Association issues final guiding principles to promote integrity of fixed income research**  On 19 May 2004, the Bond Market Association released the final version of its "Guiding Principles to Promote the Integrity of Fixed Income Research", which is a comprehensive and detailed set of voluntary principles designed to help the Association's member firms manage potential conflicts of interest that arise in their research activities. The principles have been extensively reviewed by regulators, analysts' groups and other market participants and are intended to promote an independent flow of unbiased information to the global fixed income capital markets.   The publication of the final set of guiding principles caps off an almost two-year long effort on the part of the Association's members. While members realized from the outset that the nature and intensity of conflicts of interest affecting fixed income research are different than those affecting equity research, the members also recognized conflicts are possible in the preparation of fixed income research and needed to be addressed. The guiding principles are intended to ensure research analysts are free from internal or external influences that could inhibit their ability to produce impartial assessments. For example, they recommend that analysts not participate in investment banking activities, which could raise questions about their independence.   The Association purposefully chose a principles-based approach to ensure that differing organizational structures, various types and uses of fixed income research and the unique aspects of different fixed income markets could all be encompassed within the framework.   Many of the guiding principles are designed to foster a firm culture that promotes the integrity of fixed income research and the ability of fixed income research analysts to express their views without inappropriate pressure from issuers, investment bankers and, significantly, other non-research department personnel, including traders and salespeople. In that regard, the principles go further than the regulations or legal settlements covering equity research.   Specifically, the principles recommend that firms prohibit promises of favourable research in exchange for business, prohibit retaliation against analysts for publishing unfavourable research and ensure that research coverage decisions are made by research personnel. In terms of sales and trading activities, the principles recommend firms prevent analysts' recommendations from being prejudiced by the firm's trading activities. In addition, traders should not know the content or timing of upcoming reports before they are issued.   The principles also address potential conflicts of interest that arise from the personal interests of analysts. For example, the principles recommend analyst compensation be structured to promote independence and that firms impose limitations on the personal trading activity of research analysts.   Similarly, the principles recommend disclosures to assist investors in distinguishing fixed income research from analyses produced by trading desk personnel as part of their trade execution and/or market making functions.   The principles can be accessed at [www.bondmarkets.com](http://www.bondmarkets.com/" \t "_new)  The Bond Market Association, with offices in New York, Washington, D.C. and London, represents securities firms and banks that underwrite, trade and sell debt securities and other financial products globally.  **1.5 Costs of Sarbanes Oxley reforms for US companies**  On 19 May 2004, a study of the costs of the Sarbanes Oxley corporate governance reforms in the US was released by Foley & Lardner.  The study was based on 115 public company surveys. 26 surveys were from public companies with annual revenue of US$1billion or more, and 85 surveys were from public companies with annual revenues under US$1 billion (4 companies did not provide annual revenue information).  The following summary is extracted from the study.  1.      Based on data received from Foley & Lardner’s 2003 and 2004 studies, the average cost of being public for a company with annual revenue under $1 billion in the wake of corporate governance reform has increased $1.6 million (130%) from the inception of Sarbanes-Oxley through FY 2003, including an increase of $736,000 during FY 2003. 2.      Contrary to some predictions, the overall costs increases associated with corporate governance reform in FY 2002 were not a one-time event. Costs continued to increase in FY 2003 and, in the case of director compensation, actually accelerated. 3.      Not only do the costs associated with corporate governance reform continue to be significant, but executives surveyed feel these costs are increasingly unpredictable. 4.      Section 404 compliance was overwhelmingly cited by survey respondents as the area having the most significant financial impact on public companies, followed by legal expenses and D&O insurance. 5.      Fees paid to outside auditors have continued to increase by double digits year over year since the enactment of the Sarbanes-Oxley Act in 2002. Of the companies analysed, audit fees increased an average of 23% between FY 2002 and FY 2003. 6.      Non-audit fees paid to accountants continued to decline between FY 2002 and FY 2003 for the companies studied, averaging a 20% decrease between FY 2002 and FY 2003. This is due largely to the shift in consulting work away from auditors. 7.      The increase in annual director fees accelerated, increasing at a faster rate in FY 2003 than they did in FY 2002:  **FY 2002** Increase Small-Cap 9% Mid-Cap 12% S&P 500 9%   **FY 2003** Increase Small-Cap 19% Mid-Cap 16% S&P 500 15%  8.      Based on the survey, the average costs associated with lost productivity, board compensation and D&O insurance experienced the largest percentage increase between FY 2002 and FY 2003 for public companies surveyed with annual revenue under $1 billion. Those fees increased by an average of 72% (lost productivity), 48% (board compensation) and 33% (D&O). 9.      A large number of companies now feel that corporate governance and public disclosure reforms have increased their company’s overall administrative expenses “a great deal.” 54% of respondents agreed with this statement in 2004, compared to 33% in the 2003 study. 10.  Two-thirds (67%) of survey respondents feel that corporate governance and public disclosure reforms are too strict, an increase of 12% over 2003. 11.  Survey respondents revealed that a surprisingly large number (21%) were considering going private as a result of new corporate governance and public disclosure reforms, an increase over the 2003 survey in which 13% of respondents said they were considering the option. 12.  Regardless of the fact that they are now in the second year of reacting to the Sarbanes-Oxley Act and its associated regulations, a majority of respondents (60%) did not feel that they were better able to predict costs associated with corporate governance reforms.  Foley & Lardner also released a separate study of the costs of Sarbanes Oxley on  private companies. A total of 30 surveys were returned from private organisations. The results reflect the input of 8 non-profit organisations and 22 for-profit private companies.  Interestingly, many private organisations planned to adopt or have already adopted several measures in response to the Sarbanes-Oxley Act:           CEO/CFO financial statement attestation (44%)          Establishment of whistle-blower procedures (40%)          Board approval of non-audit services by auditors (43%)          Adoption of corporate governance policy guidelines (40%).  More than three-quarters (83%) of private organisations responding to the survey felt that corporate governance reform is “about right,” while, as noted above, 67% of the respondents to the survey of public companies felt that the reforms are “too strict.” According to Foley & Lardner, this may be because 60% of the private organisations surveyed had self-imposed the corporate governance reforms they had adopted, while the public companies surveyed have had more extensive corporate governance reforms imposed on them.  **1.6 Mutual recognition of securities offers proposed**  New Zealand Commerce Minister Margaret Wilson and Ross Cameron, Australian Parliamentary Secretary to the Treasurer on 18 May 2004 released a joint discussion paper on the trans-Tasman mutual recognition of offers of securities and managed investment scheme interests.  The proposed regime will allow issuers to offer securities in both Australia and New Zealand, using the same offer documents and offer structure. The objective of the proposed regime is to remove unnecessary regulatory barriers to trans-Tasman securities offerings. This will promote investment between Australia and New Zealand, enhance competition in capital markets, reduce costs for business, and increase the choice for investors.  Submissions close on Friday 16 July 2004. Electronic copies of the document are available from the [Department of the Treasury website](http://www.treasury.gov.au/" \t "_new) under “what’s new”.  Department of the Treasury: contact Ruth Smith on (02) 6263 3985, or by email [rsmith@treasury.gov.au](mailto:rsmith@treasury.gov.au) [Ministry of Economic Development](http://www.med.govt.nz/buslt/bus_pol/bus_law/financial-markets/ttmr/" \t "_new): contact Bianca Garwood on (04) 474 2821, or by email [bianca.garwood@med.govt.nz](mailto:bianca.garwood@med.govt.nz)  **(a) Background**  In October 2001, the Australian Government invited New Zealand to work towards a regime for co-ordination in the recognition of securities offerings. After deciding on the broad parameters of the mutual recognition regime, New Zealand and Australian officials developed detailed proposals for the regime in 2003. These proposals are contained in the discussion paper.  The paper includes a description of the current position for Australian and New Zealand issuers making trans-Tasman offers of securities and then discusses the proposed mutual recognition model.  Currently, New Zealand and Australian issuers cannot use their home jurisdiction offer documents when making a trans-Tasman offer of securities. The issuer must comply with the relevant fundraising requirements in the host jurisdiction, unless operating under an exemption in the host jurisdiction.  The proposed model would allow an issuer offering securities or managed investment scheme interests to the public to extend an offer that is being lawfully made in one country (the home jurisdiction) to investors in the other country (the host jurisdiction) using the same offer documents and offer structure.  Details of the proposal are discussed, including the scope of the regime, the requirements to be met by issuers operating under it, how the laws of the host and home jurisdiction will apply, the role of the regulators, and jurisdiction and enforcement regarding civil and criminal proceedings for breaches of the regime.  **1.7** **Forced departures of CEOs declined in 2003 but remained near record levels**   Forced departures of CEOs declined last year, although involuntary turnover remains at near-record levels, according to the third annual survey of CEO turnover at the world's 2,500 largest publicly traded corporations. The survey was released on 17 May 2004 by Booz Allen Hamilton. In addition, the study found that dividing the roles of CEO and Chairman does not result in superior performance, despite the expectations of governance activists.  The study examines the linkages between CEO tenure and corporate performance, comparing CEO turnover in major regions and in specific industry sectors. Among the findings:           Companies that split the CEO and Chairman roles perform worse than companies with a single Chairman/CEO. Dividing the two positions has been the norm in Europe for at least a decade, and has become the governance movement's objective in the U.S. But returns to investors are lower — 4.7% per year lower in Europe, and 4.1% lower in North America — when the roles are split.          Globally, performance-related successions declined 29% from 2002, and represented 31% of all CEO departures, compared to 39% in 2002. Overall, 9.5% of the world's 2,500 largest public companies changed chief executives in 2003, compared to 10.7% in 2002.          Still, the rate of CEO dismissals has increased by 170% from 1995 to 2003.          Regionally, the succession rate was highest in Japan, where 13.8% of the largest companies changed their CEO — a 42% increase over 2002. The rate of CEO succession in Europe remained at 9.7%, but for the first time was higher than in North America, at 9.6%.          Globally, 28% of the CEOs departing in 2003 were "outsiders," hired into the job from another company — the highest proportion in any year that was studied.  **(a) Key Study Findings**           In North America, fewer CEOs were forced out last year. In the U.S. and Canada, involuntary successions accounted for 31% of all turnover in 2003, down from 2002's peak of 39%, but higher than in any other year studied.          Europe has become the pacesetter in forcing out underperforming chief executives. Top European companies experienced the highest-ever rate of forced succession events: Nearly half of all CEO turnovers in Europe in 2003 were performance-related. Forced turnover of CEOs of Germany's largest companies reached an extraordinary 8.1% in 2003, more than double the global average and the highest level in any region in any year studied.          Most companies split the CEO and Chairman roles. More than half the departing CEOs — 55% — in the six years studied did not hold the title of chairman. Just 28% carried both titles throughout their entire tenure.          The outsider who comes in to whip a company into shape is more likely to get a thrashing. Forced turnover of CEOs who were hired from outside the company reached striking levels in 2003; In North America, 55% of outsiders who left were forced to resign; in Europe, 70% left involuntarily.          The best-performing leaders come from within. Former chief executives do not deliver superior performance at a new company. To the contrary, over the six years of the study, CEOs who had previously led other companies delivered returns for investors 3.7% per year lower than first-timers.          A tough job is taking its toll on CEO tenure. The average term for chief executives who left office last year was only 7.6 years, among the lowest seen since 1995. Regionally, North American CEOs enjoyed the longest terms at 9.4 years, and European tenures are the shortest, at 6.5 years.          Scandalous CEO behaviour is relatively rare. Despite extensive media attention to this issue, only a handful of company leaders — no more than 0.3% in any year of the study — have been dismissed due to accounting or financial irregularities.          The younger the CEO when hired, the higher the likelihood of being fired. Chief executives forced from office last year were, on average, 49 years old when they were hired; CEOs who retired voluntarily were five years older when they started.  **(b) Industry-Specific Findings**           Highest-Risk Industries: In 2003, the industries that saw the highest rates of CEO turnover were utilities (14.3%), energy (11.5%), healthcare (11.3%) and materials (10.7%). For the period covering 1995 through 2003, telecommunications had the highest turnover rate (12.0%), followed by energy (11.9%), materials (11.5%), and industrials (11.1%).          Forced Turnover: Utilities had the highest rate of forced turnover in 2003 (5.7%), followed by telecommunications services (5.2%), and information technology (4.9%). For the period between 1995 and 2003, telecommunications services had the highest rate of CEO dismissals (4.5%), followed by information technology (4.0%) and consumer discretionary companies (3.3%).          The Safest Industries: Financial services was the safest industry for CEOs in the study — during the period between 1995 and 2003 the financial services industry had the least turnover overall (7.7%) and the fewest forced departures (1.8%). Other industries with relatively low turnover rates during this period were consumer staples (9.7%), and healthcare (10.3%). In addition to financial services, other industries with low forced turnover in this period were energy (1.9%), materials (2.2%), and industrials (2.2%).  **(c) Methodology**  Booz Allen studied the 237 CEOs of the world's largest 2,500 publicly traded corporations who left office in 2003, and evaluated both the performance of their companies and the events surrounding their departure. To provide historical context, Booz Allen evaluated and compared this data to information on CEO departures for 1995, 1998, 2000, 2001 and 2002.  For purposes of the study, Booz Allen classified each CEO departure as either:           Merger-driven, in which a CEO's job was eliminated when the CEO of the other company involved in the merger or acquisition assumed control of the enterprise.          Performance-related, which include any departure initiated by the board, attributed by the media to poor financial or managerial performance, or ascribed to "personal reasons" that accelerated a previously planned retirement.          Regular transition, which includes planned retirements, a CEO's acceptance of a better position elsewhere, health-related departures or death in office.  **1.8 Corporate governance: a prudential perspective**  On 12 May 2004, the Chairman of the Australian Prudential Regulation Authority (APRA) delivered a speech titled “Corporate Governance: A Prudential Perspective”. In the speech, Dr Laker offers a prudential regulator’s perspective on two matters:           what does APRA expect of the board of a prudentially regulated financial institution; and          what issues confront APRA in developing standards that would promote strong and effective board performance.  Dr Laker identifies the important attributes of a board of directors, apart from a strong sense of accountability, as:  “(1) independence. Independent thinking should be prevalent at board level. The board should not be beholden to the views of management, dominant shareholders or other commercial interests.  Conflicts of interest need to be avoided or appropriately dealt with. The board should feel empowered, and seek to question responsible persons about the strategy and policies that the institution has been pursuing;  (2) expertise. Collectively, the board needs sufficient expertise to understand the key elements of the institution’s business and the industry in which it operates, and the wisdom to know when it should call on technical advice from other sources. The board should not be expected to comprehend the intricacies of sophisticated financial instruments, for example, but it should have the ability to understand the risks they pose, to review the risk control framework and to assess whether the institution’s risk management strategies are effective in practice.  APRA encourages boards to seek members with substantial experience in the relevant industry as part of ensuring a broad mix of skills and experience is brought to board deliberations;  (3) diligence. Board members need to have sufficient time and willingness to learn about the business “on the ground” and to apply their skills and experience to that business. They should bring a probing mind to board discussions and canvass information from a wide range of sources, including management, auditor and actuarial reports, APRA visit reports and other feed-back, and ratings agency assessments. The board needs to be chary of becoming too comfortable with its management team. Forgive me for suggesting that board members need to be “sceptical, questioning and, where necessary, aggressive” in their approach – the very attributes which the HIH Royal Commission recommended that APRA needed to develop in its prudential supervision of general insurers!  (4) prudence. As steward of other’s vital financial arrangements, the board should take a vigorous interest in ensuring that the institution is not at material risk of failing to meet its promises to beneficiaries. APRA understands the pressures on a board to deliver strong growth in earnings and the share price, but these goals should not be achieved at the cost of underinvestment in risk management systems or through aggressive capital management, either of which would weaken the institution’s ability to respond to adversity. APRA staff are professional worriers on this score and we expect the board to share our burden!  (5) transparency. The board should have transparent decision-making processes which clearly define the responsibilities of board and management, specify lines of accountability and reporting and escalation procedures, and ensure that relevant information is provided to the board on a timely basis. The decision-making processes should be visible to those charged with review, such as external auditors and APRA. The processes should ensure that any member of the institution’s staff who perceives an emerging risk issue is clearly heard within the institution and, if necessary, by its auditors and by APRA.”  “A board with these attributes is much more likely than others to perform strongly and effectively, in the interests of beneficiaries and other stakeholders.  And the more so, if the board actively renews itself and draws on fresh ideas and enthusiasm.”  “For its part, APRA has some specific expectations of boards of regulated institutions in dealing with prudential matters. First, we expect that boards will ensure that we have full and cooperative access to the information our supervisors need to complete their risk assessments. This expectation should be interpreted broadly. A board should not wonder whether APRA might like to see a particular piece of information. If a board thinks the information might be relevant to us, it very probably is and we would expect to receive it.”  “Secondly, we expect boards to be aware of any material issues that have been raised by APRA and to be able to assess critically the proposed responses by management. We do not raise issues lightly.  We do possess considerable expertise in risk analysis and we cover each industry fully, enabling us to identify departures from good practice.”  Dr Laker discusses the APRA discussion paper on reforms to the prudential supervision of general insurance and states that: “the proposals were not on the whole well received.  What we saw as objective criteria, others saw as a “check list” or “prescription”. The strong refrain we hear, put simply, is that independence is a state of mind and cannot be guaranteed by establishing objective criteria or specific rules.”  Dr Laker further states that: “APRA is willing to consider a principles-based approach which would identify APRA’s expectations of boards of prudentially regulated institutions and would put the onus more, if not fully, on boards to demonstrate that they can meet these expectations. We welcome views on how a principles-based approach would operate, and why it would be more likely to promote strong and effective board performance than the proposals we have put forward.”  The full speech is on the APRA website at: [http://www.apra.gov.au/speeches/04\_05.cfm](http://www.apra.gov.au/speeches/04_05.cfm" \t "_new)  **1.9 Regulators receive increase in funding** On 11 May 2004, the Australian Commonwealth Budget was announced. The Australian Securities and Investments Commission (ASIC), the Australian Prudential Regulation Authority (APRA) and the Australian Competition and Consumer Commission (ACCC) have all received extra funding.   ASIC will receive an additional $52.5 million over the next four years to enhance its enforcement capabilities. ASIC will also receive $7.6 million for its role in implementing the CLERP 9 reforms. The Government will also contribute $11.3 million in 2004/05 to cover ASIC's accumulative operating losses in 2003/04 and previous years.   APRA will receive an increase of $52.4 million over four years. APRA will also receive additional funding from the Government between 2004 and 2006 to complete its assessments of whether a number of individuals meet fit and proper criteria to remain within the general insurance industry, in light of the HIH Royal Commission's findings, and to take any necessary actions.  The ACCC will receive additional funding, totalling $53.1 million for agency expenses over the next four years and $23.9 million as capital funding in 2004/05, representing a total increase of $77 million over the next four years.  **1.10 Company director's guide to enhance protection of privacy** On 7 May 2004 the Australian Federal Privacy Commissioner published a company director's guide to privacy which is aimed at assisting directors to oversee the implementation of efficient and responsible privacy procedures that have the potential to enhance customer trust and loyalty.  "A Guide for Directors - Privacy and Boards: What You Don't Know Can Hurt You" demonstrates how good privacy procedures are not only an essential part of an organisations risk management strategy, but are an integral part of good customer relations. The Guide is designed to help directors oversee a responsive organisation that engages with community concerns about privacy.  The Guide answers a number of fundamental questions which directors are asking such as, what are the National Privacy Principles? What are the risks of failing to address privacy? What is the business case for sound privacy practices? What do directors need to do?  The guide has been produced in association with the Australian Institute of Company Directors.  The Guide is available in hard copy from the Australian Institute of Company Directors. An electronic copy is available at [http://www.privacy.gov.au/publications/privacydirectors.pdf](http://www.privacy.gov.au/publications/privacydirectors.pdf" \t "_new)  **1.11 FSA confirms proposals to tackle softing and unbundling**  The United Kingdom Financial Services Authority (FSA) confirmed on 7 May 2004 that it is acting to promote efficiency and transparency in UK securities markets by limiting the scope for softing and bundling to execution services and investment research. This regulatory action will be complemented by a market-based initiative led by the Investment Management Association (IMA) to develop an improved system of disclosure that clearly identifies charges for research. These measures will allow investors to make more informed decisions about services charged to fund assets by fund managers, and help to ensure that investment research and execution services are sourced in the interests of fund investors.  The FSA will assess in December whether the industry's work on enhanced transparency and disclosure is on track to achieve the desired outcomes. If it is not then the FSA will consider what further regulatory action is necessary.  Commenting on the proposal, Christina Sinclair, Head of Institutional Business Policy, said:  “We have concluded that the softing and bundling of non-execution goods and services are not in the interests of investors. To eliminate the conflicts of interest that currently arise, we will limit the scope of such arrangements to execution services and investment research. Alongside this we are giving the industry space to develop a transparent mechanism for identifying the price of investment research included in commissions. These measures will together help strengthen fund managers' accountability to their clients. If the industry fails to deliver a high quality and workable solution, we will reconsider the need for stronger regulatory intervention, which might include the rebating proposal set out in our consultation paper last year."  By way of background information, HM Treasury published a [report](http://www.hm-treasury.gov.uk/documents/financial_services/securities_and_investments/fin_sec_mynfinal.cfm) by Paul Myners entitled “Institutional Investment in the United Kingdom: A Review" in March 2001 and endorsed its key findings. It was announced in a Treasury statement in July 2001 that the FSA had agreed to bring forward its own review of soft commission arrangements and bundled broker services, in connection with its work on best execution. In the review Paul Myners said: “There is an a priori case that this system creates an artificial bias for fund managers to have services provided by the sell-side, distorting competition, since the costs for these will not be scrutinised by the client and are not a direct charge to the fund manager’s profit.”  **1.12 UK Government announces consultation on the operating financial review**  On 5 May 2004 the United Kingdom Trade and Industry Secretary Patricia Hewitt announced the following developments:           a consultation on draft regulations for the Operating Financial Review (OFR) designed to provide better information on a company; and          the publication of guidance drawn up by Rosemary Radcliffe’s independent group to help companies prepare their OFRs.  An OFR is the directors’ overview of the company and will give shareholders key information on a company’s objectives, strategy, past performance and future prospects. Also covered in the OFR would be information such as the company’s policy towards its employees, customers and suppliers as well as its impact on the environment, social impacts and impacts on the wider community where that information is necessary for an assessment of the company.  It is proposed that all quoted companies (around 1290) would complete an OFR. The OFR builds on existing best practice followed by a number of larger companies, and follows the recommendations of the independent Company Law Review.  The consultation will last for 12 weeks and close on the 6 August. All interested parties should contribute and the DTI is considering a series of workshops during the consultation, details of which will be made available at [www.dti.gov.uk](http://www.dti.gov.uk" \t "_new).  Also published on 5 May was ‘Practical Guidance for Directors’, a report by an independent working group chaired by Rosemary Radcliffe CBE to help directors decide what principles and processes to follow in deciding what information to include in their OFR, based on what is important for the success of their business.  **Background**  1. The OFR consultation closes on 6th August. Copies of the consultation document can be obtained from [www.dti.gov.uk/cld/financialreview.htm](http://www.dti.gov.uk/cld/financialreview.htm" \t "_new) 2. Copies of Ms Hewitt’s announcement can be found at [www.dti.gov.uk](http://www.dti.gov.uk/" \t "_new) 3. The consultation document contains the Government’s proposals for a new statutory Operating and Financial Review (OFR) designed to give shareholders the information they need to help assess companies’ past performance and future prospects. This proposal applies to quoted companies only. 4. The OFR will be the directors’ view of the business. Directors will need to report on all factors that significantly affect the company and its future performance. These are likely to include the company’s impact on the environment and the wider community as well as its relationships with employees, customers and suppliers 5. In July 2003, the UK Government announced that it intended to implement its proposals on a statutory OFR by secondary legislation under existing company law. The consultative document seeks views on the detailed implementation of this new requirement. Also included are details of the changes required to the directors’ report as stipulated by the Modernisation Directive, and which will apply to all medium and large UK companies. The directors’ report already requires “a fair review of the development of the business of the company”. The directive expands that requirement by defining the fair review as “a balanced and comprehensive analysis of the development and performance of the company ’s business and of its position, consistent with the size and complexity of the business” including, where necessary, financial and non-financial key performance indicators including information relating to environmental and employee matters. The Government proposes to take up the option allowed by the directive of excluding medium-sized companies from the requirement to provide non-financial information, 6. Rosemary Radcliffe – CBE is an economist and member of the Company Law Review Steering Group. In December 2002 the Government asked her to chair an independent working group to develop broad principles and practical guidance to help directors assess what information must be included in an OFR. A copy of the Guidance can be found on [www.dti.gov.uk/cld/financialreview.htm](http://www.dti.gov.uk/cld/financialreview.htm" \t "_new)  **1.13 New Australian study of director and executive remuneration**  On 3 May 2004 the RPC Group published its Director and Executive Remuneration Top 500 Report 2004 which presents the results of remuneration in the top 500 companies. The report notes a general increase of approximately 10% in the average Total Remuneration for all categories assessed. The exceptions to this general rule being Executive Directors who recorded a decrease of 13% and the CFO/Company Secretary position that remained stable.  Non Executive Directors and Chairmen received an increase in Base Remuneration of approximately 10%. In general, executive positions received the majority of their increase in the Short-Term Incentive category.  Although an overall increase in remuneration has been recorded, RPC notes that analysis within the company size categories appears to indicate above average increases in the largest and smallest companies.  In brief:           general increase in Total Remuneration 10%;          executives are receiving the majority of this increase in Short-Term Incentives;           Chairmen and NEDs are receiving a similar increase (10%) in Total Fixed Remuneration; and          increases have been greater at the extremes of the company size categories.  **(a) Board Positions**  **(i) Chairman - Average Total Remuneration $119,000**  The average Total Remuneration of Chairmen has increased by 11% between the 2003 and 2004 reports. RPC believes that further increases in the remuneration of Chairmen will occur in response to increased responsibility due to increasing corporate governance requirements and board scrutiny.  **(ii) Non-Executive Director - Average Total Remuneration $78,000**  The average Total Remuneration of NED’s increased by 22% between the 2003 and 2004 reports. Data analysis shows that two industry categories being Alcohol & Tobacco / Paper & Packaging and Miscellaneous Industrials / Transport accounted for the majority of the increase with NED Total Remuneration increasing by 9% with these industry groups removed.  **(iii) Managing Director/CEO - Average Total Remuneration $885,000**  The average Total Remuneration of Managing Directors’ increased by 11% between the 2003 and 2004 reports. Total Fixed Remuneration remained stable with the increase in Total Remuneration being generated from the Short-Term incentive category.  **(iv) Executive Director - Average Total Remuneration $375,000**  The average Total Remuneration of Executive Directors’ has decreased by 13% between the 2003 and 2004 reports. This position was the only Board category to record a decrease. Although a decrease occurred in each of the remuneration breakdowns, the largest decrease occurred in the Short-Term Incentive category (down 44%).  **(b) Non-Board Positions**  **(i) CFO/Company Secretary - Average Total Remuneration $315,000**  The average Total Remuneration of CFO/Company Secretaries remained stable between the 2003 and 2004 reports.  **(ii) General Manager - Average Total Remuneration $587,000**  The average Total Remuneration of General Managers increased by 13% between the 2003 and 2004 reports. Fixed remuneration remained stable with the increase in Total Remuneration being generated within the Short-Term incentive category.  **(iii) Senior Executive - Average Total Remuneration $295,000**  The average Total Remuneration of Senior Executives reversed a 6% decline in the 2003 report with an 11% increase between the 2003 and 2004 reports. Increases in remuneration occurred in all categories.  **(c) Ratio: CEO to Top 5 Executives**  The ratio of the CEO’s Total Remuneration in the 2004 report has remained constant to the next highest paid executive when compared to the 2003 report. However, when the ratio of CEO’s Total Fixed Remuneration is assessed there has occurred an increase across the board in the relationship between CEO’s and the next five highest paid employees. This indicates that although CEO’s still demand a similar relationship between Total Remuneration, a narrowing in the difference between CEO’s and subordinate’s Total Fixed Remuneration is occurring.  On average the percentage of the CEO’s total remuneration paid to the next levels of executives are:  Position 2nd 3rd 4th 5th 6th  CEO 61% 48% 39% 31% 26%  **1.14 US business roundtable calls for independent governance committees to assume lead role in board governance and director nominations** In April 2004, the Business Roundtable, an association of CEOs of 150 leading US companies, issued principles that urge publicly owned companies to empower independent board committees with greater responsibilities in overseeing director nominations, board operations and corporate governance issues.   "The Roundtable believes it is critical to have independent director oversight of board nominations and operations," said Steve Odland, Chairman of the Roundtable's Corporate Governance Task Force. "These new principles emphasize the importance of ensuring that key corporate governance issues are addressed effectively by independent board members."  The new Roundtable principles recommend that every publicly owned corporation should have an independent board committee that addresses director nominations and corporate governance issues.   As companies plan further steps for implementing enhanced corporate governance practices, including standards for board performance evaluations, board compensation and shareholder communication, the Roundtable recommends seven principles for corporate governance committees:  1.      The corporate governance committee, which should be composed entirely of independent directors, should play a leadership role in shaping a company's corporate governance and overseeing the composition, structure, operation and evaluation of the board and its committees.  2.      The corporate governance committee should take responsibility for assuring that a substantial majority of the board meets appropriate standards of independence developed by the committee and approved by the board.  3.      The corporate governance committee should develop and recommend to the board a set of corporate governance principles, which the corporation should make publicly available.  4.      Director candidates should be identified, evaluated and recommended to the board by the corporate governance committee. The corporate governance committee should consider director candidates recommended by stockholders, as well as suggestions from directors, management and other sources.  5.      The corporate governance committee should have an established process for evaluating the independence, contributions and effectiveness of incumbent directors when deciding whether to recommend those directors for re-nomination.  6.      The corporate governance committee should be responsible for establishing and overseeing procedures for stockholder communications with directors if the full board or another committee does not do so.  7.      The corporate governance committee should assist the board in planning for CEO and senior management development and succession if another committee of independent directors does not do so.  A full copy of "The Nominating Process and Corporate Governance Committees: Principles and Commentary" is available on the Business Roundtable website at  [http://www.businessroundtable.org/publications/publication.aspx?qs=2856BF807822B0F13DC42](http://www.businessroundtable.org/publications/publication.aspx?qs=2856BF807822B0F13DC42" \t "_new)  **1.15 US business roundtable proposes rulemaking to enhance communication with beneficial owners of shares**  In April 2004, the US Business Roundtable submitted a significant rulemaking petition to the US Securities and Exchange Commission (SEC) to enhance the ability of public companies to communicate directly with beneficial owners of shares held in street name and to permit those beneficial owners to vote directly rather than through brokers or banks. The changes, if adopted, could have a major effect on voting among beneficial owners, especially retail investors.  The proposal asks the SEC to conduct a review of the current shareholder communication system, and in particular makes the following recommendations:           Eliminate the OBO/NOBO rules. The proposal calls for the elimination of current SEC rules that distinguish between two types of beneficial owners: objecting beneficial owners (OBOs), who insist on anonymity, and non-objecting beneficial owners (NOBOs), who permit their brokers or banks to reveal their identity to the company whose shares they own. The proposal argues that current SEC rules prohibiting companies from communicating directly with OBOs, who own more than 50% of all public company shares and an estimated 75% of shares held in street name, create a costly and circuitous “daisy chain” system that hampers the ability of companies to communicate effectively with their shareholders. The proposal notes that shareholders who want to preserve their anonymity can establish nominee accounts (eg, partnerships) and should bear the cost of doing so rather than spreading the cost among all shareholders as a group.          Permit companies to mail proxy materials directly. The proposal requests that companies be permitted to forward proxy materials directly to beneficial owners, noting the inefficiencies, delays and high costs of the current system. The proposal points out that while current rules permit companies to mail proxy materials to NOBOs, in practice they never do so because SEC rules require companies to forward proxy materials through brokers and banks regardless of whether they are also mailed directly.          Permit beneficial owners to vote directly. The proposal calls for the SEC to permit beneficial owners to cast votes directly, noting the lower-cost communication technologies, such as Internet voting, that are now available to record holders, and the prospect of further technological advances that will give companies “real time” access to beneficial ownership information.  The Business Roundtable pointed to recent NYSE changes that eliminated brokers’ discretionary authority to vote on equity compensation plan proposals, and to the possibility that the SEC might eliminate discretionary broker voting altogether, as providing additional impetus for companies to communicate with and solicit the support of shareholders.  The Business Roundtable letter to the SEC is available on the Business Roundtable website at: [http://www.businessroundtable.org/taskForces/taskforce/document.aspx?qs=6AE5BF159F949514481138A67FB1851159169FEB5623EB3](http://www.businessroundtable.org/taskForces/taskforce/document.aspx?qs=6AE5BF159F949514481138A67FB1851159169FEB5623EB3" \t "_new)  **1.16 OECD countries agree new corporate governance principles** In April 2004 the governments of the 30 OECD countries approved a revised version of the OECD's Principles of Corporate Governance adding new recommendations for good practice in corporate behaviour with a view to rebuilding and maintaining public trust in companies and stock markets.  The revised Principles respond to a number of issues that have undermined the confidence of investors in company management in recent years. They call on governments to ensure genuinely effective regulatory frameworks and on companies themselves to be truly accountable. They advocate an increased awareness among institutional investors and an effective role for shareholders in executive compensation. They also urge strengthened transparency and disclosure to counter conflicts of interest.    The OECD Principles of Corporate Governance, first published in 1999, have been widely adopted as a benchmark both in OECD countries and elsewhere. They are used as one of 12 key standards by the Financial Stability Forum for ensuring international financial stability and by the World Bank in its work to improve corporate governance in emerging markets.   In 2002, OECD governments called for a review of the Principles to take account of developments in the corporate sector. The revised text is the product of a consultation process involving representatives of both OECD and non-OECD governments as well as of businesses and professional bodies, trade unions, civil society organisations and international standard-setting bodies.  Other issues addressed by the revised Principles include:   **a) Institutional investors**           They should disclose their corporate governance policies, how they decide on the use of their voting rights and how they manage conflicts of interest that may compromise their voting;           Restrictions on consultations between shareholders about their voting intentions should be eased to reduce the cost of informed ownership.  **b) Shareholder rights**           The rights of investors must be strengthened. Shareholders should be able to remove board members and participate effectively in the nomination and election processes;          They should be able to make their views known about executive and board remuneration policy and any equity component should be subject to their approval.  **c) Conflicts of interest and auditor responsibility**           A new principle calls for rating agencies and analysts to avoid conflicts of interest which could compromise their advice;           The duties of the auditor must be strengthened and include accountability to shareholders and a duty to the company to exercise due professional care when conducting an audit;           Auditors should be wholly independent and not be compromised by other relations with the company.  **d) Stakeholder rights and whistle-blower protection**           The Principles make reference to the rights of stakeholders, whether established by law or through mutual agreements.          A new principle advocates protection for whistleblowers, including institutions through which their complaints or allegations can be addressed and provides for confidential access to a board member.  **e) Board responsibilities**           The duties and responsibilities of the board have been clarified as fiduciary in nature, particularly important where company groups are concerned;           The principle covering board independence and objectivity has been extended to avoid conflicts of interest and to cover situations characterised by block and controlling shareholders, as well as the board's responsibility for oversight of internal control systems covering financial reporting.  See [www.oecd.org/daf/corporate/principles](http://www.oecd.org/daf/corporate/principles" \t "_new) for the text of the revised Corporate Governance Principles.  **1.17 New US study of executive remuneration**  The Wall Street Journal/Mercer Human Resource Consulting CEO Compensation Survey and Trends has tracked CEO pay trends in the US for more than a decade. This study, conducted for the Wall Street Journal, analyses the recent proxy statements of 350 of the largest US public companies, with median revenue of $6.2 billion.  The 2003 edition shows how dramatically executive compensation is changing, as companies           moved away from granting CEOs stock options,          rebalanced the long-term incentive mix for CEOs,          reined in overall CEO pay, and          strengthened the link between CEO pay and performance.  The following is a summary of findings from the study’s executive summary.  **(a) Key proxy data findings on CEO compensation**  CEO cash compensation rose modestly in 2003, reflecting stronger corporate performance. Long-term incentive grant values for CEOs in their positions for two or more years declined for the first time since Mercer started tracking this data. The bottom line for CEOs: expected total direct compensation (base salary, annual bonus, the grant value of stock options, restricted stock, and other long-term incentives) was essentially flat at the median year over year. But changing grant values are only a small part of the story. There are striking changes in the long-term incentive component of the CEO pay package, as described below.  Pay for performance: The positive statistical relationship between CEO annual cash compensation and company financial performance continued in 2003. On a number of key performance measures, companies fared better in 2003 than they did in 2002. In particular, Mercer 350 net income rose a median 19.2 percent. CEO pay reflected this improvement – albeit modestly – with a median annual bonus increase of 6.7 percent to $1.1 million. But not all CEOs benefited from the improved economic environment: 39 companies granted no annual bonuses to their CEOs, compared to 50 in 2002.  CEO salaries increased a median 3.8 percent to $950,000 in 2003. A salary increase for the CEO is no longer a sure thing: more than one-third of the companies (121 of the 350) did not increase the CEO’s salary in 2003 (compared to 132 companies in 2002).  Total annual cash compensation (base salary and annual bonus) for CEOs rose a median 7.2 percent over 2002 to $2.1 million.  CEO expected total direct compensation remained essentially flat at the median, $6.2 million, year over year. But for CEOs in their positions for at least two full years, the median percentage dropped 4.1 percent. This is somewhat surprising in a year when median one-year total shareholder return (TSR) was 26.9 percent, a dramatic improvement over 2002’s median TSR of -5.9 percent. Although not reflected in expected total direct compensation, CEOs did benefit somewhat from the stronger equity markets as gains on option exercises rose to a median $1.9 million, up from $1.7 million in 2002.  **(b) The real action: long-term incentives**  The most significant changes in executive compensation are taking place in the area of long-term incentives: grant values are declining, and companies are using fewer options and more full-value share vehicles. The result is a remarkable change in CEO pay mix:           The median expected long-term incentive value dropped 10.6 percent to $4.2 million in 2003, after being flat from 2001 to 2002.          Most striking is the movement away from stock options and toward other long-term vehicles. A total of 278 companies awarded stock options to CEOs in 2003, compared to 295 in 2002. But 138 CEOs received restricted stock grants in 2003, compared to 104 in 2002.          Mega stock option grants have quickly fallen out of favour: only 22 companies made such grants in 2003, down from 62 in 2002.  The cumulative effect of the changes is reflected in the long-term incentive mix. Stock options dropped from 76 percent of the mix in 2002 to 62 percent in 2003, while restricted stock climbed from 12 percent to 20 percent and performance cash/shares rose from 12 percent to 18 percent.  **(c) New balance in CEO pay packages**  The shifting pay mix for CEOs is the clearest evidence of the extent of the executive compensation transition. Starting in the 1990s, long-term incentives accounted for an increasing share of the CEO pay mix, topping out at 71 percent in 2001. The CEO pay mix in 2003 is more balanced, with long-term pay making up a little less than two-thirds of the package and variable pay (annual and long-term incentives) instituting a bit over 80 percent. Mercer expects 2004 to show even further emphasis on the short term relative to the long term.  **(d) Dilution levels**  Companies’ desire to manage dilution levels has been a significant factor in shaping executive compensation packages over the past year. Reducing dilution (or “overhang” – options and other awards outstanding plus shares reserved for future grants as a percentage of common shares outstanding) is difficult, because underwater options and poor share price performance mean fewer option exercises to reduce the pool. Burn rates (annual shares granted as a percentage of common shares outstanding) are theoretically easier to reduce through fewer grants, smaller grants, and use of full-value shares rather than options. But these strategies have significant HR implications and are not easily implemented.           Preliminary data from the Mercer 350 indicate that median dilution remained stable at 14.7 percent of common shares outstanding (CSO), but the range is shrinking, as the 75th percentile dropped to 18.8 percent from 20.4 percent in 2002.          Burn rates are continuing to trend downward. Preliminary data show median rates dropped to 1.6 percent of CSO, down from 1.9 percent in 2002 and 2.0 percent in 2001.  Executives aren’t the only ones affected by the sea change in equity programs. The analysis also shows a drop in the use of stock options for the broader employee population. The use of broad-based option plans climbed sharply in the 1990s, carried by the momentum of the dot-com boom. Now the use of such plans is in an equally pronounced decline.  **(e) Industry variations**  The decline in CEO expected total direct compensation was virtually an across-the-board phenomenon in 2003. Median total direct compensation for CEOs dropped in 7 of the 10 industry categories in Mercer’s study. Only companies in utilities, energy, and financial industries saw increases in 2003 (median increases of 16.9 percent, 11.8 percent, and 1.0 percent, respectively). Median total direct compensation dropped most dramatically in the telecommunications (median of -13.0 percent), industrial (-8.5 percent), and technology (-7.7 percent) sectors. Median base salary and bonus (total annual compensation) increased significantly in four sectors: energy (35.4 percent), telecommunications (28.2 percent), health care (25.3 percent), and utilities (23.7 percent). Only two sectors saw a decline in 2003: cyclical (-2.9 percent) and basic materials (-2.4 percent).  **(f) A look to the future**  The transition in executive compensation that began in earnest in 2003 is likely to continue through 2005 as we move from one era of executive compensation to the next. Companies are retooling and realigning their programs in light of proposed accounting changes, pressure from shareholders to manage dilution, and increased scrutiny of executive pay from all quarters. In particular, Mercer expects continued movement away from stock options and toward an increased diversification of long-term incentive programs. But instead of further adoption of restricted stock plans, as was common in 2003, Mercer anticipates that more companies will adopt performance share and performance unit plans. These plans respond to a need to balance rewards for share price appreciation with rewards for long-term financial and operational achievements. Shareholders must approve equity plans. This requirement has given institutions significant influence over these plans’ size and design features. Shareholders have also been active in other arenas, submitting proposals on a number of executive compensation issues, including severance, retirement benefits, and perquisites. Mercer expects to see increased scrutiny of these components. Finally, with corporate governance reform taking hold, transparency has become a guiding principle. Recent proxy statements include far more discussion of executive programs, the relationship of pay to performance, and the rationale for compensation committee decisions. Mercer looks for this trend to continue and to extend to enhanced disclosure of benefits and perquisites.  **1.18** **Corporate governance at the New York Stock Exchange** A brief article on the current state of governance at the New York Stock Exchange has been published by the Wharton Business School. As noted in the article the scandal erupted in August 2003 when the exchange disclosed a US$139.5 million retirement and severance package for former chairman and CEO Richard Grasso. Additional benefits pushed the figure to $197.2 million. Grasso was forced to resign in September and is now in a battle with the exchange over whether he should return most of the package. The exchange wants $120 million back but disclosed on 3 May that it had set aside $36 million in case it has to pay him the more than the $50 million he is still owed under contracts approved by previous directors. The Securities and Exchange Commission and New York Attorney General Eliot Spitzer are investigating whether Grasso manipulated the complex compensation process to conceal the full figures from board members. Grasso has insisted he did nothing wrong.  The article also discusses the current debate about the trading system used by the exchange.  The article is available at [http://knowledge.wharton.upenn.edu/article/983.cfm](http://knowledge.wharton.upenn.edu/article/983.cfm" \t "_new)  **1.19 Study of early reporting trends under the ASX corporate governance guidelines**  Chartered Secretaries Australia recently released the results of a study conducted by KPMG titled “Early Reporting Trends: A Survey of Early Reporting Trends Under the ASX Corporate Governance Council Guidelines”.  The study examines the levels of disclosure as at 1 October 2003 under the ASX Corporate Governance Council Guidelines Principles of Good Corporate Governance and Best Practice Recommendations(“ASXCGC Guidelines”) among a representative sample of listed entities. The survey identifies early trends in compliance as well as some examples of best practice. The total number of entities surveyed was 68.  **(a) Background**  The ASX Corporate Governance Council was formed in 2002 with the mission of developing an industry-wide framework for corporate governance. The resulting ASXCGC Guidelines recommend that listed entities make certain disclosures around ten core principles of corporate governance in their annual reports and on their websites.  These disclosures only apply to financial years commencing after 1 January 2003 i.e. for financial years ending in 2004. However, the Council has encouraged companies to adopt the recommended disclosures in their 2003 reporting cycle. This survey examines the levels of disclosure as at 1 October 2003 under the ASXCGC Guidelines among a representative sample of listed entities.  **(b) Summary of findings**  The key findings of this survey are outlined in the following extract from the study’s executive summary.  **(i) Board composition**  While not part of the ASXCGC Guidelines KPMG included a general review of board composition, including board size, executive and non-executive ratio’s and female directors. A majority of the 68 entities surveyed had boards of six to nine members, although some comprised as few as three directors and as many as 16. All but four of these boards had a majority of non-executive directors, with the most common ratio being one executive to eight non-executives. While 20 entities surveyed had no female directors on the board, a majority of boards had at least one female director, although only 11 had two or more female members.  **(ii) Board independence**  Of the entities surveyed, 66 per cent disclosed a majority of “independent” directors, and half of these embraced all the criteria recommended by the ASXCGC in assessing “independence”. However very few disclosed the applicable “materiality” thresholds. This may be a matter to be addressed in the 2004 reporting season.  Another matter that could arise in 2004 is whether the length of a director’s tenure affects the definition of independence. In the survey, nine entities specifically excluded length of tenure from their assessment on independence.  After excluding entities with year-ends prior to 30 June 2003, there were 16 entities that either made no disclosure on the independence issue or that clearly did not have a majority of independent directors.  When it came to independent chairmen, similar levels of compliance and similar issues of disclosure were found as for independent directors by the survey.  **(iii) Remuneration issues**  Overall, most entities provided some level of descriptive narrative to explain their policies on executive remuneration. Some (including BHP Billiton and ANZ) made very detailed disclosures.  There were four companies in the top 50 S&P/ASX All Ordinaries Index and nine smaller companies with little narrative explaining executive remuneration and its link to performance.   Six companies provided extensive disclosure in detailing the benefits their current chief executive officers would receive on termination. These were BHP Billiton, BHP Steel, Lend Lease, WMC Resources, St George Bank, and Wesfarmers. Nine entities also took the lead from the Corporate Law Economic Reform Program (CLERP 9) and disclosed the remuneration of more than five current top executives (not counting board members). Amcor disclosed details on its top 10 people.  The biggest area of interest relating to non-executive director remuneration concerned non-statutory retirement benefits. Over half of the entities surveyed disclosed the existence of these schemes in the reporting period. However, there appears to be a move towards curtailing these benefits. Twenty-five entities ceased to pay retirement benefits in the relevant reporting periods.  **(iv) Reporting integrity and risk management**  Few entities disclosed explicit CEO and CFO sign-offs under Principles 4 and 7 of the ASXCGC Guidelines. This was not unexpected since many entities will still be deciding how the sign-offs will actually be implemented, particularly in relation to risk management. Moreover, only departures from recommended practice are technically required to be disclosed in annual reports. (And, of course, the ASXCGC Guidelines do not formally apply until 2004.)  Audit committee structures were basically in line with the ASXCGC Guidelines for the majority of entities, although several entities will need to review their structures before the 2005 deadline under the ASX listing rule 12.7.  Nearly all of the entities confirmed in some way that they have an established policy on risk oversight and management. However, disclosure of the entities’ risk profiles, which is now recommended by the ASXCGC supplementary guidelines on risk issued in November 2003, was not detailed. It was apparent that there are varied approaches to risk management reporting, with responsibilities spread between full board, audit committee and/or separate risk committee.  **(v) Encouraging enhanced performance**  Of the 68 entities reviewed, just under half disclosed that a board performance evaluation had taken place during the reporting period. This may be a matter for entities to address in the 2004 reporting cycle.  **(vi) Website disclosures**  Website disclosure under the ASXCGC Guidelines was found to be generally less detailed than for disclosures via the annual report. For the majority of the ASX Principles, approximately one-third or less of the surveyed entities had posted the additional information recommended under the ASXCGC Guidelines to their respective websites.  **1.20 Study of mutual funds** Australia remains the fourth largest market for mutual fund assets with US$518 billion at fourth quarter 2003, according to the most recent release of statistics and research from the Investment Company Institute (ICI). Mutual fund assets for Australia increased by US$162,107 billion since fourth quarter 2002, reflecting rising equity prices and continued demand for equity funds.  The total pool of mutual fund assets worldwide rose to US$13.96 trillion at the end of the fourth quarter 2003, up from US$11.32 from the fourth quarter 2002. Assets for the Asia-Pacific increased from US$1 trillion to US$1.3 trillion over the same period. Asset growth was boosted by positive stock market returns in almost all reporting countries and the ongoing net flow of new investments. Net cash flow to all funds worldwide was $74 billion in the fourth quarter with equity funds experiencing strong net cash inflows.   At year-end 2003, the number of mutual funds worldwide stood at 54,015. By type of fund, 41 percent were equity funds, 22 percent were bond funds, 21 percent were balanced/mixed funds, and 9 percent were money market funds.  The statistics released by ICI incorporate data from 39 countries and are compiled on behalf of the International Investment Funds. More data from the study is available on the [ICI website](http://www.ici.org/" \t "_new). |
| **2. Recent ASIC Developments** |
| **2.1 Appointment of Chairman of the Australian Securities and Investment Commission**  On 13 May 2004, the Treasurer, The Hon Peter Costello MP announced the appointment of MrJeffrey Lucy AM as the Chairman of the Australian Securities and Investments Commission (ASIC) for a three-year term. Mr Lucy has been Acting Chairman since 17 December when Mr David Knott resigned as Chairman.  Mr Lucy has been Deputy Chairman of ASIC since 24 February 2003. Prior to that, he was Chairman of the Financial Reporting Council. Mr Lucy is a chartered accountant and experienced financial consultant. He is a Fellow of the Institute of Chartered Accountants in Australia, CPA Australia, the National Institute of Accountants, and the Australian Institute of Company Directors. He is a former member of the Business Regulation Advisory Group, a former National President of the Institute of Chartered Accountants in Australia, and a former Managing Partner of PricewaterhouseCoopers, Adelaide.  **2.2 How ASIC will use infringement notices: a guide**  The Australian Securities and Investments Commission (ASIC) released on 20 May 2004 a guide detailing how it will administer infringement notices, a new proposed remedy for breaches of continuous disclosure law.  The infringement notice remedy is contained in the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003 (CLERP 9)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default) currently before the Commonwealth Parliament and due to be enacted on 1 July 2004.  ASIC's guide has been released in anticipation of the Bill being enacted in its current form and a revised guide will be issued if the infringement notice provisions change.  Under the proposed law, if ASIC has reasonable grounds to believe that the continuous disclosure provisions have been breached, it may issue an infringement notice that requires a monetary penalty to be paid.   'The proposed infringement notice process gives ASIC an additional remedy to address less serious breaches of the continuous disclosure laws in a timely and efficient way', said Ms Jan Redfern, ASIC's Executive Director, Enforcement.  'The use of infringement notices will potentially resolve issues more quickly and remove the need for expensive and lengthy court cases', she said.  The guide sets out the key features of the infringement notice process, including that:           infringement notices will be used for less serious contraventions of the continuous disclosure obligations           an ASIC delegate who has not been involved in the investigation will decide whether or not to issue a notice, and the company will be able to present information before the delegate makes a decision           the company can decide whether or not to comply with the notice           if the company complies, it is not an admission of liability. ASIC will publish details of the notice but cannot commence further proceedings against the entity in relation to the breach specified in the notice.  Companies that do not immediately disclose materially price-sensitive information to the market operator, so that it can be provided to investors, breach their continuous disclosure obligations under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  The guide is available on the ASIC website at [www.asic.gov.au/clerp9](http://www.asic.gov.au/clerp9" \t "_new).  **2.3 ASIC grants relief for debt factoring arrangements**  The Australian Securities and Investments Commission (ASIC) has on 4 May 2004 issued a class order granting relief from the requirement to hold an Australian Financial Services Licence, and from the product disclosure and hawking provisions of Chapter 7 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) (the Act) to persons providing, or advising on, debt factoring arrangements, Class Order 04/239: Factoring arrangements - licensing, hawking and disclosure relief [CO 04/239].  A factoring arrangement is defined under the class order to mean an arrangement under which a person acquires debt obligations, such as receivables, at a discount.  Advice or dealing activities in relation to debt factoring arrangements have the potential to be caught by the licensing, conduct and disclosure requirements of the Act as they may technically fall within the broad definition of 'derivative' in section 761D.   ASIC considers it appropriate to grant relief to persons who provide financial services in respect of debt factoring arrangements, in light of the unintended application of the broad 'derivative' definition in the Act.  Under the terms of the class order, if the other party to a factoring arrangement is a retail client, the relief granted to a person who is, or proposes to be, the purchaser of debt obligations under the terms of the factoring arrangement is conditional. To comply with the terms of the class order, such a person must:           ensure that the terms and conditions of the factoring arrangement are given in writing to the retail client before the factoring arrangement is entered into; and           establish and maintain an internal dispute resolution system that complies with the Australian Standard on Complaints Handling AS4269-1995 that covers complaints made by retail clients against the person in connection with a factoring arrangement.  A copy of the class order is available at the ASIC website [www.asic.gov.au/co](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co04-239_pdf" \t "_new), or by calling ASIC's Infoline on 1300 300 630.  **2.4 ASIC provides guidance on superannuation calculators**  The Australian Securities and Investments Commission (ASIC) provided on 4 May 2004 some general guidance on the application of the financial services licensing regime to providers of superannuation calculators. ASIC is of the view that the mere provision of a superannuation calculator does not mean the provider will always need an AFS licence or authorisation under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).  Superannuation calculators, typically accessible online, are mathematical tools that allow consumers to input various facts such as estimated future contributions and estimated retirement age. The calculator then derives an estimated final superannuation lump sum or pension, based on assumptions relating to matters such as future fund earnings and inflation. Superannuation calculators have been established by some superannuation fund trustees, amongst others.  Superannuation calculators can assist consumers in planning for their retirement. They can help a consumer assess if their current superannuation contributions are likely to yield sufficient income in retirement, to satisfy the consumer's needs and aspirations. They can also assist consumers to understand the impact of certain costs on their superannuation savings. They are useful educational tools as they can help illustrate the beneficial effects of making regular contributions over a long period of time or salary sacrificing into superannuation. While calculators are useful, it is important that consumers are made aware of their limitations.  In administering the law, ASIC accepts that superannuation calculators can often be provided without a licence or authorisation, particularly where all of the following are satisfied:  1.      The calculator allows the consumer to alter all 'default settings' for the various assumptions; 2.      any default settings are based on industry-wide rather than fund-specific information ; 3.      the calculator is accompanied by a clear explanation of its purpose and limitations, including an explanation of the assumptions (including the limitations of those assumptions) and a clear statement that the calculator is intended to illustrate the broad impact of consumer choices and is not a prediction of a consumer's final superannuation benefit; 4.      the calculator is accompanied by a clear statement to the effect that the calculator is not intended to be relied on for the purposes of making a decision in relation to a financial product, including a decision in relation to a particular superannuation fund or strategy, and that consumers should consider obtaining advice from an AFS licensee before making any financial decisions;  5.      the calculator forms part of, or is linked to, other educational material and is distinct from any fund's promotional or marketing material.  A licence or authorisation is more likely to be required if, the calculator is intended to, or might reasonably be regarded as intended to encourage consumers to make a decision about a particular financial product or strategy.  **2.5 ASIC scrutinises recent debenture prospectuses**  The Australian Securities and Investments Commission (ASIC) has released on 29 April 2004 an overview of common defects identified in its surveillances relating to debenture prospectuses, and the actions it has taken to halt defective prospectuses.  ASIC has issued five interim stop orders and one final stop order involving debenture prospectuses seeking to raise more than $80 million from the public, since 1 January this year.  The publication of the various defects identified in ASIC's most recent surveillance is intended to assist issuers and the advisers who prepare these documents, to adequately discharge their duties.  Common defects identified in debenture prospectuses since January 2004 include:           The mis-description of debentures in prospectuses.  Some issuers continue to incorrectly describe unsecured notes as debentures. This can be misleading and deceptive, as it leads investors to believe that the instruments may be more secure than they actually are.   When issuing debentures issuers and their advisers must have regard to section 283BH of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act). This section sets out in very clear terms how debentures can be described. ASIC is concerned that issuers continue to misdescribe debentures despite previous guidance on this issue. (See [Media Release 04-02](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/04-002+ASIC+focuses+on+defective+debenture+prospectuses?openDocument" \t "_new): ASIC focuses on defective debenture prospectuses).           Failure to comply with the requirement to enter into a trust deed and with the requirement to appoint a trustee.  These requirements are important protection mechanisms for investors and must be strictly adhered to. Prior to issuing debentures, all issuers need to be aware of their obligations under Chapter 2L of the Act.           Insufficient disclosure on the prospects of the issuer.  This information is critical in allowing investors and their professional advisers to make a fully informed investment decision, and to compare potential investments. Where the issuer on lends the money within a corporate group, a description about the operations of the group may be necessary to enable an investor to assess the prospects.           Inadequate disclosure on borrowing limitations.  Without this information, investors will have difficultly in making an accurate call on the risk/reward returns in the offer.   In the current low interest rate environment, ASIC considers that it is extremely important that debenture issuers provide adequate disclosure to enable investors to understand the risk profile of the products and make a fully informed decision about whether to invest in the issuer. |
| **3. Recent ASX Developments** |
| **3.1 Report of the ASX Corporate Governance Council Implementation Review Group - ASX Listing Rules – Audit Committee requirement**  **(a) Background**  On 1 January 2003 ASX introduced listing rule 12.7 which provides that an entity included in the S & P All Ordinaries Index (the top 500) at the start of its financial year must have an audit committee and that the composition, operation and responsibility of the audit committee must comply with the best practice recommendations of the ASX Corporate Governance Council (CGC).  Listing rule 1.1 condition 13 mirrors this requirement in relation to new admissions.  The requirement was introduced as part of the “Enhanced Disclosure” package of listing rule amendments and was subsequent to the proposals contained in the CLERP 9 discussion paper released in late 2002. These rules also complement the ‘Principles of Good Corporate Governance and Best Practice Recommendations’ (the Guidelines) released in March 2003.  On 31 March 2004 the CGC Implementation Review Group (the Review Group) released its report setting out its findings and conclusions on how well the Guidelines have been understood and received by listed companies and the wider market, including the practicality of the operation of the Guidelines in practice. The report recommends a number of changes to the Guidelines, both in relation to interpretation and in relation to specific Recommendations. The full report, and the ASX Corporate Governance Council response, together with a summary of key implications for listed companies, is available at [www.asx.com.au](http://www.asx.com.au/" \t "_new)  **(b) Key conclusions**  The key conclusions of the report were:           The Review Group endorsed the non-prescriptive nature of the Guidelines, which gives companies the flexibility to consider a range of different approaches to achieving effective governance.          The Review Group did not accept that selected classes of listed companies should be the subject of a carve-out from the Guidelines.          The Review Group confirmed that it is the role of each Board to determine the issue of independence. Where a director may fail a strict test but it is deemed that they will serve the interests of the company, the important issue is that full disclosure is made to shareholders using the indicators in the Guidelines.          The Review Group noted the need for further guidance in relation to executive remuneration disclosure, in particular the need for more useful information to be provided to shareholders.          The Review Group recommended certain relaxation of the audit committee requirement (see below).  **(c) Audit Committees – composition, operation & responsibility – listing rule amendment**  In relation to Principle 4: Safeguard integrity in financial reporting, the Review Group noted that significant feedback was received. One concern raised was the compulsory nature of the audit committee for the top 500. Issues included:           Concern that the requirement was too onerous for those companies at the smaller end of the top 500. In addition, it has been submitted that companies who may move in and out of the top 500 are being penalised for success by being required to incur a significant additional expense, to ensure compliance.          An ASX review of corporate governance disclosure in FY02 annual reports indicated that the number of companies without a “formal” audit committee increased incrementally outside the top 300. In addition, companies outside the top 300 generally had smaller boards and a lower proportion of independent directors. The Review Group noted that these two factors made it more difficult to establish an audit committee which satisfied the Guidelines.          For those companies outside the top 300 without an audit committee, more than 60% gave board size as a reason. In many cases the audit committee was composed of the entire board (other than executives).          Feedback was also received suggesting that the benefits to investors of a company having an audit committee compliant with the terms of the Recommendations significantly reduced outside the top 300. Institutional and retail investment is largely concentrated in the top 300 and investors in smaller companies generally understand their more speculative nature, and that it may be appropriate for those companies to adopt an alternative governance structure to ensure the integrity of financial reporting.  The Review Group stated that it believed there is an appropriate balance to be struck between the benefits of an audit committee compliant with the Guidelines and the costs and practical difficulties in implementing the Guidelines to that extent. The Review Group therefore recommended that the requirement be relaxed, for those companies who fell outside the top 300.  ASX has determined to amend the listing rule requirement as follows:           The top 500 entities by market capitalisation i.e. those within the S & P All Ordinaries Index will be required to have an audit committee.          Only the top 300 entities in that group will be required to comply with the CGC recommendations as regards composition, operation and responsibility. The top 300 is determined by market capitalisation; and           All other entities must still provide "if not why not" reporting in relation to CGC recommendations they do not adopt.  To provide maximum certainty in implementing the rule, ASX will publish a list of the top 300 listed companies in the S & P All Ordinaries Index on a regular basis, taking account of the fact that companies have a range of balance dates over the year. If an entity is included in the list of the top 300 on the first day of its financial year, it must have an audit committee that complies with the Guidelines as regards composition, operation and responsibility.  The rule amendment took effect on 3 May 2004. |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Data & Commerce Ltd: Conclusion of panel proceedings**  On 19 May 2004 the Panel advised that it has concluded the proceeding (the Proceeding) arising from the application made by Radio Australia Pty Ltd and its associate Andros Nominees Pty Ltd (collectively, Radio Australia) on 30 April 2004 (the Application) in relation to the affairs of Data & Commerce Limited (DCL). The Panel concluded the Proceeding without making a declaration of unacceptable circumstances or any order following the lodgement and dispatch of a second supplementary prospectus dated 17 May 2004 (the Second Supplementary Prospectus) by DCL.  **(a) Background**  **(i) Rights offer and underwriting**  On 14 April 2004, DCL lodged with ASIC a prospectus (the Prospectus) for an underwritten non-renounceable rights issue of 147,646,147 ordinary shares in DCL at an issue price of 4 cents per share (the Rights Offer). The Rights Offer was made on the basis of 1 share for every 1 share held as at 23 April 2004 to raise approximately $5.9 million to retire debt and provide the company with working capital.  The directors of DCL stated in the Prospectus that they, and entities associated with them, would take up their rights under the Rights Offer, covering approximately 19% of the new shares to be issued under the Rights Offer.  DCL had entered into an underwriting agreement (the Underwriting Agreement) with Rentamobile Pty Ltd (Rentamobile) to underwrite the remainder of the issue, subject to certain terms and conditions. The underwritten shares (being 119,843,526 shares) represented approximately 81% of the Rights Offer (the Underwriting).  On 15 April, DCL lodged a supplementary prospectus with ASIC (the Supplementary Prospectus). The Supplementary Prospectus disclosed that Rentamobile did not currently hold any shares in DCL, and that if none of the shareholders other than the directors and associates took up their entitlements under the Rights Offer and Rentamobile took up all of the underwritten shares as required under the Underwriting Agreement, Rentamobile would obtain approximately 40.56% of DCL.  **(ii) Application**  On 30 April, Radio Australia applied to the Panel for a declaration of unacceptable circumstances and final orders in relation to the affairs of DCL, particularly the Underwriting arrangements to the Rights Offer. Details of the Application and the orders sought by Radio Australia are set out in the Panel’s media release TP04/33.  **(b) The Panel’s decision**  In assessing whether or not the Rights Offer and the Underwriting constituted unacceptable circumstances, the Panel referred to the general criterion set out in InvestorInfo for proper reliance on the exception in item 10 of section 611, that the structure, process and disclosure of the Rights Offer should be such as to make participation genuinely accessible to the shareholders in general, having regard to the company’s position and the requirements of Chapter 6D. The Panel also had regard to the particular factors listed in paragraph 38 of the InvestorInfo reasons, as relevant to DCL’s position and prospectus.  While the Proceeding was underway, DCL agreed to issue the Second Supplementary Prospectus to resolve the issues raised in the Application and to extend the closing time of the Rights Offer from 11 May until 18 May (this was later further extended to 27 May). The Second Supplementary Statement described the level of applications received by DCL from shareholders under the Rights Offer and offered shareholders proportionate participation in the underwriting shortfall. It also provided additional information about Rentamobile and its possible shareholding after the issue, depending on various assumed levels of shortfall. The Panel also asked DCL to include in the Second Supplementary Prospectus recent information about its financial performance.  The Second Supplementary Prospectus was dispatched to shareholders on 18 May, nine days before the extended closing date of the Rights Offer.  Given that the Second Supplementary Prospectus dealt with the issues raised by the Application which would have lent any support to a declaration of unacceptable circumstances, the Panel concluded the Proceeding on the basis that it was not necessary or appropriate to make a declaration and that no order was required.  The sitting Panel comprised Andrew Knox (sitting President), Michael Ashforth and Simon Withers.  **4.2** **Panel publishes final guidance on correction of takeover documents**  On 14 May 2004 the Takeovers Panel published its Guidance Note on Correction of Takeover Documents. Minor amendments have been made to the final version in response to comments received when the Panel released a draft for public consultation.  The Guidance Note seeks to assist the market by indicating the standard of disclosure that the Panel wishes to see in disclosure documents (such as bidder’s and target statements, notices of meeting and shareholder letters) relating to transactions affecting the control of companies and managed investment schemes to which Chapter 6 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) applies. It also discusses some of the considerations that the Panel will take into account when dealing with a defective disclosure and the remedies that it may impose where the documents fall short of the standard that the Panel requires.  The Panel has also published on its website a paper that sets out its response to the external comments that the Panel received on the consultation draft.  The Correction of Takeovers Documents Guidance Note is available on the [Takeover Panel’s website](http://www.takeovers.gov.au/" \t "_new).  **4.3 Kaefer Technologies Ltd (Administrator appointed): Panel decides not to commence proceedings**  On 21 May 2004 the Takeovers Panel announced that it has considered the application (Application) by Mr G. F. Pauley and Dr G. B. Elkington (Applicants) dated 12 May 2004 alleging that unacceptable circumstances exist in relation to the affairs of Kaefer Technologies Ltd (administrator appointed) (KAE). It has decided not to conduct proceedings in relation to the Application.  **(a) Background**  The Panel's Media Release TP04/36 provides details concerning the facts said by the Applicants to give rise to unacceptable circumstances.  **(b) Factual investigations**  A critical element to the alleged unacceptable circumstances was the appointment by the directors of KAE of Clifford Rocke and Jeffrey Herbert of PPB Administrators) as voluntary administrators under section 436A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act). The Panel is aware that, in general, the supervision of administrators and companies in administration is the role of the Courts and of the committee of creditors which, in this case was appointed on 30 April 2004. It notes that one of the applicants, Mr Pauley, is a member of the committee of creditors and, accordingly, involved in the supervision of the conduct of the Administrators in that capacity. However, as the decision of the Panel in Pasminco [2002] ATP 6 shows, issues relating to compliance with the provisions of Chapter 6 of the Act or conduct which may offend the policies, or avoid the protections, of that Chapter can arise in the context of an administration.  Accordingly, before making its decision on whether to conduct proceedings, the sitting Panel sought, and obtained, further factual material from KAE and the Administrators. This factual material, when combined with material contained in the Application and other material available in the public domain to which the Panel had regard (such as media releases and documents lodged by KAE with ASX and/or ASIC) has caused the sitting Panel to conclude that it would be unable to reach the view that the circumstances affecting KAE at present would be unacceptable because:           of their effect on an acquisition or proposed acquisition, by a person of a substantial interest in KAE or any other company; or          of their effect on the control, or potential control of KAE or any other company; or          they are or give rise to a contravention of the takeovers provisions (i.e. Chapters 6, 6A, 6B or 6C of the Act).  In particular, none of the material before the Panel gave any support to a view that either the directors of KAE, in making the decision to appoint the Administrators, or the involvement of KAE's parent company, KAEFER Isoliertechnik GmbH & Co KG (KG) in either that decision or the proposed conduct of the administration of KAE gave rise or could have given rise to unacceptance circumstances in relation to KAE in the sense used in Chapter 6 of the Act.  The Panel notes that the policies of Chapter 6, as set out in section 602, and the protections provided by Chapter 6 are concerned to ensure that shareholders are treated equally as between themselves and that bids occur in an efficient, informed, competitive and well-regulated market. In general, the appointment of the Administrators affected all shareholders in KAE equally, so that any detriment suffered by the Applicants was also shared by KG. The Panel could not identify any circumstance in the current situation which pertained to control or potential control of KAE in the sense used in Chapter 6 (that is, as it pertained to control of KAE by its shareholders) that is, or threatens to be, unacceptable.  As the material provided to the Panel by KAE and the Administrators only confirmed the view that the Panel had formed following its own consideration of the Application, it did not request any comments or submissions on that material, or any further information, from the Applicants.  **(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.  The sitting Panel was Andrew Lumsden (sitting President), Norman O'Bryan SC (deputy President) and Robyn Ahern. |
| **5. Recent Corporate Law Decisions** |
| **5.1 Extent of power to execute a search warrant: another Alpine Offset judgment** Kennedy v Baker [2004] FCA 562, Federal Court of Australia, Branson J, 6 May 2004  The full text of the judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fca562.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/may/2004fca562.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Background**  This is another judgment relating to an investigation by the Australian Securities and Investments Commission into the role of several people, including Mr Trevor Kennedy, in the affairs of Offset Alpine Printing Group Ltd. This judgment concerns the execution on 13 November 2003 of a search warrant issued pursuant to the [Crimes Act 1914](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6050" \t "default)[(Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6050" \t "default) at business premises occupied by the applicant, Mr Kennedy.  On 25 March 2004 Justice Gyles published a judgment concerning the execution on the same day (ie 13 November 2003) of a warrant at Mr Kennedy's home: Kennedy v Wallace [2004] FCA 332. That judgment is discussed in Corporate Law Bulletin No 80 (April 2004). In that judgment, Justice Gyles summarised some of the background information as follows:  “The immediate events commenced on 30 October 2003 when The Australian Financial Review newspaper (AFR) published a series of articles over a number of pages (commencing with page 1) concerning what was described as a special investigation. The articles published included headlines such as:  “Share-trading secrets: A special investigation” “Rivkin’s Swiss bank scandal” “Inside the Offset Alpine maze” “I keep no Swiss records, says Trevor Kennedy”  The most significant allegation concerning Kennedy was that one René Rivkin (Rivkin) had given evidence to Swiss authorities that Kennedy had been the beneficial owner of approximately 12 per cent of a parcel of shares in the Australian listed public company Offset Alpine Printing Group Limited (Offset Alpine). It will be necessary to look more closely at events surrounding that parcel of shares but for present purposes it suffices to know that, when Kennedy had been interviewed by officers of the predecessor of ASIC in 1995, he had denied holding any beneficial interest in that parcel of shares. The AFR articles also contained a good deal of information alleged to relate to dealings between Kennedy and various Swiss banks. The implication of the articles was that the proceeds from the Offset Alpine shares and other monies had been hidden from the Australian authorities by means of such dealings. The articles purported to quote from the transcript of the interview between Rivkin and the Swiss authorities which was, so they said, conducted in the presence of his Swiss lawyer – a lawyer also said to be retained by Kennedy. The articles also purported to quote from at least two letters written by Kennedy to that lawyer in 2002.”  **(b) Summary**  The following summary of Kennedy v Baker is provided by the Federal Court.  The first respondent, Mr Baker, a member of the Australian Federal Police, was the executing officer in relation to the warrant executed at Mr Kennedy’s business premises. He was assisted by other members of the Australian Federal Police, officers of ASIC and experts in computer forensics. During the course of the execution of the warrant, Mr Baker directed that a copy be made of the hard drive of the personal computer ordinarily operated by Mr Kennedy’s personal assistant. The copy hard drive was removed from the business premises, with Mr Baker’s approval, by an officer of ASIC. As yet neither Mr Baker nor ASIC has sought to access the data in the copy hard drive.  In this proceeding Mr Kennedy challenged the authority of Mr Baker to direct that the hard drive of the personal computer be copied and to permit the copy of the hard drive to be removed from the business premises. Mr Kennedy sought an order declaring that neither Mr Baker nor ASIC is entitled ‘to examine, process, copy or otherwise access or use the imaged hard drive or any copy thereof or any data contained therein’. He further sought an order requiring the copy of the hard drive to be delivered to him. The issue of whether Mr Baker was authorised to cause the hard drive of the personal computer to be copied, and the copy removed from the business premises, required consideration of the extent of the authority given to an executing officer by subsection 3L(1A) of the Crimes Act 1914. Subsection 3L(1A) was inserted into the Crimes Act by the [Cybercrime Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58241" \t "default). Subsection 3L(1A) provides:  “If the executing officer or constable assisting believes on reasonable grounds that any data accessed by operating the electronic equipment might constitute evidential material, he or she may:  (a) copy the data to a disk, tape or other associated device brought to the premises; or (b) if the occupier of the premises agrees in writing—copy the data to a disk, tape or other associated device at the premises; and take the device from the premises.”  Mr Kennedy argued, in effect, that the subsection only authorised information held in the hard drive that itself fell within the terms of the warrant to be copied. The respondents argued, in effect, that the subsection treated the information or data held in the hard drive as a single body of information and authorised the copying of that information in its entirety.  The judgment concludes that the construction of subsection 3L (1A) for which the respondents argued is the correct construction of the subsection.  The judgment also rejects the arguments advanced by Mr Kennedy that:  (a) Mr Baker did not believe on reasonable grounds that any data accessed by operating the personal computer fell within the terms of the warrant; and (b) Mr Baker did not give Mr Kennedy an adequate opportunity to make a claim of legal professional privilege in respect of the copy hard drive.  The judgment does not identify the formal orders to be made in the proceeding. The parties will be given an opportunity to address Justice Branson on the question of the appropriate final orders.  **5.2 Application to set aside creditors’ resolutions - matters to be considered**  (By Johann Kirby, Corrs Chambers Westgarth)  Frond Pty Ltd; P. Aker Flowerbulbs Pty Ltd v Spiros Livadaras, [2004] VSC 142, Supreme Court of Victoria, Mandie J, 28 April 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/april/2004vsc142.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/april/2004vsc142.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The case involved resolutions passed at a creditors’ meeting to confirm the appointment of a liquidator appointed by the members of a company. A major creditor sought to have the resolutions overturned or alternatively to have a second resolution reinstated that allowed for the appointment of their liquidator of choice. The decision provides discussion on matters to be taken into account in orders under sections 600B and 600C of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“the Act”).  **(b) Facts**  The members of Frond Pty Ltd (in liquidation) (“Frond”) appointed the second defendant (“Mr Yeo”) and the third defendant (“Mr Rambaldi”) as liquidators for the purposes of winding up the company. Following the members’ meeting at which that appointment was made, a creditors’ meeting was held at which the creditors were required to confirm the appointment of Mr Yeo and Mr Rambaldi, or appoint an alternative liquidator.  The plaintiffs (who were major creditors of the company) had instructed their solicitor, Mr Liakopoulos, to attend the creditors’ meeting and to seek the appointment of an alternative liquidator, Mr Rathner. Mr Liakopoulos had also been instructed to contact other creditors and obtain proxies from them in support of the appointment of the alternative liquidator. Based on a list of creditors provided with the notice of the creditors’ meeting, Mr Liakopoulos believed he had the support of creditors with a majority in value and approaching a majority in number for the resolution to appoint an alternative liquidator.  At the creditors’ meeting Mr Liakopoulos saw a list of proxies granted in favour of Mr Livadaras (the first defendant) by 22 creditors, only one of whom was listed in the list of creditors provided in advance of the meeting.  At the meeting Mr Rathner expressed concern about additional creditors that had not appeared on the initial list of creditors and queried whether there was any evidence to support their claims. Mr Rathner asked that those creditors not be given the right to nominate and vote on the choice of liquidator (amongst other matters).  Mr Livadaras, who represented a creditor that was identified in the original list of creditors nominated himself as chairman of the meeting and was appointed on a show of hands.  During the meeting, considerable discussion took place as to the eligibility of the additional creditors to vote on the resolutions. Ultimately, the chairman allowed the creditors to vote.  The first resolution put to the meeting was that Mr Rathner be appointed as liquidator. The vote on the resolution was deadlocked with a majority of creditors by value but not by number voting in favour of the appointment of Mr Rathner. Mr Livadaras, in his capacity as chairman of the meeting, informed the meeting that he would not exercise a casting vote, with the result that the resolution was not passed. The second resolution put to the meeting was that the appointment of Mr Yeo and Mr Rambaldi by the members of the company be confirmed. The vote was a mirror of that on the previous resolution, except Mr Livadaras elected to exercise his casting vote, resulting in the confirmation of the appointment of Mr Yeo and Mr Rambaldi.  The plaintiffs sought orders pursuant to section 600C and, in the alternative, section 600B, to have the resolutions of the creditors’ meeting set aside on the basis that the process of convening the creditors’ meeting had been “tainted” due to Frond not providing a full list of creditors as required under the Act. The plaintiffs submitted that this failure inhibited the ability of the plaintiffs to obtain proxies for the meeting in favour of the resolution to appoint an alternative liquidator, and may have altered the result of the vote.  **(c) Decision**  In his judgment, Mandie J considered a number of cases that provide guidance on matters to be taken into account when making an order under sections 600B and 600C of the Act. These matters include the following:           It is necessary for an applicant seeking orders under sections 600B or 600C to show some reason, other than the bare consideration of majorities, why an order for removal of a liquidator should be made. The frustration of the strong and desired preference of the largest creditor does not of itself show that the failure to pass a resolution is contrary to the interests of the creditors - Network Exchange Pty Ltd v MIG International Communications Pty Ltd (1994) 12 ACLC 594          The fact that an applicant seeking orders under section 600B or 600C is a major creditor of the relevant company is a persuasive but not conclusive factor to be considered - Re Coaleen Pty Ltd (administrator appointed) (1999) 30 ACSR 200          Whether the decision to remove a liquidator would cause detriment to the other creditors is a matter to be considered - Re Coaleen Pty Ltd (administrator appointed) (1999) 30 ACSR 200          The chairman of a meeting of creditors is under no obligation to exercise a casting vote - Metal Manufacturers Ltd v ACN 063 086 126 Pty Ltd (in liq) [2001] QSC 106          It is necessary to weigh up all the relevant factors, rather then simply the vote of creditors having a majority in value - Young v Sherman [2002] NSWCA 281          It may be necessary to make available to the Court all of the same material as the chairman had, to enable the Court to consider the facts in full. Whether this is necessary would depend on the facts of the case - Young v Sherman [2002] NSWCA 281.  Having considered the relevant authorities, Mandie J stated that the primary issue to consider was whether it would be contrary to the interests of the creditors as a whole to alter the outcome of the resolutions voted on at the creditors’ meeting, and to replace the liquidators appointed by the members of the company.  Mandie J considered whether any inference could be drawn by the fact that Mr Livadaras did not provide evidence on oath for his actions at the meeting. Mandie J found that this did not justify any inference that he was not acting bona fide or honestly in accordance with what he believed to be the creditors’ interest.  On the facts, Mandie J found that there was no suggestion of bias, appearance of bias or allegation of any threatened misconduct by the appointed liquidators, who were well qualified to perform their role. Mandie J found that the disadvantage suffered by the plaintiffs in not receiving a full list of creditors, was not sufficient to justify the removal of the liquidators, as the result of the resolution caused no real disadvantage to the creditors as a whole or the plaintiffs in particular.  **5.3 Misleading or deceptive conduct in unsolicited offers**  (By Michael Crichton, Blake Dawson Waldron)  National Exchange Pty Ltd and Tweed v Australian Securities and Investments Commission [2004] FCAFC 90, Federal Court of Australia, Full Court, 22 April 2004  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/april/2004fcafc90.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/april/2004fcafc90.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  At first instance, the present respondent ("ASIC") sought to establish that conduct of the first appellant ("National Exchange") in relation to a financial product had contravened subsection 1041H(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the "Act"). The impugned conduct was the issue of certain written offers by National Exchange to purchase shares in Onesteel Ltd ("Onesteel"), which were said to be misleading or deceptive or likely to mislead or deceive. ASIC also alleged that the second appellant ("Mr Tweed") had aided, abetted, counselled or procured the alleged contraventions and/or was knowingly a party to them.  ASIC's main argument was that the offer document gave the impression the consideration for the shares, which was higher than the market value at the time, would be paid immediately, whereas on closer inspection of the offer document, it became apparent that the consideration was to be paid by National Exchange over 15 equal annual payments. Thus, the offer document was misleading, and breached subsection 1041H(1).  Finkelstein J found this conduct to be misleading or deceptive. On appeal Dowsett, Jacobson and Bennett JJ upheld his decision.  **(b) Facts**  National Exchange sent offers to 5000 shareholders of whom 4114 held less than 4000 shares. The offer was $2 for each share acquired. The offer document invited a comparison between the offer amount and the closing market price for the shares on 25 July 2003, which was $1.93. A subsequent and less prominent part of the offer document provided that the purchase price was to be paid by 15 annual instalments payable on 3 September each year, commencing 3 September 2004. When this provision was taken into account, the actual value was substantially less than the two dollars per share.  **(c) Arguments and decision at first instance**  ASIC claimed National Exchange's conduct caused three misrepresentations to be made:  1.      The total price offered for Onesteel shares was payable in full upon acceptance of the offers by the recipients, whereas the total price was payable in fifteen equal annual instalments; 2.      The financial value of the price offered for each Onesteel share pursuant to the offer was $2 per share, whereas the financial value was less than $2 per share; and 3.      The financial value of the price offered for each Onesteel share pursuant to the offers exceeded the stated closing market price for Onesteel shares as at 25 July 2003, whereas the financial value did not exceed the stated closing market price.  ASIC led evidence concerning the reactions of numerous shareholders to the offers. At least two of the shareholders spoken to appreciated the consequences of the proposed deferred payment of the purchase price. However, three other shareholders were confused or misled at least temporarily.  Finkelstein J found that the first alleged misrepresentation was established, and was a breach of subsection 1041H(1), but that the second and third alleged misrepresentations were not established. A finding against National Exchange resulted in an adverse finding against Mr Tweed.  National Exchange and Mr Tweed appealed against Finkelstein J's findings as to the first alleged misrepresentation. ASIC appealed against his findings as to the second alleged misrepresentation.  **(d) Appeal decision**  Dowsett J examined four steps which Finkelstein J used in coming to the conclusion that the conduct was misleading or deceptive (by reference to Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177).  **(i) Was there a false representation?**  A truthful statement may nonetheless be misleading or deceptive. The offers invited a comparison between the $2 offer per share and the current market price of $1.93. This invitation carried an implicit representation that the offeree would be better off if he or she accepted rather than rejected the offer. The subsequent provision for deferred payment significantly undermined the validity of such a comparison.  The offers were capable of being understood as offering a purchase price significantly in excess of the closing market price, with the tacit representation that there was nothing else in the document which would seriously undermine the validity of such comparison. That representation was false.  **(ii) Did National Exchange intend to mislead?**  It is impossible to imagine any investor finding the offer attractive, given the arrangement of deferred payment. It is of some significance that National Exchange sent the offers to the holders of relatively small parcels of shares. Such persons could have been expected to pay less attention to the offers than they would if large holdings were involved.  Hence, it is impossible to avoid the conclusion that National Exchange expected that some people might accept the offers without fully understanding them.  **(iii) Did the conduct lead to erroneous assumptions?**  The offer led to the erroneous assumption that accepting would yield two dollars per share.  **(iv) Was the conduct misleading or deceptive having regard to a 'reasonable shareholder'?**  The class of shareholder to whom the offers were addressed was dominated by small shareholders who stood to receive amounts of less than $8,000. The format of the offer would suggest to any reasonable person that the benefit to be derived from the offer was $2 as compared to the market price of $1.93. A sceptical shareholder would look for the 'catch' but in Dowsett J's view, many reasonable shareholders would have been inclined to accept the offer at face value, assuming that conditions as to payment would not significantly reduce the value of the offer.  It may be that many reasonable shareholders would, before accepting, read the documents more carefully. However, his Honour was of the opinion that not every reasonable shareholder in the class would have done so. He concluded that the offers were likely to mislead or deceive reasonable offerees.  Jacobson and Bennett JJ noted that Finkelstein J found a number of shareholders would have formed a 'mistaken view' about the offer by reason of the 'general impression' of the offer document. So long as Finkelstein J did not apply the wrong test in identifying the persons who fell within the class of ordinary or reasonable shareholders, they could see no error in this approach. The question was one of fact for the primary judge, and they would not depart from his finding, as they did not consider it to be wrong.  They felt that it was not entirely clear whether Finkelstein J applied the conduct to the test of the hypothetical ordinary shareholder as stated in the case of Campomar Sociedad Limitada v Nike International Ltd (2000) 202 CLR 45. Finkelstein J said that it was difficult to identify the criteria for the ordinary member of a diverse group. He did not refer to the ordinary or reasonable shareholder in making his findings. Instead, he referred to a 'number of shareholders' and the 'general shareholding public' who would likely to have been misled by the 'general impression of the document'. Jacobson and Bennett JJ felt the explanation for this is that Finkelstein J wrongly treated the case as one where the representation was made to identified individuals.  But even though Finkelstein J failed to apply the correct tests, their Honours were not persuaded by the argument that the offer was not likely to mislead or deceive the ordinary or reasonable shareholder. The disparity between the primary representation ($2 per share) and the qualification (paid over 15 years) was so great that the warning was insufficient to draw the true position to the attention of the ordinary shareholder.  As to the cross appeal, Dowsett J as well as Jacobson and Bennett JJ, could see no purpose beyond that served by the existing declaration that the first alleged misrepresentation was misleading or deceptive. Thus there was little point in considering whether or not the second alleged misrepresentation was made out on the evidence. In any event, they accepted the view expressed by Finkelstein J that it was not.  The cross appeal and appeal were dismissed.  **5.4 Admissions of insolvency as evidence in unfair preference proceedings** (By Ian Hanrahan, Blake Dawson Waldron)  Dean-Willcocks v Commissioner of Taxation (No 2) [2004] NSWSC 286, New South Wales Supreme Court, Austin J, 21 April 2004  The full text of the judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc286.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc286.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The plaintiffs, SJP Formwork (NSW) Pty Ltd (SJP) and its liquidator, Mr Ronald Dean-Willcocks sought final relief under s 588FF 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" \t "default) (the Act) against 14 defendants (including the Commissioner of Taxation) for repayment of various sums of money paid by SJP on the ground that the payments were unfair preferences.  Mr Dean-Willcocks also sought a direction under s 479(3) of the Act that he was justified in relying on certain evidence as sufficient to enable the Court to be satisfied that SJP was insolvent at the relevant time. His evidence consisted of two affidavits and a letter from the Australian Taxation Office (ATO) in which the Commissioner of Taxation made the admission that SJP was insolvent at all relevant times.  Mr Dean-Willcocks wanted to proceed with a separate trial of a claim against the Commissioner in order to improve his funding position in relation to the other 13 claims. Given the admission of insolvency by the Commissioner, he did not wish to fund an expert's report as to the solvency of SJP. However, relying on this admission as evidence became an issue because of observations made by Finklestein J in Crosbie, in the matter of Trollope Silverwood & Beck Pty Ltd (in liq) v Commissioner of Taxation [2003] FCS 922.  Austin J produced a detailed examination of the Crosbie decisions and its implications for the plaintiffs. His Honour stated:  "Although the court would not ordinarily give a liquidator directions as to how he should present his case, the uncertainty created by Crosbie and the obvious cost and inconvenience that would be suffered if substantial evidence of insolvency were thought to be necessary, make it appropriate for the court to give the liquidator directions as to the proper way forward in this case."  Austin J granted the direction sought in the application. However in light of his commentary on Crosbie, his Honour advised the plaintiffs to consider the position of the directors of SJP before seeking final orders against the Commissioner and other defendants under s 588FF.  **(b) Facts**  Mr Dean-Willcocks was appointed liquidator of SJP in September 1999. He noted the potential to recover money in respect of a number of unfair preference transactions by SJP, but he did not initiate proceedings for recovery until May 2002 due to lack of funds.  The Commissioner was served with originating process in March 2003. The other 13 defendants were not served at this stage. Mr Dean-Willcocks made an application under Part 8 Rule 6 of the [Supreme Court Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11562" \t "default) for the court to order a separate trial against the Commissioner, in the hope that a favourable judgment would improve his funding position in relation to the other claims. That trial was granted and heard on 29 April 2003 (Dean-Willcocks v Commissioner of Taxation (2003) 45 ACSR 298), where Austin J required that the other 13 defendants be notified and given an opportunity to be heard.  In September 2003 the Commissioner wrote to Mr Dean-Willcocks, advising him that the Commissioner would not be contesting the issue of the insolvency of SJP in the proceedings, but would be relying on the defence provided for in s 588FG(2) of the Act, namely that the transaction was not an unfair loan.  **(c) Crosbie**  The Commissioner did not object to Mr Dean-Willcocks' application to rely on the admission of insolvency rather than requiring an expert's insolvency report. However, problems arose from observations made by Finkelstein J in Crosbie.  Crosbie also involved an attempt to recover payments from the Commissioner as unfair preferences. Unlike the present case, however, the Commissioner made a cross-claim against the directors of the company for indemnity under s 588FGA of the Act. When the Commissioner did not contest the plaintiff's claim, the directors sought leave to challenge the assertion that the company was insolvent at relevant times.  As Finklestein J pointed out, the institution of a cross-claim in Crosbie did not create a direct issue between the directors and the plaintiffs. In that sense, the directors were "third parties" in the proceeding, notwithstanding the cross-claim.  Finklestein J adopted the following two propositions:           Since s 588FF requires a court to be satisfied that a transaction of the company is voidable (ie the company was insolvent at the relevant time), the court cannot make an order under that section merely by consent and without first examining the facts (consent point); and          The directors should be given the opportunity to appear to defend the plaintiff's claim, because they would suffer grave injustice if leave were refused (third party point).  In the present case, Austin J found that the observations relating to the consent point were plainly wrong, and chose not to follow them. Austin J respectfully agreed with Finklestein J on the third party point.  **(d) Consent point**  In Crosbie, Finklestein J found that the court cannot be "satisfied" that a transaction is voidable, as required by s 588FF, unless it has before it the facts which will establish that conclusion. This implies a substantive investigation of the facts, and not merely a reliance on the defendant's admission.  Austin J criticised the reasoning in Crosbie, disagreeing with Finklestein J's interpretation of s 588FF and dismissing authorities cited in the case as they did not address the court's power to accept admissions as satisfactory evidence for statutory purposes. In his Honour's mind, there was no authority on the consent point before the Crosbie decision.  Austin J went on to describe any approach where the court was committed to inquiring into the facts as:  "unusual in our adversary system, where it is normally up to the parties to nominate the issues for determination, and the court resolves those issues on the basis of the evidence presented."  Austin J also expressed concern that requiring the commission of an expert's report in a proceeding such as this would cause substantial expenditure (often at the expense of unsecured creditors) where the report addresses a matter that is not in contest.  However two important observations were made:           A court is not bound by an admission made between the parties (Termijtelen v Van Arkel [1974] 1 NSWLR 525). It may decline to act on admissions if, for example, they are made so as to attract a jurisdiction that is not naturally present; and          An important question, particularly in relation to s 588FF admissions, is whether any third parties may be prejudiced by the court's orders. For instance, other defendants to unfair preference claims will be affected by the presumption in s 588E(8) that a company found to be insolvent at a certain point in time is taken to be insolvent at that point in time in subsequent proceedings.  The second point created some concern in the present case. The question was raised whether s 588E(8) operated to create a presumption against the other 13 defendants if orders were obtained against the Commissioner in a separate trial. His Honour found it unnecessary to answer the question, instead finding it sufficient that the other defendants had been given notice of the issues and an opportunity to be heard.  One defendant responded to the present application. That defendant sought an order that findings against the Commissioner would not give rise to a presumption under s 588E. Austin J declined to give the order, as that defendant had previously indicated that it would challenge the presumption in s 588E(8) in its own trial if such an order was made against the Commissioner.  **(e) Third party point**  In Crosbie the Commissioner was the defendant to an unfair preference recovery proceeding and the payment in question was made in respect of a tax liability listed in s 588FGA(1). If an order is made against the Commissioner in that situation, each director of the company at the time is liable to indemnify the Commissioner in respect of any loss or damage resulting from the order.  Crosbie dealt with an application by directors of a company for leave to defend a preference action against the Commissioner to challenge the assertion that the company was insolvent. Although being "third parties" to the original claim, Finklestein J made the orders, saying that they would suffer grave injustice if leave were refused. This kind of third party procedure was described by Austin J as "a vehicle for giving effect to the principles of procedural fairness".  In the present case, no s 588FGA cross-claim was made against the directors of SJP. Austin J had to consider whether the directors were entitled to receive notification of the Commissioner's admission of insolvency or any proposed orders given that they were not cross-defendants.  Directors of a company may be prejudiced by an order under s 588FF because it imposes on them an obligation to indemnify under s 588FGA. Prima facie, the rules of natural justice would require the directors to be notified and given an opportunity to be heard before such an order is made.  However Austin J looked at various legislative reforms to taxation and insolvency laws during the 1990s, which placed the Commissioner in a position equivalent to a guaranteed creditor. His Honour saw that on one hand, this impliedly excluded the rights of directors to be heard as a contractual guarantor is not entitled to notice of action against the debtor unless the contract so provides. On the other hand, he noted that directors are exposed to liability by virtue of a statutory indemnity rather than a contractual guarantee, which would normally provide a basis for application of the rules of natural justice.  The question remains unresolved as to whether the directors should be notified before orders are made under s 588FF even if the directors have not sought such relief. Instead of resolving the issue, Austin J left it to be considered in a situation where a court comes to make orders under s 588FF and the directors have not been duly notified of the circumstances.  **(f) Conclusions**  Mr Dean-Willcocks was granted a direction under s 479(3) that he was justified in relying on his evidence as sufficient to enable the court to be satisfied that SJP was insolvent at all material times. This declaration does not bind third parties and does not prevent challenges to the question of insolvency in subsequent hearings. In light of his commentary on Crosbie, Austin J advised the plaintiffs to consider the position of the directors of SJP before seeking final orders against the Commissioner and other defendants.  **5.5** **Ordering specific performance of a company’s obligation which arose prior to the company entering into a deed of company arrangement**  (By Anna Chung, Corrs Chambers Westgarth)  The Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd (subject to a Deed of Company Arrangement) [2004] FCA 393, Federal Court of Australia, Beaumont J, 7 April 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/april/2004fca393.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/april/2004fca393.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  A claim for specific performance for the equitable assignment of specified property is maintainable against a company which has entered into a deed of company arrangement.  **(b) Facts**  In 1997, Airtourer Co-operative Limited (Airtourer) entered into a contract with Millicer Aircraft Industries Pty Ltd (Millicer) for the sale by Airtourer to Millicer of certain aircraft parts and intellectual property rights.  Under this contract, Millicer agreed to manufacture and market an aircraft under the name “Air Tourer”.  It was a term of the contract that if Millicer failed to produce an Air Tourer aircraft for sale to Airtourer within 5 years, Millicer would return the property sold under the contract.  Within the relevant 5 year period, Millicer failed to produce an Air Tourer aircraft and Airtourer demanded the return of the property sold under the contract. Millicer refused.  Airtourer subsequently commenced proceedings, seeking specific performance of the contract. Millicer, having entered into a Deed of Company Arrangement (Deed) in 2000, responded that any claim Airtourer had against Millicer was as a creditor and subject to the Deed, and therefore could not be the subject of proceedings without the leave of Court.  Airtourer argued that it was not a creditor of Millicer in relation to any debt. Instead, it was merely claiming its proprietary right for the return of specified property, which could not be satisfied by monetary consideration.  Millicer argued that Airtourer’s claim, if established, was a ‘contingent claim’ capable of proof and adjudication by the administrator, for reasons including the following.  Under section 553 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), debts admissible to proof include certain or contingent debts and claims against the company and the Deed expressly mandated the admission to proof of contingent claims, being claims which may never accrue or may accrue upon the happening of a future event as a result of an existing contractual obligation.  **(c) Decision**  Under section 444D of the Corporations Act 2001, a deed of company arrangement binds all creditors of the company, so far as it relates to claims arising on or before the date specified in the deed (in this case, 18 August 1999).  Beaumont J held that as at 18 August 1999, Airtourer’s claim was not a claim capable of being made as a creditor of Millicer for the following reasons.  Airtourer’s claim for specific performance was based on a claim for equitable assignment of specified property for consideration. As such, the character of Airtourer’s claim was quite different to that of a creditor, as it had no connection with any debt, liquidated or unliquidated. Accordingly, Airtourer’s claim was not bound by the Deed nor could it be satisfied under the Deed.  In coming to this decision, Beaumont J relied upon Airtourer’s submissions which drew an analogy to cases where a right to sue for damages for a particular future breach of a covenant was found to be a mere expectancy rather than a contingent claim, and thus incapable of being the subject of proof.  **(d) Practical implications**  If an obligation of an insolvent company arose before the company entered into a deed of company arrangement, a court may order specific performance of that obligation even if such relief will adversely affect the unsecured creditors of the company.  **5.6 Court appointed liquidators – fiduciary duties and duty to the court**  (By Sonia McMillan, Phillips Fox)  In the matter of ACN 003 671 387 and ACN 008 664 257 [2004] NSWSC 368,  New South Wales Supreme Court, Austin J, 4 May 2004.  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc368.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/may/2004nswsc368.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case involved an application for leave of the Court by the liquidator of two mining companies referred to as ACN 003 and ACN 008, to allow the liquidator to enter into a share agreement to purchase the shares of both the companies. The liquidator also sought an order terminating the winding up of the companies.  The liquidator sought these orders in the interest of his firm which had incurred expenses of more than $700,000 during the liquidation of the companies. Relevant to the liquidator, the companies were entitled to pursue approximately $81,097,632 in insurance claims arising from an incident which led to their current status. The companies had no funding to pursue litigation relating to the insurance claims. The liquidator proposed to buy the entire share capital of the companies and pursue the insurance claims for the benefit of his firm.  The New South Wales Supreme Court granted leave to allow the liquidator to acquire the share capital of the two companies, satisfied that the liquidator had discharged his duty to provide full disclosure with respect to the transaction. The Court also made the requested order to terminate the winding up of the companies for the sole purpose of pursuing the insurance claims.  **(b) Facts**  In the early 1990s, ACN 003 and Sumisho Coal Development Pty Ltd (‘SCD’) formed a joint venture to conduct a mining operation in Queensland known as the North Goonyella Coal Mine. ACN 003 held a 51% interest and SCD a 49% interest in the joint venture. ACN 008 was a wholly-owned subsidiary of ACN 003 and the vehicle through which ACN 003 held its interests in the joint venture.  In 1993 the joint venture purchased an integrated longwall mining system from a UK company now known as Longwall Roof Supports Ltd. Longwall coal mining operations commenced in 1994.  In 1997 SCD acquired all of the shares in ACN 003, and from that time ACN 003 has been a wholly-owned subsidiary of SCD, with ACN 008 remaining a wholly-owned subsidiary of ACN 003.  Between November 1998 and June 1999, four major roof falls occurred in part of the mine known as Longwall 5 South (‘L5S’). This resulted in equipment damage and interruption to mine production. In September 1999 a spontaneous combustion incident occurred in LW5S. The incident was investigated and it was concluded that the whole of the mine could be jeopardised unless the supply of oxygen (fuelling the spontaneous combustion) was cut off by sealing the mine face in LW5S. LW5S was sealed off. The majority of the equipment constituting the longwall unit is now permanently sealed within LW5S.  **(c) Insurance claims**  An industrial special risks insurance policy for $25 million and additional excess policies providing cover of a further $225 million were in place for the relevant time.  A consolidated claim in respect of the roof falls and the spontaneous combustion incident was submitted in March 2001, for a total amount of $81,097,632 (the ‘Insurance Claims’).  Earlier, in November 2000, SCD sold its interests in the mining operation to a third party. The Contract of Sale expressly excluded from the assets sold, insurance claims relating to the roof falls and the interest of SCD, ACN 003 and ACN 008 in the longwall equipment lost as a result of the combustion incident, the subject of the Insurance Claims.  **(d) Liquidation of ACN 003 and ACN 008**  In October 2001, orders were made by the New South Wales Supreme Court upon an application by Sumitomo Australia Ltd (the parent company of SCD) to wind up ACN 003 and ACN 008 and to appoint Mr Sheahan as their liquidator. Mr Sheahan’s company had been previously engaged to provide litigation management services to SCD to support the prosecution of the Insurance Claims and to advise on the winding up of ACN 003 and ACN 008.  **(e) Pursuing the insurance claims**  In January 2002, the agreement between Mr Sheahan's firm and SCD for the provision of litigation management to pursue the Insurance Claims was terminated. As sole creditor and shareholder of ACN 003, SCD made it clear that it had no intention of making funds available to pursue any of the Insurance Claims.  For the next 12 months, Mr Sheahan sought financial assistance to fund litigation of the Insurance Claims. Mr Sheahan also explored the possibility of selling the Insurance Claims or the two companies to a third party. These endeavors were fully disclosed to SCD, and incurred costs of $705,000 in accumulated fees and disbursements owing to Mr Sheahan. Mr Sheahan was ultimately unsuccessful in all attempts to obtain third party assistance.  In February 2003, SCD confirmed it would not pursue the Insurance Claims and would finalise the winding up of the companies and have them deregistered.  **(f) Sale of ACN 003 and ACN 008 to Delamere**  To avoid this and the loss to his firm, Mr Sheahan proposed the sale by SCD of the shares in the two companies to Delamere Corporation Pty Ltd (‘Delamere’), so that the Insurance Claims could be pursued. Mr Sheahan is a director of Delamere, the trustee of the Sheahan Services Trust, the service trust for Mr Sheahan's firm. SCD and Mr Sheahan subsequently commenced negotiations of two share sale deeds in relation to the sale of SCD’s shareholdings in ACN 003 and ACN 008 to Delamere.  Two share deeds were executed by the parties, each of them subject to a condition that completion must not occur until an order terminating the winding up of the two companies under s 482(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) was obtained. The deeds also contained a warranty by Delamere as purchaser that full disclosure had been made to SCD of information known to Mr Sheahan and his firm, relevant to the strength of the Insurance Claims.  It is on the basis of the terms of the share sale deeds that this application was made to the Court.  **(g) This application**  The primary issue before the Court in determining this application was whether or not Mr Sheahan, in proposing this transaction to purchase the companies, had conflicting duties - his duty as a court-appointed liquidator, that being, his fiduciary duty and his duty to the court.  Austin J held that a court-appointed liquidator has a fiduciary duty in administering the assets of the company in liquidation. As a fiduciary, the liquidator is subject to the general obligation to avoid being in a position in which his duty conflicts (or there is a real sensible possibility that it may conflict) with personal interest.  In addition, the ‘purchasing rule’ prohibits a fiduciary from purchasing property from his principal unless the fiduciary can show that the transaction is fair. Fairness is demonstrated where full value is given for the property, and all material information is disclosed to the principal to ensure informed consent is given to the transaction proceeding. In the context of liquidation, the Court stated that informed consent given by the creditors and contributories to a proposed purchase by the liquidator will suffice. In this case the only consent required was that of SCD, as the only creditor and sole shareholder.  The Court held that the duty to the court of a court-appointed liquidator is to avoid any undisclosed conflict of interest. Discharging this duty is measured by full disclosure to the Court of all relevant facts and circumstances surrounding the transaction.  **(h) Decision**  The Court held that in the circumstances it was satisfied that Mr Sheahan had made complete disclosure to the Court and to SCD of all the relevant facts and circumstances surrounding the transaction, and in doing so had discharged his respective fiduciary duties and duties to the Court. The Court granted leave to Mr Sheahan to proceed with the share sale deeds on behalf of Delamere.  The Court made an order to terminate the winding up of the two companies, in accordance with the intention to pursue the Insurance Claims, particularly since this termination had the support of SCD as sole shareholder and formerly the only external creditor.  **5.7** **Who can vote against a share buy-back?**  (By Andrew Walker (Clayton Utz, Melbourne) and Anna Vetrova (Clayton Utz, Sydney))  Village Roadshow Limited v Boswell Film GmbH [2004] VSCA 16, Court of Appeal of the Supreme Court of Victoria, Callaway, Buchanan and Chernov JJA, 27 February 2004.  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/february/2004vsca16.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/february/2004vsca16.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Decision**  The Victorian Court of Appeal unanimously dismissed an appeal by Village Roadshow Limited ("Village") against the judgment of Mandie J in which his Honour held that the holders of preference shares in Village were entitled to vote against the proposal to buy-back their preference shares.  **(b) Facts**  In October 2003, Village proposed a selective buy-back of all of its preference shares. Two meetings were convened to implement the buy-back. Firstly, as it was a selective buy-back, a general meeting was held to approve the buy-back by special resolution ("general meeting") in accordance with section 257D of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act"). Secondly, because the buy-back was compulsory, a Court-ordered meeting was held to approve a scheme of arrangement between Village and its preference shareholders pursuant to section 411 of the Act ("scheme meeting").  The scheme booklet and the notice of general meeting assumed that the holders of the preference shares were not entitled to vote on the buy-back resolution because the buy-back was not a "proposal to reduce the share capital" of Village for the purposes of the voting rights attaching to the preference shares as set out in article 2.4(a)(i) of Village's constitution. The scheme booklet and the notice of general meeting also stated that the holders of ordinary shares and preference shares were not entitled to vote either for or against the buy-back resolution in respect of their ordinary shares. Following an approach from ASIC, Village published notices in major newspapers which stated that it would record and report to the Court any votes cast against the buy-back resolution by shareholders holding both ordinary shares and preference shares, and count those votes should the Court so determine.  At both the general meeting and the scheme meeting, the resolutions were passed by the required majorities. However, Mandie J refused to approve the scheme of arrangement on the basis that (contrary to the statements in the notice of general meeting) section 257D requires a special resolution to be passed with no votes being cast in favour of the resolution by any person whose shares are proposed to be bought back or their associates, and so did not prevent preference shareholders from voting against the buy-back resolution.  **(c) Matters in dispute**  Callaway JA (with whom Buchanan and Chernov JJA agreed) summarised the matters in dispute as follows:           Does section 257D prevent a person whose shares are proposed to be bought back pursuant to a selective buy-back from voting *against* a special resolution of the kind referred in section 257D(1)(a) of the Act?          If section 257D does not have that effect, were preference shareholders entitled to vote against the special resolution that was proposed pursuant to that section at the general meeting?  Village contended that the answer to the first question should be "yes", while the answer to the second question should be "no". The respondent (a preference shareholder) argued the contrary position.  **(d) Judgment of the Court of Appeal**  The Court held that the answer to the first question was "no" and the answer to the second question was "yes", and therefore dismissed the appeal. The words "no votes being cast in favour of" in section 257D(1)(a) cannot be read as if they said "no votes being cast in favour of or against". These words are unambiguous and persons seeking to comply with the law, or like ASIC seeking to enforce it, should be able to rely on them. Accordingly, section 275D did not prevent preference shareholders, or ordinary shareholders who were also preference shareholders, from voting against the buy-back resolution if they were otherwise entitled to do so pursuant to Village's constitution.  Article 2.4(a)(i) of Village's constitution provided that the holders of preference shares had no right to vote at any general meeting except in limited circumstance, including “C. on a proposal to reduce the share capital of the company". The Court held that a buy-back is clearly a reduction of capital, and therefore that a vote on a buy-back resolution is a vote on a proposal to reduce share capital of the company. Accordingly, the holders of preference shares were entitled to vote against the buy-back proposal. All of Village’s arguments that a buy-back was not a proposal to reduce share capital for the purposes of this article were rejected by the Court.  Village’s first argument was that the buy-back resolution passed pursuant to section 257D did not itself effect the reduction of capital, but merely authorised Village to purchase its own shares. Section 257D requires only the "terms of the buy-back agreement" to be approved at a general meeting. The Court held that a resolution pursuant to section 257D, even if it did no more than approve the terms of the buy-back, was nevertheless a proposal to reduce the share capital and the only opportunity to vote on that proposal.  Village then argued that article 2.4(a)(i)(C) only covered conventional capital reductions under Division 1 of Part 2J.1 and did not extend to buy-backs under Division 2 of Part 2J.1. Village argued that the reference to capital reductions (and the omission of reference to buy-backs) in article 2.4(a)(i)(C) reflected the separate treatment given to them in other parts of the Constitution. The Court rejected both arguments as insufficient to displace the plain meaning of the words "a proposal to reduce share capital of the Company", on which the holders of preference shares have a right to vote. This right should not be cut down by uncertain inferences drawn from the way in which Part 2J.1 or Village’s constitution had been structured.  Village’s final argument was that, if article 2.4(a)(i)(C) were to extend to buy-backs, an anomaly would result where article 2.4(a)(i)(C) and section 257D are considered together, because the effect of section 257D is that holders of preference shares can only vote against the buy-back proposal, whereas article 2.4(a)(i)(C) gives those holders a right to vote for or against a proposal. Village argued that there could be circumstances where a buy-back proposal would be defeated even if three-quarters of the ordinary shareholders and the preference shareholders may be in favour of it. The Court rejected this argument noting that the "lack of even-handedness" in section 257D is just as capable of producing the same result if the ordinary shares were bought back selectively, and that it was unlikely that reading down article 2.4(a)(i)(C) to exclude buy-backs would reduce the incidence of anomalies caused by section 257D.  **(e) Comment**  Despite the legalisation of share buy-backs and the abolition of par value, the decline of the doctrine of maintenance of capital has been a drawn-out affair. Both the Corporations Act and the constitutions of many companies are littered with artefacts from the various stages of that process. Those artefacts provided the basis for Village's unsuccessful argument that a buy-back was not a reduction of capital for the purposes of its Constitution. The Court of Appeal sensibly gave pre-eminence to the "plain meaning" of the relevant provisions.  Nevertheless, the Court of Appeal's judgment does give rise to some issues for consideration by the Corporate Law Economic Reform Program. The Court appeared sympathetic to the policy arguments raised by Village as to the effect of the voting exclusion in section 257D, particularly that by restraining interested shareholders from voting in favour of, but preserving their ability to vote against, a buy-back resolution, a relatively small number of shareholders may effectively have the ability to "veto" a buy-back proposal notwithstanding the support of a special majority. Indeed, the Court speculated that it may well have been better to disenfranchise wholly the persons whose shares are to be bought back, and that section 257D gives too much weight to the wishes of opponents, albeit that such policy considerations could not displace the plain meaning of the section. Similar sentiments were expressed by Santow J in Re Tiger Investment Pty Ltd (1999) 33 ASCR 438 at 444-5, where his Honour called for a clarificatory amendment to the corresponding provision governing selective reductions of capital (section 256C(2)) to mirror the standard voting exclusion in ASX Listing Rule 14.11.  It may also be time to query whether buy-backs should continue to be subject to a parallel regime to capital reductions in terms of the statutory procedural requirements. In the absence of any proposal to introduce treasury shares, it is unclear why it is thought necessary to have two different regimes - one for buy-backs and the other for reductions not otherwise authorised by law - when, as the Court of Appeal judgment makes clear, the end result is the same. It is true that the voluntary character of buy-backs is distinct from the compulsory nature of capital reductions, but this is readily capable of being catered for within a single regime by, for example, maintaining a requirement for a class meeting of affected shareholders whose shares would be cancelled (or bought back) without consent.  **5.8 Winding up a company on the just and equitable ground**  (By Tim Slattery, Freehills)  Rocco Triulcio v Chase Property Investments Pty Ltd [2004] NSWSC 311, New South Wales Supreme Court, Gzell J, 27 April 2004 (revised).  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc311.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc311.htm" \o "http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc311.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  In this decision, Gzell J considered an application by a minority shareholder, Triulcio, to wind up several companies under the “just and equitable” limb of section 461 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the “Act”). The dispute arose following the breakdown of personal and business relations between Triulcio and the Elias family who had invested together using several companies whose accounts had fallen into disarray.  The case is interesting because the court made winding up orders in respect of solvent companies and a breakdown of mutual confidence between shareholders and directors justified the winding up order under the “equitable” ground of section 461.  **(b) Facts**  Triulcio held a minority interest in each of the defendant companies. The Elias family held the majority interests. Triulcio and Anthony Elias were each a director of each defendant company. After the relationship between them broke down, Triulcio claimed it was just and equitable to wind up the companies under section 461(1)(k) of the Act. He also claimed that a basis for winding them up had been made out under sections 461(1)(e), (f) and (g) in that the directors had acted in their own interests and the affairs of the companies and its acts had been conducted oppressively, unfairly prejudicially or discriminatorily of his interests. Each of the companies was solvent.  The defendants cross claimed for an order for the compulsory purchase of Triulcio’s shares under section 233(1)(d) on the basis that the conduct of the companies’ affairs was oppressive to, or unfairly discriminatory against, the majority shareholders under section 232. The defendants alternatively submitted that the court could also make such an order under its discretionary powers contained in section 467(1)(c) of the Act.  Triulcio alleged that he was excluded from the management of the companies, that they had not kept proper accounts and that the Elias family had benefited at his expense in dealings with the companies. Triulcio relied on limited specific allegations because an attempt to raise all issues with the companies’ accounting would have been like trying to conduct an audit. Gzell J was satisfied there were significant concerns as to the accuracy of the companies’ accounts. The allegations relied on included that:           Mr Elias took $307,000 in cash from one of the companies and did not record it as a loan from the company; and          a liability arising from a buy out of another investor was unfairly split between the Elias family and Triulcio, to Triulcio’s detriment.  **(c) Decision**  **(i) Summary**  Gzell J decided that the each of the defendant companies should be wound up under section 461(1)(k) (the “just and equitable” limb) following investigation of the accounts to determine the proper value of the companies shares.  Triulcio claimed successfully that there were no sufficiently reliable accounts upon which a valuation of the shares in the companies could be based with accuracy and that it was therefore inappropriate to order compulsory acquisition of his shares as a solution. The defendants did not submit that a case had not been made out for the winding up of the companies under section 461(1)(k). Therefore Gzell J did not decide the matter on the “conflicted interest, unfair discrimination, oppression or unjust prejudice” limbs in sections 461(1)(e), (f) and (g).  **(ii) The equitable ground and quasi-partnerships**  In making out his claim that it would be “equitable” to wind up the companies, Triulcio submitted that the defendant companies were in the nature of quasi-partnerships and therefore the exercise of strict legal rights should be subject to equitable considerations of a personal character between the parties. Gzell J cited Lord Wilberforce’s judgment in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 where he explained that the circumstances which would attract equitable considerations included where there was a personal relationship involving mutual confidence, an agreement or understanding that shareholders would participate in the conduct of the business and where there were pre-emptive sale rights for acquiring other shareholders’ shares. Gzell J found the circumstances were such to establish the superimposition of equitable considerations in this case. The breakdown in mutual confidence between Triulcio and the Elias family made it appropriate to wind up the companies on the just and equitable ground.  **(iii) Solvent companies**  Gzell J also considered the defendants’ submission that courts are extremely reluctant to wind up solvent companies (supported by International Hospitality Concepts Pty Ltd v National Marketing Concepts (No 2) (1994) 13 ACSR 368). Gzell J said the availability of other forms of redress had to be considered (there were no feasible alternatives here) and that winding up remained appropriate where fraud or breaches of duty had been serious and persistent.  **(iv) Compulsory acquisition alternative**  The defendants submitted that under section 467(1)(c), which empowers the court to make any other orders it thinks fit in a winding up application, the court could order the compulsory acquisition of Triulcio’s shares, as valued by a referee. Section 467(4) provides that in a winding up on the just and equitable ground brought by a shareholder, the court is required to wind the company up, unless it is of the opinion that the shareholder is acting unreasonably by not pursuing another available remedy. The defendants asserted that the alternative remedy could be a compulsory acquisition order (under section 233) and was not limited to causes of action. Gzell J did not decide this particular issue, as he found that Triulcio was not acting unreasonably in any case, in pursuing the winding up of the companies. Gzell J also dismissed the defendants’ claim that Triulcio was subjecting them to oppression by not seeking relief by way of compulsory acquisition of his shares.  **(d) Conclusions**  Company stakeholders should be aware that solvent companies may be wound up on the just and equitable ground of section 461 where there are no appropriate alternative solutions. The “equitable” limb of this section may be satisfied where a company has been operating as a quasi-partnership and there has been a breakdown in the personal relationship and mutual confidence between the company’s members.  **5.9 Letter of financial support binding on its author**  (By Rebecca Taube, Freehills)  Gate Gourmet Australia Pty Limited (in liquidation) v Gate Gourmet Holding AG [2004] NSWSC 149, New South Wales Supreme Court, Einestein J, 31 March 2004.  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/march/2004nswsc149.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/march/2004nswsc149.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case decided whether contractual obligations arose through a “letter of support”, between a Swiss parent company and its subsidiary Australian trading company. The court found that the correspondence between the parties indicated there was an intention to create legal obligations, and that on the proper construction of the letters, the parent had breached its obligations by failing to provide the promised financial support.  Additionally, the Swiss parent was found to have engaged in misleading or deceptive conduct under section 52 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default), and that the Australian trading company had suffered loss as a result.  **(b) Facts**  The plaintiff, Gate Gourmet Australia Pty Limited (in liquidation) (“GG Australia”) was the Australian trading arm of the world’s second-largest airline catering company, whose primary purpose was to provide Ansett’s catering services. GG Australia sought a letter of comfort from its Swiss parent. Correspondence regarding this financial support was exchanged between the Swiss parent, and its subsidiary, the holding company of GG Australia (“GG Holdings”). In requesting the letter of support, it was indicated that “the guarantee needs to be provided to the Directors [of GG Australia], so they can carry on the business within the Australian statutory legislation.” Further, the Swiss parent was informed that a Letter of Support would be required in order for GG Australia’s auditors to sign off on their annual financial accounts.  As a result of Ansett’s demise, and under pressure from Westpac Banking Corporation, which had granted a major banking facility to GG Australia, the directors of GG Australia requested financial support from their Swiss parent. Such financial support was not provided. On 13 September 2001, GG Australia entered into voluntary administration. Liquidation subsequently took place on 15 November 2001, as the Swiss parent company denied any binding obligations through the Letter of Support.  GG Australia primarily claimed that the letter of 16 February 2001 (the “Letter”) amounted to an offer by the Swiss parent to either:           GG Australia, as the Australian trading company; or           GG Holdings, as agent or trustee for GG Australia.  The Letter, addressed to the directors of GG Holdings, contained statements to the effect that:  “This is to confirm that the parent entity… will provide the financial support that may be necessary to enable [GG Holdings] and its controlled entities [one of which was GG Australia] to meet its financial commitments as and when they fall due. This Letter of Support will not be withdrawn before [GG Holdings] and its controlled entities have sufficient means to meet their obligations without the support of the parent entity.”  In defence, a number of evidentiary inconsistencies going to credibility were raised, however Einstein J did not find these persuasive.  **(c) Decision**  **(i) Breach of Contract**  The Swiss parent was found to have breached its contractual obligations to provide financial support to GG Australia, arising from the Letter of Support sent to GG Holdings.  With respect to the issue of whether there was an intention to create legal obligations, Einstein J referred to authorities which stated that “Courts decide whether parties intended to form a contract by considering what is objectively indicated by the parties’ acts and conduct, including statements they made and documents they signed or dealt with,” but noted also that “… in an ongoing relationship it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled.” Here, intention to contract was found because:           the Letter clearly indicated a “promissory intent to be bound in terms of legal relations” to provide the financial support requested by GG Australia; and           the commercial purpose of the letter and the circumstances of its drafting and sending suggested an intention to create legal obligations.  In discerning the commercial context and the proper construction of the Letter, Einstein J referred to:           the obligation of directors to prevent insolvent trading and associated offences contained in section 588G(1), (2) and (3) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default); and          the obligation contained in section 295(4)(c) of the Corporations Act with regards to annual financial reporting and a director’s obligation to declare “whether, in the director’s opinion, there are reasonable grounds to believe that the company… will be able to pay its debts as and when they become due and payable.”  GG Australia referred to these statutory requirements as providing a significant and mutually understood background to the relevant letters of support: such letters were required to enable the directors of GG Australia to be able to discharge their duties regarding reporting and to prevent insolvent trading.  Justice Einstein found that GG Australia was the beneficiary of the promise of financial support because:           the Letter referred to support for GG Holdings “and its controlled entities”;           the financial commitments were of a recurrent and continuing kind; and          as GG Holdings did not trade, it would not be seen to require financial support; and there would be no practical purpose in limiting the promise to it.  Further, Einstein J noted that even if the proper construction of the Letter meant that GG Holdings was the only promisee, despite the general rule of privity, GG Australia may be able to enforce the obligations contained in the Letter where, as per Trident General Insurance Co Limited v McNiece Bros Pty Ltd (1987) 119 CLR 460:           it is the common intention of the parties that a non-party beneficiary benefit under the contract; and          the non-party beneficiary accordingly relies on the contract.  Here, the language of the Letter suggested GG Holdings’ controlled entities were contemplated as beneficiaries, and GG Australia’s directors relied on the Letter in continuing to trade and in publishing their annual financial accounts.  **(ii) Trade Practices cause of action**  Under section 82(1) of the Trade Practices Act 1974 a party who suffers loss or damages as a result of the misleading or deceptive conduct of another may recover the amount of damages from that party. Here, GG Australia claimed that in providing the Letter, but then failing to honour its terms, the Swiss parent had engaged in misleading or deceptive conduct, and that GG Australia suffered loss as a consequence. Section 51A renders a promise to do something in the future as a representation that it will be performed, and therefore brings it within the scope of conduct under section 52. Justice Einstein was satisfied that:           the Swiss parent’s Letter was a representation made in the course of trade and commerce as to the provision of financial support;           the Letter induced GG Australia to take a course of action, being reliance on the Letter by its directors, and the production of financial statements;           the Letter was misleading and deceptive as the Swiss parent had no intention of providing the financial support, or that it had not given any consideration as to whether it would provide such support;           GG Australia had suffered loss in reliance on the representations contained in the Letter; and           the Swiss parent had not lead sufficient evidence to establish that it had made the representations contained in the Letter on reasonable grounds.  **(d) Conclusions**  In light of the mutually understood commercial context and the language of support, the Letter provided by the Swiss parent to its Australian subsidiaries was sufficient to create legal obligations and consequently base claims in contract and under trade practices law. The court considered the nature of the clear language employed in the Letter and the purposes behind its provision were significant factors in finding the Swiss parent liable.  **5.10 Court’s power to order a meeting of members under section 249G**  (By Nadia Kalic, Solicitor, Clayton Utz)  Tamar Rivqa Beck v Tuckey Pty Ltd (ACN 069 981 942 [2004] NSWSC 357, New South Wales Supreme Court, Austin J, 30 April 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc357.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc357.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **a) Summary**  The NSW Supreme Court has clarified the position with respect to a court's discretion under section 249G to order a meeting of a company's members to be called if it is impracticable to call the meeting in any other way.  Case law regarding the exercise of this discretion under the former Corporations Law will continue to be applicable notwithstanding a change of wording introduced by the Company Law Reform Act in 1998. Accordingly, the court will follow a two step approach:           first, it must be impracticable to call the meeting in any other way; and          secondly, once impracticability is established, the Court has a discretion to make or refuse the order.  **(b) The facts**  Tuckey Pty Ltd ("Tuckey") (the first defendant) was one of 18 companies and trusts forming the Weinstock Group. The dispute predominately involved the plaintiff and the second defendant, who were brother and sister. The plaintiff held 70 percent of the ordinary shares in Tuckey.  The major focus of the Weinstock Group was property investing. Two family discretionary trusts were established for this purpose and these trusts borrowed both externally and from other entities in the Weinstock Group.  The second defendant argued that Tuckey and another company were incorporated for the purpose of receiving trust distributions, and that the vast majority of the income of Tuckey was the result of these distributions. In contrast, the plaintiff contended Tuckey was a corporate vehicle for the plaintiff's personal use, namely, her interior design and furniture business.  In 2003, the plaintiff wrote to the second defendant convening a meeting of directors of Tuckey for the purpose of approving a loan of $740,000 from the Commonwealth Bank to Tuckey (of which the plaintiff and the second defendant were directors). The letter said the loan was to be applied to reimburse the plaintiff's loan account in the sum of $415,893 and to meet the cost of renovations to her place of business in the sum of $334,107. The letter invited the second defendant to resign from his position as director of the company.  The meeting was held on 2 October 2003 with the second defendant, the plaintiff and their respective solicitors. The second defendant requested a deed poll be signed to cause $342,000 to be repaid by Tuckey to the Weinstock Group before he would vote in favour of the proposed $750,000 loan. The plaintiff refused to execute the deed poll on the basis that the intercorporate loans were not required to be repaid. Accordingly, the second defendant voted against the motions to approve the $750,000 loan.  After a short overseas break, the plaintiff attempted to convene a meeting of members to consider motions to remove her brother and mother as directors and secretaries of Tuckey and appoint her daughter as director. However, she failed to comply with section 249H of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and give the required 21 days notice of the meeting.  The plaintiff tried another six times to convene a general meeting of Tuckey, and on each occasion the second defendant either failed to attend the meeting or advised (through his solicitors) he was unable to attend. Because Tuckey's constitution required a quorum of two members, these meetings were inquorate.  In April 2004, the second defendant contacted the plaintiff and advised he was willing to negotiate a settlement that would involve his disposing of his shareholding and office bearing positions in Tuckey as part of a cleaning up of the corporate ownership of the other companies and paying out of associated loans between the entities. The plaintiff replied the next day, and although she appeared willing to negotiate a settlement, requested further information about her correct entitlements.  The plaintiff applied to the Court for an order calling a general meeting of Tuckey under section 249G.  **(c) The decision**  Austin J found the weight of evidence supported the second defendant's conclusion that Tuckey was part of the Weinstock Group and not a corporate vehicle for the plaintiff's personal use.  Section 249G of the Corporations Act gives the court the power to order a meeting of the company's members if it is impracticable to call the meeting in any other way. Once impracticability is established, the court has a discretion to make or refuse the order: s1319 Corporations Act 2001.  **(i) Meaning of "impracticable"**  Austin J considered the body of case law regarding the meaning of "impracticable" under the former Corporations Law and the current wording of section 249G in the Corporations Act 2001, and found that although there were changes made to the wording of the provision in 1998, there was no intention to change the substance of the court's power to order that a meeting be called.  Accordingly, he relied on the judicial interpretation of the word "impracticable" that had been considered in the context of the old provisions of the Corporations Law and applied this interpretation to the meaning of "impracticable" under the current section 249G of the Corporations Act 2001.  He said the word "impracticable":           required the court to examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company could be conducted, there being no doubt that it could be convened and held;          covered a wide range of circumstances, from the case, for example, where all the corporators have been killed in an aircraft accident, to a situation where it is extremely inconvenient for a meeting to be held; and          included the situation where it is difficult to achieve a quorum of members.  Austin J concluded it was impracticable to conduct the meeting of Tuckey in the manner prescribed by the company's constitution, which required a quorum of two members, because it was unlikely that enough members would attend.  **(ii) Discretionary considerations**  In exercising his discretionary power, Austin J refused to make an order under section 249G because:           it was not a case of general deadlock preventing the day-to-day management of the company;          the parties had indicated they were prepared to negotiate to resolve their differences;          he was reluctant to order the court's intervention in the dispute in a partial fashion when there was a prospect that such negotiations may take place and succeed;          although there was evidence the company could suffer some detriment because of the failure of the parties to agree to the $750,000 loan, such detriment would be minor; and          if the second defendant were removed as director, he would be unlikely to cause trust distributions to be made to Tuckey - stultifying its principal function.  The parties were ordered to attend a mediation to resolve their dispute.  **(d) Conclusion**  The NSW Supreme Court has clarified the position with respect to a court's power under section 249G of the Corporations Act 2001 to order a meeting of a company's members to be called if it is impracticable to call the meeting in any other way.  Directors or members entitled to vote, particularly family members who are finding it difficult to call a meeting involving other family members because of a family squabble, should explore other avenues of dispute resolution before making an application to the court for an order under section 249G. Although a court may agree it is "impracticable" to hold the meeting because of the failure (whether intentionally or otherwise) of certain members to attend the meeting, the court will exercise its discretion to make an order under section 249G with caution.  **5.11** **Statutory derivative actions and the applicant's need to show "good faith"**  (By Fiona Boyce, Clayton Utz)  Cannon Street Pty Ltd v Karedis [2004] QSC 104, Supreme Court of Queensland, Muir J, 30 April 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/april/2004qsc104.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/april/2004qsc104.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This recent decision of the Supreme Court of Queensland dealt with the meaning and application of sections 236 and 237 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in the context of shareholder conflict. The decision equated the concept of "good faith" under section 237 with the obligation of directors to act in good faith and not for ulterior purposes.  **(b) Facts**  Section 237 of the Corporations Act 2001 provides that the court must grant an application by a person under section 236 to bring proceedings on behalf of a company if it is satisfied that:           it is probable that the company will not itself bring the proceedings;          the applicant is acting in good faith; and          it is in the best interests of the company that the applicant be granted leave.  This proceeding arose when the defendants, who were directors and majority shareholders of The Grape Management Pty Limited ("the company"), passed by majority a resolution to implement a sale process to sell the business of the company.  The plaintiffs, the minority shareholders of the company, made a section 236 application to commence proceedings on behalf of the company to permanently restrain the sale process on the grounds that the resolution to pass the sale process had been made in breach of the defendants' directors' duties to act in good faith and in the best interests of the company.  The plaintiffs contended that the defendants were preferring their own personal interests concerning their contractual arrangements with a third party and that the sale process excluded other parties.  The plaintiffs also claimed that pursuant to certain oral agreements, they had:           a right to increase their shareholding to 20% ("the option agreement"); and           an agreement that all resolutions proposed at shareholders' and directors' meetings had to be unanimous ("the unanimity agreement").  The plaintiffs claimed that the consideration for the alleged agreements consisted of certain assistance that the third plaintiff provided to the defendants in:           not accepting an offer made by a third party for the shares in the business; and          in helping the defendants increase their shareholding.  The defendants gave evidence alleging that, although there had been discussions concerning the alleged option and unanimity agreements, no agreements had ever been reached.  **(c) Decision**  Justice Muir found that the plaintiffs were not entitled to bring the section 236 application because they had failed to satisfy the section 237 requirement that the application be made in "good faith".  His Honour found it probable that the plaintiffs were pursuing the litigation in order to seek advantages for themselves "otherwise than as members of the general body of shareholders".  In considering the meaning of "good faith" in the context of section 237, his Honour:           reasoned that, given that a section 236 application will often be made in circumstances were the directors of the company fail to bring proceedings, the applicant is assuming the role of the company director. Therefore, the meaning of "good faith" is consistent with the normal meaning of "good faith" in the context of directors’ duties; and          rejected the proposition submitted by the plaintiffs that absence of "good faith" could be shown only where the applicant did not intend to prosecute the proposed action to a conclusion.  Given that the plaintiffs did not satisfy the section 237 requirements, it was unnecessary for his Honour to express a concluded view on whether it would be in the best interests of the company to grant leave to the plaintiffs under section 236.  In relation to the alleged option and unanimity agreements:           although his Honour accepted that some discussion took place regarding the alleged agreements, he did not accept that the discussions between the parties were intended to give rise to legally binding agreements; and           in relation to "consideration" for the alleged agreements, his Honour did not accept that the facts supported the plaintiffs' conclusion that actions performed by the plaintiffs were offered in exchange for the offer of a promise.  Judgment was delivered in favour of the Defendants with costs. Clayton Utz acted for the defendants in this proceeding.  **5.12 Company administration – validity of costs orders, priority and admission of creditors to vote**  (By Rohan Bartlett, Phillips Fox)  Expile Pty Limited v Jabb's Excavations Pty Ltd [2004]  NSWSC 284, New South Wales Supreme Court, Palmer J, 13 April 2004.  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc284.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/april/2004nswsc284.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The Court held that an order for costs under a winding up that is made after the date of a company going into administration is not a valid claim under a deed of company arrangement. Furthermore, a deed of company arrangement that purports to deprive a party of their priority in respect of its costs of a winding up application will be held to be invalid.  **(b) Facts**  On 14 February 2002 the plaintiff, Expile Pty Ltd, filed a winding-up application against the defendant, Jabb’s Excavations Pty Ltd. The application was dismissed and Expile appealed. Following the hearing of the appeal but before judgment was delivered, the defendant appointed administrators. The Court of Appeal allowed the plaintiff’s appeal, holding that the defendant had not proved its solvency. The Court allowed the plaintiff the opportunity to make an application under section 440A(2) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) for an order that the winding up application be adjourned on the ground that it was in the interests of the creditors for the company to continue under administration rather than be wound up. A costs order was made in favour of the plaintiff. The creditors at the adjourned meeting resolved pursuant to section 439C of the Corporations Act 2001 for the execution of a deed of company arrangement (“the Deed”).  The case turned on whether the costs order was subject to the Deed and whether the Deed in itself was valid.  **(c) Decision**  **(i) Whether costs order was a debt or a claim subject to the deed**  The costs order made in respect of the winding up was issued after the company entered into administration. In determining whether claims for costs of litigation fall within section 444D(1) of the Corporations Act 2001, which binds all creditors to a deed of company arrangement, the Court distinguished between a claim against a company to wind it up in insolvency and a claim against it for damages or other relief against wrongdoing. In the latter situation, if the company has committed a wrong prior to the commencement of the winding up or the deed of company arrangement, then it is regarded as already incurring a liability. A company which becomes insolvent does not, by that circumstance alone, commit a legal wrong against anyone.  An application to wind up in insolvency is in a category different from all other claims against a company, as recognised by section 466(1) and (2) and section 556(1)(b). A company’s obligation to pay the costs of an application seeking to wind it up in insolvency does not exist unless and until a winding up order is made. However, once the order is made, the applicant’s costs are to be reimbursed in priority to all other claims against the company, save for the costs of getting in its assets and carrying on its business. Accordingly, even if it could be said that a claim against a company based on wrongdoing gives rise simultaneously to a contingent claim for the costs of proving the claim, section 466(1) renders that proposition inapplicable to a claim for winding up in insolvency.  The concept of a ‘future claim’ was also discussed by the Court. A future claim is distinguishable from a contingent claim in that, while both are founded on an obligation existing as at the commencement of the winding up or the deed of company arrangement, a future claim will arise at some time thereafter while a contingent claim may arise, such as future rent on a current lease. The Court stated that the possibility that a winding up order would be made in the future and that section 466 would have the effect of making the defendant liable to the plaintiff for its costs did not give rise to a future claim within the meaning of section 553(1).  The Court held that the plaintiff’s claim for costs in the winding up and in the appeal was not provable under the Deed.  **(ii) Termination of Deed of Company Arrangement**  The Court held that the Deed should be terminated under section 445D(1)(g) because it operated to deprive the plaintiff of their priority in respect of their costs of the winding up application, which they would otherwise have received under sections 466(2) and 556(1)(b). The continuation of the Deed was held to be oppressive and unfairly prejudicial to the plaintiff as a creditor, within the meaning of section 445D(1)(f)(i).  Palmer J referred in his judgment to previous authorities having established that where a creditor would have a particular priority under the Corporations Act or other legislation if a company were to be wound up in insolvency, the Court, as a general rule, does not permit any other regime of distribution of the company’s assets which would alter that priority. The Courts do not permit deeds of company arrangement to be used as a means of frustrating the priority given by section 556(1)(b) to costs of a winding up application.  The Court affirmed that it retains a discretion under section 445D(1) as to whether or not to terminate a deed of company arrangement. The discretion is a wide one and the factors which weigh in its exercise include the interests of the creditors as a whole and the public interest: Emanuele v Australian Securities Commission (1995) 63 FCR 54, at 69C; Deputy Commissioner of Taxation v Portinex Pty Ltd (2000) 34 ACSR 391, at 414.  The Court held that the inducement to risk-taking for the general good of creditors held out by section 556(1)(b) is not lightly to be taken away or weakened. Creditors should not assert that a deed of company arrangement should stand simply because its effect will be to deprive a successful applicant for winding up of its priority to its costs, thereby giving them more than they would receive in a liquidation, as would have been the case here.  The defendant could have made provision in the Deed for the plaintiff’s costs, so that the plaintiff’s prospective rights under section 556(1)(b) would have been satisfied and the Deed upheld as valid. |
| **6. Recent Corporate Law Journal Articles** |
| **(a) Company and Securities Law Journal**  Vol 22, No 3 May 2004  C Anderson, “Decision-making in a voluntary administration”  This article discusses the decision-making procedure of Pt 5.3A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). An initial review of the background to the provisions is undertaken which shows an emphasis on the creditors making a decision without any necessary review by the courts. This has placed considerable emphasis on the role of the administrator as a provider of information to the creditors to enable them to make a proper decision. The article then examines some aspects of the procedure by which this is carried into effect. Emphasis in the procedure is on making a decision quickly but despite this there is a lack of clarity in some areas and some improvement in the drafting may clarify what is required of administrators as well as facilitate the wishes of creditors.  The method of voting used in the procedure is examined and subsequently measured against an economic and law analysis of how voting should be conducted. This suggests that the current form of voting does raise several difficulties including placing the administrator in the potential position of deciding his or her own fate and hence compromising the administrator’s independence. In addition it is not clear if the division of creditors into number and value is particularly helpful. There has not been consideration of these issues from a policy perspective except in the most rudimentary manner. As making the “right” decision is critical in this context it is suggested the current system needs to encompass a sound theoretical basis. It indicates further research could be undertaken to examine issues such as the role of the secured creditor in the voting mechanism and the extent of the dichotomy between number and value in meetings.  J S Keeves, “Directors’ duties – ASIC v Rich – landmark or beacon?”  Is ASIC v Rich a landmark decision concerning the statutory duty of care and diligence under s 180 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) as it applies to company chairmen? This article reviews Justice Austin’s decision and its possible implications, with particular attention to the term “responsibilities” when used in s 180, and the applicability of “usual practice” in formulating the duty or standard of care and diligence. The article then considers other recently published material concerning corporate governance and the role of the chairmen of listed public companies, including the Report of the HIH Royal Commission, the ASX Principles of Good Corporate Governance and Best Practice Recommendations, the revised UK Combined Code on Corporate Governance and Sir Adrian Cadbury’s Corporate Governance and Chairmanship – A Personal Perspective. The article closes with some observations on the role of chairmen and related matters, and observations as to whether ASIC v Rich should be regarded as a landmark.  Note, ‘[CLERP (Audit Reform & Corporate Disclosure) Bill](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default) and financial reporting’  Note, ‘Comply or comply: The illusion of voluntary corporate governance in Australia’  Note, Overseas notes – Hong Kong, Singapore and Malaysia: ‘When to sanction a scheme of arrangement’  Vol 22, No 2 March 2004  J Rogers, “Minimum price rule in takeovers: Does the minimum price rule promote the equal opportunity principle at the expense of a more efficient market for corporate control?”  The minimum price rule is an embodiment of the equal opportunity principle incorporated into our takeover regulations as part of the Eggleston principles. The intention of the minimum price rule is to ensure that shareholders in a target company have a reasonable and equal opportunity to participate in the benefits derived from a change in corporate control. The scope of the minimum price rule has been extended by the [Corporate Law Economic Reform Program Act 1999 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) to cover all types of takeover bids. This article discusses the legislative history of the minimum price rule and the manner in which the rule has been applied in practice. It also critiques the policy rationale behind the equal opportunity principle in light of the legislature’s stated policy objective of encouraging takeover activity. The primary contention of the article is that potential bidders should be able to build a pre-bid stake in a target company unfettered by takeover regulation and particularly the minimum price rule. Finally, this article considers some proposals for reform pursuant to which the minimum price rule would be abolished in favour of alternative protections for target shareholders.  K Lewis, “When is a financial product not a financial product?”  The definition of “financial product” is central to the operation of the financial services reforms in Ch 7 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). In this article, the author explores the scope of that definition and critically examines recent rulings by ASIC that bills of exchange and promissory notes are not financial products for the purposes of Ch 7. He concludes that there is a strong likelihood that those rulings are not correct and outlines the consequences for industry participants if that is so. He suggests changes to the law to rectify the situation and action that ASIC and industry participants who advise on or deal in these products should be taking in the meantime to avoid a breach of the law.  D Kingsford Smith, “Is ‘due diligence’ dead? Financial services and products disclosure under the Corporations Act”  This article maps the legal implications of the new disclosure regime for the variety of instruments which are “financial products” under the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default), which came into final effect as Ch 7 of the Corporations Act, on 10 March 2004. It also considers the similarly patterned disclosure requirements for “financial services” (eg financial advice), which commonly accompany the delivery of financial products. The article analyses the policy reasons which underpin the reform legislation. It also argues for the adoption of compliance programs to operationalise the “due diligence” requirement under the new legislation and give meaning to the term “take reasonable steps” which has been provided to defend allegations of defective disclosure.  Vol 22, No 1, February 2004  M Broderick and M Lenicka, “Uncommercial transactions – corporate governance for insolvent companies”  The uncommercial transaction regime was enacted as part of the Corporate Law Reform Act 1922 (Cth). Despite being introduced as a new concept, the test imposed for characterising a transaction as uncommercial is remarkably similar to tests adopted by Courts of Chancery over a century ago to ascertain if directors upheld the requisite standards of care and diligence in managing the affairs of the company. This article draws comparisons with the Business Judgment Doctrine, the Business Judgment Rule and other standards of corporate governance to better understand the nature of an uncommercial transaction through a comparative analysis. Other topical issues such as the need to prove insolvency to avoid an uncommercial transaction, the reasons for the slow development of the regime, corporate groups, insolvent trading, defences and remedies are also considered in this article.  T Ciro, “Trading in financial derivatives: Does it increase market volatility and systemic risk?”  The article examines the legal and non-legal risk factors affecting the markets for financial derivatives. Contrary to popular belief, there appears to be little evidence to suggest that trading in financial derivatives increases the probability of systemic risk or market volatility. The tenuous relationship between financial derivatives and underlying market volatility is further supported by recent empirical studies undertaken by researchers at the Bank for International Settlements. Similarly, other non-legal risk factors appear to have no discernible effect on risk. Instead, it is argued that legal risk and in particular, legal uncertainty creates considerable harm to market participants and adversely affects market efficiency and market volatility. This is borne out by recent United States legislative initiatives, which are aimed at reducing legal risk through incremental measures designed to improve both legal certainty and systemic stability.  M J Duffy, “Procedural dilemmas for contemporary shareholder remedies – derivative action or class action?”  Shareholders seeking relief in relation to corporate misconduct or negligence face the basic dilemma of whether the conduct complained of infringes a personal right of the shareholder or a right of the corporation. An important indicator that a right is corporate in nature will be that the only loss to the shareholder is a diminution in the value of his or her shareholding. Such a loss will generally not be personally actionable by the shareholder though exceptions to this general rule have developed and may develop further. Where there are personal rights of a shareholder, the “class action” procedure in the Federal Court now allows personal rights to be pursued by large numbers of shareholders. It is amenable to a number of types of claim including claims under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and other Acts and at common law. In the case of infringement of company rights, however, the shareholder will need to seek relief on the corporation’s behalf. This will mean seeking leave to bring a statutory derivative action which since 13 May 2000 has been governed by the statutory provisions in Pt 2F.1A of the Corporations Act. 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