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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Institutional investors views on corporate governance**  On 19 April 2006, Institutional Shareholder Services (ISS) released the preliminary results of its 2006 Global Investor Study, summarising the findings of interviews conducted with over 300 institutional investors representing $10.5 trillion in assets across 19 countries. 30 major investors in Australasia shared their views on corporate governance with ISS and confirmed that their approach is changing from a compliance obligation to a business imperative.  Whilst 72% of Australasian institutional investors considered corporate governance to be very or extremely important, 90% of investors in China had this view - emphasising the emergence of governance as a risk and performance issue in mature and developing markets alike.  3 in 4 Australian investors were motivated to take corporate governance seriously because of the possibility of enhanced investment returns or improved risk management. This was despite an acknowledged difficulty in quantifying the value of corporate governance.  Key themes relating to Australian institutional investors include:   * a growing propensity to engage directly with companies on issues of corporate governance concern; * a high value attached to the importance of governance; and * a belief that governance is growing in significance as an investment issue.   Australian investors expect the trend toward more direct engagement with companies to continue and note the rise of industry associations acting as a collective voice for investors. Many also believe the need to manage corporate governance risk and vote on offshore companies will rise in importance in coming years.  Fundamental concerns on corporate governance that were shared by local and international investors included:   * a desire for better boards, * a more direct link between executive pay and investment returns, and * improved company and CEO performance.   The report explores five key themes:   * the shift of corporate governance from compliance obligation to a business imperative; * the globalization of corporate governance; * emerging investor concerns on corporate governance; * one size doesn't fit all investors; and * the challenges for investors in managing corporate governance   More information is available on the [ISS website](http://www.issproxy.com/index.jsp" \t "_new).  **1.2 Corporate law reform draft Bill**  On 13 April 2006, the Exposure Draft of the Corporations Amendment Bill (No 2) 2006 was released for public comment.  The Bill will:   * remove the 100 member rule from sections 249D and 252B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (this is the rule that allows 100 members of a company to call an extraordinary meeting of members); * facilitate the electronic circulation of members' resolutions and members' statements (sections 249O and 249P); * ensure the voting intentions of members are carried out by appointed proxies by prohibiting the 'cherry-picking' of proxy votes (subsections 250A(4) and (5)); * remove the requirement in section 250J(1A) of the Corporations Act which provides that before a vote is taken at a meeting of shareholders, the chair must inform the meeting whether any proxy votes have been received and how the proxy votes are to be cast; and * remove the requirement in section 250J(1A) of the Corporations Act which requires companies to disclose information reported to overseas exchanges.   The Exposure Draft and Explanatory Memorandum are available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1101" \t "_new).  **1.3 Competition and choice in the UK audit market**  On 12 April 2006, the UK Financial Reporting Council (FRC) and the UK Department of Trade and Industry (DTI) published a study jointly commissioned by them, "Competition and choice in the UK audit market".  The study, conducted by economic consultancy Oxera, considered the factors that contribute to the competitive environment for audit services to large listed companies in the UK. Oxera's study is based on extensive research among audit committees, companies, firms, investors and regulators.  Its findings relating to the degree of choice available in the market include:   * 97 per cent of the FTSE 350 companies are audited by one of the 'Big Four' accountancy firms. * Many large listed companies report an effective choice of only two or three audit firms and in a small number of cases companies may have no effective choice of auditor in the short term. * Barriers to entry into the market for FTSE 350 audits are high and in current conditions substantial new entry either by a mid-tier or a new firm is unlikely. * Any new entrant would need to overcome perception barriers and demonstrate sector-specific skills, international coverage and high quality staff to win audits. * The loss of a Big Four firm could lead to serious problems for some companies and a loss of investor confidence.   The FRC plans a wider consultation into the public interest issues that may arise from the existing competitive environment for audit services to large listed companies in the UK and how these issues might be addressed.  This will include:   * Undertaking a comprehensive evaluation of possible measures to reduce actual and perceived barriers to entry with a view to improving market structure. * Considering options to reduce the risk of unnecessary failure of a significant supplier of audit services. * Contingency planning to reduce disruption to the availability of an effective audit service in the event of the withdrawal of a significant supplier of audit services. * Ensuring that analysis of the issues and any possible approaches to addressing them take full account of the global nature of many audits and the audit firms.   The FRC aims to prepare a discussion paper in May and will hold further meetings with stakeholders to facilitate further dialogue on these issues.  The study is available on the [FRC website](http://www.frc.org.uk/press/pub1083.html" \t "_new).  **1.4 Review of personal property securities**  On 11 April 2006, the Australian Attorney-General Philip Ruddock released an options paper on the establishment of a single national personal property security register. The national register would allow prospective lenders and purchasers involving all personal property (i.e. other than houses or land) to check cheaply and easily on the Internet whether there is an encumbrance on the property.  According to the Attorney-General, a national register would reduce the cost of loan transactions for business and consumers. The existing personal property security arrangements involve around 7.3 million transactions annually - that is, registrations, variations, discharges and searches of existing registers. Nearly 96 per cent of these involve motor vehicles through the Registers of Encumbered Vehicles (REVS) maintained by each State.  Other searches are carried out on the company charges register maintained by the Australian Securities and Investments Commission and State and Territory registers that list mortgages over personal property such as livestock, boats and machinery.  The options paper also considers whether the law on personal property securities should be changed so that registration is not based on the form of the collateral, but instead on whether the substance of the transaction is to take a security over personal property.  The options paper is available on the [Attorney-General's website](http://www.ag.gov.au/pps" \t "_new).  **1.5 Consultation paper on corporate and financial services regulation**  On 7 April 2006, the Parliamentary Secretary to the Australian Treasurer, Mr Chris Pearce, released a consultation paper on corporate and financial services regulation.  The consultation paper outlines 56 issues and focuses on the following areas:   * further refinements to financial services regulation; * company reporting obligations; * auditor independence; * corporate governance; * fundraising; * takeovers; * collective investments; and * dealing with regulators.   A copy of the Corporate and Financial Services Regulation Review Consultation Paper is available on the [Treasury website](http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2006/014.asp?pf=1" \t "_new).  **1.6 Government response to the report of the taskforce on reducing the regulatory burdens on business**  On 7 April 2006, the Australian Government announced actions to address a number of the recommendations of the Report of the Taskforce on Reducing the Regulatory Burdens on Business - Rethinking Regulation.  The report makes 178 recommendations on actions to reduce red tape.  The government's interim response addresses, in full or in part, 86 of those recommendations. A final response addressing all recommendations will be provided by the end of July 2006.  The Australian Government's interim response is available on the [Prime Minister's website](http://www.pm.gov.au/" \t "_new) and the [Treasury website](http://www.treasurer.gov.au/tsr/default.asp" \t "_new).  The Report of the Taskforce is available on the [Regulation Taskforce website](http://www.regulationtaskforce.gov.au/" \t "_new).  **1.7 APRA releases proposed approach to Tier 1 capital under IFRS**  On 7 April 2006, the Australian Prudential Regulation Authority (APRA) issued the second of two consultation packages outlining its proposed prudential response to the adoption of International Financial Reporting Standards (IFRS) in Australia by authorised deposit-taking institutions (ADIs) and general insurers.  This consultation package, which follows industry consultation, deals with APRA's proposals to de-couple the definition of capital instruments eligible for Tier 1 capital from Australian Accounting Standards and to bring its approach to innovative capital instruments into line with international practice. It also deals with its proposals to de-couple the assessment of securitised assets for capital adequacy purposes from Australian Accounting Standards.  The consultation package includes a draft prudential standard and guidance notes for ADIs. The prudential standard for ADIs will come into effect from 1 July 2006, while new Tier 1 capital limits will be effective from 1 January 2008. Similar changes to the prudential standards for general insurers will be introduced following the completion of consultation on APRA's general insurance 'Stage 2' reforms dealing with capital, assets in Australia and custodian arrangements. These particular reforms are expected to take effect in late 2006.  Following discussions with industry, APRA has decided on a simpler set of transition arrangements for institutions affected by APRA's IFRS-related changes. These arrangements will be based on the capital base of each institution as at 1 July 2006 calculated after taking into account the overall impact of these changes.  Institutions expecting their total capital to be reduced by these changes are invited to apply to APRA for transition relief until 1 January 2008. Institutions expecting that their Innovative Tier 1 capital will exceed the proposed limit of 15 per cent of net Tier 1 capital as at 1 January 2008 may apply to APRA for a two-year transition period, until 1 January 2010.  The draft package follows the release in August 2005 of APRA's discussion paper, "Adoption of International Financial Reporting Standards: Prudential Approach 2- Tier 1 Capital and Securitisation" and also APRA's discussion paper "Response to Submissions - Adoption of International Financial Reporting Standards: Prudential Approach 1 - Fair Value and Other Issues".  APRA's consultation package is available on the [APRA website](http://www.apra.gov.au/" \t "_new).  **1.8 News Corporation settlement with institutional investors on poison pill**  On 7 April 2006, the Australian Council of Superannuation Investors (ACSI) announced that News Corporation had bowed to superannuation and pension fund demands that shareholders be given a vote on the extension of "poison pills". Poison pills are shareholder rights plans that enable companies to block potential takeovers.  Twelve funds, including six major Australian superannuation funds took legal action in the Court of Chancery in Delaware demanding News Corp abide by the agreement it made with ACSI in October 2004, to secure support for the redomicile of the company in Delaware.  Settlement terms are agreed and are now being drafted in the form required for the Delaware Court of Chancery to make its order. News Corporation has agreed to refer the extension of its existing poison pill to shareholders.  The settlement provides the following:   * Should shareholders agree to extend the existing poison pill, this will trigger a range of conditions and safeguards that will apply to this and any future poison pills, and any potential extensions, over the next 20 years; * That these arrangements are underpinned by a legally binding Delaware Court of Chancery order; * Should the extension to the existing poison pill be rejected by shareholders in October 2006, then the 12 superannuation funds and News Corporation involved in the current action will revert back, on a without prejudice basis, to their pre-settlement position and proceed to trial in the Delaware Court of Chancery later this year.   In December last year the Court of Chancery in Delaware rejected News Corporation's arguments that the case should not proceed. The trial was set for 24 April 2006.  The court determined that there were substantial arguments to be considered at trial, particularly as to whether a legally binding contract may have been breached by News Corporation.  **1.9 The Coca-Cola company announces new remuneration plan for directors entirely based on company's performance over three-year periods**  On 5 April 2006, the Coca-Cola Company announced that it is adopting a new remuneration plan for its board of directors consisting entirely of equity-based remuneration payable only when the company meets defined performance targets.  The plan, which takes effect in 2006, grants directors equity share units each year equal to a flat fee of US$175,000 and sets for the initial three-year performance period a target of 8 percent compounded annual growth in earnings per share, which is the mid-point of the company's long-term performance target. The company will use its 2005 earnings per share of US$2.17 (after considering items impacting comparability) as the base for this percentage growth calculation. When the performance target is met at the end of the performance period, the share units will be payable in cash. Should the performance target not be met, all share units and hypothetical dividends would be forfeited in their entirety.  "This all-or-nothing approach to board compensation aligns the interests of our directors with those of shareowners more closely than any other compensation formula I have seen," said Neville Isdell, chairman and chief executive officer.  The new plan replaces one under which directors received an annual retainer fee of US$125,000, of which US$50,000 was paid in cash and US$75,000 accrued in share units. The old plan also provided additional fees for such duties as chairing board committees and attending board and committee meetings. All these fees have been eliminated under the new plan. The new plan provides the option for the board of directors to make a one-time cash award to any new director.  **1.10 CEO pay in the top 100 Australian companies**  Research for the Australian Council of Superannuation Investors (ACSI) published on 4 April 2006, has found pay rises for Top 100 company CEOs have been driven by substantial rises in annual bonuses.  The research, conducted for ACSI by institutional governance adviser ISS Australia, found that over the period 2001 to 2004, the median CEO's fixed remuneration increased by 76%. This is many times greater than inflation and the increase in average employee earnings over that period (15%).  **The rise in CEO Pay 2001 - 2004**   |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | | Median Pay | 2001 | 2002 | 2003 | 2004 | Overall Change | | Fixed Pay | $781,788 | $914,330 | $1,137,769 | $1,376,798 | 76% | | STI | $386,805 | $ 475,000 | $ 735,129 | $911,803 | 136% | | Total Rem (excl. LTI) | $1,422,662 | $1,447,111 | $1,773,180 | $2,408,670 | 69% | | Total Rem | $ 2,120,411 | $2,098,601 | $2,325,692 | $3,138,235 | 48% |   Note: The fixed pay and STI figures do not add to the 'Total Rem (excl. LTI)' figure as these are median values.  But dwarfing the increase in fixed pay was the increase in the short-term incentive. Over the period 2001 to 2004, the median short-term incentive increased by 136%.  According to ACSI, the increased emphasis on short-term incentives marks a change in the focus of 'at-risk' pay away from long-term incentive instruments (such as options and performance rights). Traditionally, 'at-risk' pay, that portion of executive pay that is sensitive to performance, was dominated by long-term incentives. Long-term incentives are typically subject to rigorous, demanding performance hurdles. The terms of short-term incentive grants are comparably much more vague. Moreover, the potential for a divergence between shareholder and managerial interests is exacerbated - short term incentive benchmarks are generally less likely to be aligned with the pursuit of shareholder wealth than those required by long-term incentive plans.  Further information is available on the [ACSI website](http://www.acsi.org.au/" \t "_new).  **1.11 FSA consults on listing rule changes and transparency directive**  On 30 March 2006, the UK Financial Services Authority (FSA) published a consultation paper on proposed changes to the Listing Rules (LR) for investment entities and on proposed changes to the Listing Rules and Disclosure Rules to implement the Transparency Directive (TD).  The proposed changes for investment entities replace the existing regime with a more principles-based approach to determining eligibility for listing. This would enable those employing a wider range of investment strategies, including those currently pursued by some hedge funds, to list in the UK for the first time. Appropriate investor protections would be maintained through revised and enhanced disclosure requirements.  The TD forms part of the EU's Financial Services Action Plan (FSAP) and is designed to enhance transparency across the EU's capital markets by harmonising information requirements across the EU. It requires companies whose shares are admitted to trading on regulated markets to produce periodic financial reports and shareholders to disclose major holdings in such companies.  The proposed reforms cover two principal areas - eligibility for listing (for entities seeking a listing for the first time) and continuing obligations of entities once listed.  **(a) Changes for investment entities**  The main changes being proposed are:   * to replace the current, rather mechanistic rules, governing what qualifies as an adequate spread of investment risk with a more principles-based approach, which will allow investment entities to have greater flexibility in their choice of investment strategies. It will also remove restrictions on short selling and enable greater use of synthetics; * to ensure investors remain appropriately protected by: requiring, as a condition of listing, new investment entities to have sufficient working capital for 12 months; * to require investment entities to state in their annual report and accounts how they are achieving their objectives of spreading investment risk and to immediately notify any significant changes to their risk profile; * to remove what is effectively duplication by looking to rely where possible on other relevant regulatory provisions - such as the regimes for authorising fund managers, and for authorising Open-Ended Investment Companies - rather than imposing additional listing requirements; * to simplify other ongoing disclosure obligations, for example by removing a number of detailed financial disclosure requirements to be included in an investment entity's annual report and accounts regarding portfolio composition; and * to remove restrictions presently in place on property investment companies, thus ensuring the compatibility of listing rules with tax rules that are to be introduced under the new REITs regime.   **(b) Transparency Directive changes**  The TD will introduce requirements in three areas, namely: publication of financial information, disclosure of shareholdings and the dissemination of TD information.  **(i) Publication of financial information**  The TD requires issuers to produce annual and half-yearly reports, and also to produce interim management statements. The FSA proposes to:   * copy-out the TD requirements for such reports and statements into the Disclosure Rules; * remove the requirement for issuers either to publish half-yearly reports in a newspaper or to send such reports to every holder of their securities; and * retain a number of Listing Rules that set slightly more stringent requirements than the TD (for example, the requirement for wholesale debt issuers to produce annual financial reports), or lie outside the TD's scope, and to remove the remainder whose benefits are unclear.   **(ii) Disclosure of shareholdings**  The TD sets out requirements for the disclosure of acquisitions or disposals of major shareholdings. This is currently a Department of Trade and Industry (DTI) responsibility and will transfer to the FSA on the implementation of the TD.  The FSA is inviting views on two possible options:   * retaining the broad parameters of the current UK regime, with notifications necessary when shareholdings reach a 3% threshold, and every 1% thereafter threshold (the issuer being notified within two days of the notifiable event, and the issuer notifying the market no later than the end of the business day after receipt). This would apply to holdings in issuers with shares admitted to trading on a regulated market, and to holdings of shares in UK companies traded on exchange-regulated markets (including AIM and Ofex); or * introducing the TD minimum requirements, under which notifications become necessary when shareholdings reach thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. Shareholders must notify the issuer no later than four trading days of the notifiable event, with the issuer notifying the market no later than three trading days after receipt. This would apply to holdings in issuers with shares admitted to trading on a regulated market only.   The FSA does not propose to extend the scope of disclosure requirements to cover economic interests in shares more broadly (such as CFDs). However, the FSA welcomes views on the issues which would be raised by such an extension, and the likely costs and benefits.  **(iii) Dissemination of information**  The TD requires issuers to disseminate TD information in a timely manner on a pan-European basis. The FSA proposes:   * to retain the UK's current model, where issuers report information through a small number of Primary Information Providers for onward dissemination; but * to invite views on whether, as the TD allows, issuers should have a choice of disseminating directly or through a service provider.   The TD requires the establishment of at least one Officially Appointed Mechanism (OAM) for the central storage of such information. The Commission has indicated that interim solutions will be acceptable pending their formal legislative determination of the standards which an OAM will have to meet. The FSA proposes, as an interim solution, to use the FSA website to provide hyperlinks to commercial websites that provide access to this information.  The consultation paper is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Policy/CP/2006/06_04.shtml" \t "_new).  **1.12 Global report on executive pay**  Senior executives in the US earn the highest salaries and annual total cash (total of annual base salary, guaranteed cash bonus and short term incentives) globally, according to a survey published on 29 March 2006 by Mercer Human Resource Consulting. The research, which covers pay for finance, marketing, and HR directors in 14 countries worldwide, found that finance and marketing directors earn more than five times their counterparts in India, while HR directors earn over three times as much.  The research is part of Mercer's 2006 Global Pay Summary, which provides base salary and total cash compensation for 50 job positions in 50 countries worldwide.  **(a) Finance directors**  US-based finance directors are the highest paid, earning US$250,000 on average, followed by those in Canada and the UK, who receive around US$186,400 and US$180,300 respectively. Their counterparts in Hong Kong, Italy, and Germany also earn above-average base pay, at US$168,500, US$159,000, and US$154,400.  Annual total cash for finance directors follows the same pattern as base pay. US-based finance directors are the highest paid, earning annual total cash of US$324,600 on average, followed by those in Canada and the UK, who receive approximately US$262,700 and US$236,600, respectively.  At the lower end of the spectrum, finance directors in Hungary and India receive less than average for this position - earning a base salary of approximately US$59,800 and US$53,800. Average base pay for this role in Poland is US$108,200.  **(b) Marketing directors**  Base pay for marketing directors ranges between US$203,100 in the US and US$40,000 in India. Marketing directors in the US are followed by those in Italy and the UK, who are paid around US$169,100 and US$167,800.  Marketing directors in the US also receive the most annual total cash, followed by those in the UK, Germany, and Italy.  While Hungary and Poland still feature toward the bottom of the rankings, interestingly, pay for marketing directors in these countries and Germany is higher (US$91,000, US$110,600, and US$165,000) than that for finance directors.  **(c) Human resources directors**  HR director is the lowest paid role of the three positions covered. The best paid HR directors are found in the US, UK, and Germany where employees can earn US$175,000, US$161,900, and US$160,500 respectively. Annual total cash for this position is highest in Germany, at US$227,500, followed by US$219,000 in the US and US$202,500 in the UK.  Again, employees in this position working in Hungary and India earn significantly less annual base pay than in those in other countries - receiving around US$57,100 and US$47,900 respectively.  **1.13 Report on regulatory challenges in Hong Kong**  On 29 March 2006, the Hong Kong Securities and Futures Commission (SFC) released a document setting out the regulatory challenges and risks that it faces and the strategies to address them.  The document is the result of a comprehensive analysis of the environment in which the SFC and the market operate. It provides a strategic framework for the SFC for the next three financial years. This is the first time in recent years that the SFC has articulated at a high level the regulatory challenges and published co-ordinated responses to them.  Four major regulatory challenges have been identified, and for each a set of initiatives will be in place to ensure that the statutory regulatory objectives of the SFC are met.  The four challenges are:  1. Improving standards of corporate governance and behaviour;  2. Tackling risks arising from complex and structured products, and mis-selling to retail investors;  3. Addressing the consequences of a market or economic downturn if and when that happens; and  4. Keeping Hong Kong at the forefront of international financial markets and promoting regulatory best practice.  A total of 21 initiatives in the four areas of regulation, enforcement, education and market facilitation have been mapped out to address the above challenges and associated risks  The document "Regulatory Challenges and Responses" is available on the [SFC website](http://www.sfc.hk/sfc/doc/EN/speeches/public/others/publications/06/corporate_plan_0603_eng.pdf" \t "_new).  **1.14 Sustainability reporting on the rise**  On 23 March 2006, the Australian Minister for the Environment and Heritage, Senator Ian Campbell, released the results of a survey of the top 500 Australian companies, "The State of Sustainability Reporting in Australia 2005". It is the third annual report bringing together information from Australian companies in the Standard & Poor's/ASX 300 index, the top 100 private companies, and the top 100 unlisted public companies.  Sustainability or non-financial reporting involves companies assessing their performance against environmental, social and economic criteria, how these results relate to the success of the business, and how potential impacts, opportunities and risks are addressed.  The survey found that the rate of reporting is highest in the manufacturing and mining sectors, followed by the wholesale trade, electricity, gas and water supply industries. It also revealed that companies are now producing separate sustainability reports, instead of including them in annual reports or on websites.  Of the 486 companies researched for the project, 119 companies are producing a sustainability report. Of the Standard & Poor's/ASX 300 index, 52 companies produced a sustainability report - up from 42 in 2004. The companies surveyed said there were several benefits for producing a sustainability report. These may include increased market share, brand dominance, innovation, new business opportunities, enhanced reputation and the ability to attract and retain employees.  The report is available on the [Minister for the Environment and Heritage's website](http://www.deh.gov.au/about/whatsnew.html" \t "_new).  **1.15 FSA publishes feedback on hedge fund risks**  On 23 March 2006, the UK Financial Services Authority (FSA) published its feedback to Discussion Paper 05/4 "Hedge Funds: A Discussion of Risk and Regulatory Engagement", which looked at the impact of hedge funds on the UK's wholesale market.  The FSA continues to view hedge funds as an important part of the financial services system providing a major source of liquidity and enhancing market efficiency. In DP05/4 the FSA identified what it saw as the risks posed to its objectives by hedge funds and outlined the steps it had taken to mitigate them and a number of further ways in which it could address those risks.  In order to increase its understanding of the activities of those asset managers using hedge fund techniques, the FSA proposes to include additional questions to identify the firm's prime broker, third party administrator and the fund auditor in the Integrated Regulatory Returns that firms send to the FSA.  Additionally, two specific areas are the subject of supervisory focus. These are:   * Asset Valuations: hedge fund managers may be exposed to conflicts of interest as their remuneration is based on performance and assets under management. This may create an incentive to overstate the valuations it provides to administrators, who may not be able to challenge them. Themed visits are currently being carried out in this area and the findings will be known in the third quarter this year. The FSA has also sponsored an IOSCO project on valuing complex and illiquid assets in hedge funds; and * Side Letters: the failure by hedge fund managers to disclose that side letters have been granted to certain clients may result in some investors receiving more information and preferential treatment to other investors in the same share class. The FSA expects managers to ensure that all investors understand that a side letter has been granted and that conflicts may arise.   The discussion paper and feedback document are available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Communication/PR/2006/026.shtml" \t "_new).  **1.16 FSA to consider extending range of retail investment products**  On 23 March 2006, the UK Financial Services Authority (FSA) announced that it will consult next year on widening the range of funds that can be marketed to retail investors to include new authorised funds of hedge funds. This would enable retail investors, who are already gaining access to products with hedge-fund investment characteristics through a variety of means, to invest in products that would be subject to the FSA's regime for authorised collective investment schemes.  The funds would be subject to structural and operational safeguards including the requirement to have an independent depositary. In addition, the fund of hedge funds managers will not be able to invest into all hedge funds - there will be liquidity criteria, for example, in respect of the underlying funds. This should enhance investor protection whilst allowing increased investor choice.  The decision to consult is published in the FSA's feedback to Discussion Paper 05/3 "Wider Range of Retail Investment Products: Consumer Protection in a Rapidly Changing World", which considered the increasing variety of retail investment products, the risks these products posed to consumers, and how those risks could be addressed.  The discussion paper on retail investment products identified three risks to consumers posed by the current suite of retail investment products. These were: lack of consumer understanding of newer products; confusion over the sales and distribution channels used; and possible detriment caused by marketing prohibitions on certain unregulated funds.  In addition to consulting on a possible extension of the range of authorised collective investment schemes the FSA proposes to focus on two additional areas of relevance to the wider range of investment products currently in the market:   * Consumer education and awareness - the FSA will reinforce its existing consumer information and awareness work, stressing the increasing need for consumers to invest proportionately across a range of products, to read the disclosure material they receive, and to seek financial advice when necessary; and * Product provider responsibility - the FSA will examine the role that product providers and distributors play in ensuring customers are treated fairly, primarily through the provision and use of product information. Some of this work is already being carried out under the Treating Customers Fairly project from which results will be published later this year.   The discussion paper and feedback document are available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Communication/PR/2006/027.shtml" \t "_new).  **1.17 Ranking of 100 global companies on climate change strategies**  On 21 March 2006, a report was published by the Ceres investor coalition that analyzes how 100 leading companies are addressing the growing financial risks and opportunities from climate change whether from expanding greenhouse gas regulations, direct physical impacts or surging demand for climate friendly technologies. Altogether, 76 U.S. companies and 24 non-U.S. companies in 10 business sectors are profiled in the report.  The report uses a "Climate Governance Checklist" to evaluate how major industrial corporations are addressing climate change in five broad areas: board oversight, management performance, public disclosure, greenhouse gas emissions accounting and strategic planning. The report uses data from securities filings, company reports, company websites, third-party questionnaires and direct company communications.  Using a 100-point scoring system, the report ranked the largest companies in the oil/gas, electric power, auto, chemical, industrial equipment, mining/metals, coal, food products, forest products and air transportation sectors, with operations in the United States. The scoring system gave most credit to companies with a sustained commitment to controlling greenhouse gas emissions, disclosing data and strategies, supporting regulatory actions, and taking practical, near-term steps to find lasting solutions to climate change.  Foreign companies such as BP, Toyota, Alcan, Unilever and Rio Tinto had the highest scores in five of the nine sectors that included both U.S. and non-U.S. firms. American companies - DuPont, General Electric, International Paper and United Parcel Service - led in the other four sectors. (In the electric power sector, only American companies were analyzed.)  According to Ceres, the report's overall results are encouraging. In 2003, Ceres released a report on 20 companies showing that major U.S. businesses were doing little to address climate challenge. By contrast, this report shows that leading companies in many key industries are now tackling the issue at the highest level, with boards conducting strategic assessments and management setting performance goals for reducing greenhouse gas emissions and developing new climate-friendly products.  DuPont, the leading scorer among U.S. firms has reduced its GHG emissions 72 percent since 1990 and developed forward-thinking commercial products such as energy-efficient building materials, components for solar, wind and fuel cell systems and next-generation refrigerants with low global warming potential.  The report also shows, however, that dozens of U.S. businesses in various climate vulnerable sectors - including leading electric power and oil companies - are still largely dismissing the issue or failing to articulate clear strategies to meet the challenge. Low climate governance scores also were prevalent among entire sectors, including: coal companies, which are especially vulnerable to greenhouse gas regulations; food and forest product companies, which are vulnerable to natural resource impacts from climate change; and airlines, one of the fastest growing sources of CO2 emissions.  Douglas Cogan, principal author of the report and the 2003 report, says he sees important progress by U.S. companies that are beginning to build climate change into their governance practices and strategic planning. In the past two years, Cogan cited such as examples as:   * General Electric's launch of 'ecoimagination', a plan to double investments in climate-friendly technologies and reach $20 billion in annual sales by 2010. * Ford Motor's announcement that it will boost production of hybrid vehicles tenfold by 2010. * Chevron's decision to add renewable technologies into its energy portfolio and set targets to cut its greenhouse gas emissions. * American Electric Power's decision to build the nation's first commercial-scale coal gasification power plant, a "clean coal" technology that is says is the "right investment" given foreseeable greenhouse gas regulations in the U.S.   These companies join others, like DuPont and Alcoa that have had climate change governance strategies in place for more than a decade.  The report is available on the [Ceres website](http://www.ceres.org/news/news_item.php?nid=154" \t "_new).  **1.18 New Zealand Securities Legislation Bill discussion document**  On 23 March 2006, the New Zealand Securities Legislation Bill discussion document was published. The Securities Legislation Bill is designed to encourage investment in New Zealand's capital markets by strengthening the regulatory framework embodied in securities, securities trading, and takeovers laws. It is expected that the Bill will be passed into law later this year.  Regulations will be required once the new securities legislation comes into force to ensure the new regime is sufficiently flexible and able to be updated to address new developments in securities markets, particularly relating to insider trading and market manipulation exemptions which deal with market efficient conduct.  The discussion document seeks feedback on:   * whether regulations should be made requiring investment advisers and brokers: to make additional disclosures; meet a minimum level of professional indemnity insurance; and comply with certain content requirements or requirements prescribing the form of disclosure; and whether there should be exemptions from compliance with the disclosure obligations in certain circumstances (for example, where advice is given over the phone or in a public forum); * whether exemptions should be given from the new insider trading and market manipulation regimes in order to prevent market efficient behaviour from being inadvertently caught under the regimes, particularly exemptions for passive index funds, market stabilisation arrangements, short selling and other matters; and * minor amendments to the current Substantial Security Holder Regulations to make them consistent with the changes contained in the Securities Legislation Bill.   Further information is available on the [Ministry of Economic Development website](http://www.med.govt.nz/templates/MultipageDocumentTOC____18247.aspx" \t "_new).  **1.19 CED releases recommendations for improving corporate governance**  On 21 March 2006, the US Committee for Economic Development (CED) released "Private Enterprise, Public Trust: The State of Corporate America After Sarbanes-Oxley", a policy statement that examines the state of corporate governance in the United States and offers practical recommendations for restoring public trust in business.  Sarbanes-Oxley regulations and other new government-imposed rules, though beneficial on balance and deserving of time to become fully effective, are not sufficient to restore trust in business, according to CED. CED recommends additional practical and effective changes - in financial statements, executive compensation, selection of corporate boards, and other matters - that do not require new government mandates.  CED's recommendations include:  **(i) Making audit committees autonomous and vigorous**  In order to accurately present a company's position, the board of directors must have access to all pertinent data. This will occur only if a board's audit committee is competent, independent, and establishes effective control over both the internal auditors and the independent outside auditors.  The relationship between the audit committee of the board and the outside and internal auditors is crucial. The audit committee should exercise the same tone of control over the internal auditor as it does over the external auditor, extending to decisions of hiring, firing, and compensation.  **(ii) Ensuring that users understand that financial information is based on judgments**  Financial statements would be more useful if they were governed by fewer rules and displayed more of the judgment that lies behind estimated numbers. Stock analysts, the investing public, and regulators must recognize the inherently judgmental character of accounting statements and financial information. Ranges of values rather than precise numbers should be explained and understood as such. In addition, financial statements should be supplemented with non-financial indicators of value.  **(iii) Giving Sarbanes-Oxley a chance to work**  CED sees room to tailor the requirements imposed by section 404 of Sarbanes-Oxley within the existing statute, and endorses the Public Company Accounting Oversight Board (PCAOB) and Securities and Exchange Commission (SEC) implementation guidance based on their evaluation of the first-year experience. The guidance, issued simultaneously by the two agencies in May 2005, should lower the costs and increase the value of section 404 compliance. Moreover, CED does not recommend a broad exemption from Sarbanes-Oxley requirements for small-capitalization companies but nevertheless supports the objective of mitigating the costs to smaller companies.  **(iv) Taming excessive executive compensation**  In CED's view, the disparity of income between top corporate executives and average employees is a cause for serious concern. The differentials that exist too often reflect neither market conditions nor individual performance. The procedure for determining executive compensation has been broken at far too many US larger corporations, and CED believes that the solution to excessive executive compensation must be regarded as a matter of process and disclosure, including: compensation committees must adopt measurable, specific, and genuinely challenging goals for the performance of their businesses, and judge management by them; the compensation process must be run by compensation committees composed of independent directors; the compensation committee should have direct authority over all terms of any management contract, including all forms of compensation; management should have a substantial equity interest in their company; and management should make a full, timely, and transparent disclosure to shareholders of its compensation.  **(v) Using independent nominating committees to select and appraise directors**  A paradox of corporate stewardship is that, despite the principle that directors represent shareholders in the selection and retention of management, historically most directors have been selected by management. In the view of CED, the best approach to building high-quality boards is to assign to truly independent nominating committees the responsibility for recommending new board candidates and for evaluating the performance of existing board members. The nominating committee should also have the responsibility of recommending committee assignments.  "Private Enterprise, Public Trust: The State of Corporate America After Sarbanes-Oxley" and an executive summary of the recommendations are available on the [CED website](http://www.ced.org/newsroom/press/press_2006corpgov.pdf" \t "_new).  **1.20 Report on US CEO remuneration**  A study published by The Corporate Library ("TCL") on 21 March 2006 of executive incentive compensation practices found that the gap between pay and performance over the past five years is most pronounced at 11 of the largest U.S. companies. At the 11 companies in the study, "Pay for Failure: The Compensation Committees Responsible", The Corporate Library found that compensation committees authorized a total of US$865 million in pay to CEOs who presided over an aggregate loss of US$640 billion in shareholder value. The 11 companies are some of the biggest household names in Corporate America. They are:   * AT&T Inc * BellSouth Corporation * Hewlett-Packard Company * Home Depot, Inc * Lucent Technologies Inc * Merck & Co., Inc * Pfizer Inc * Safeway Inc * Time Warner Inc * Verizon Communications Inc * Wal-Mart Stores, Inc   Each of the 11 companies: received a high risk rating from The Corporate Library; paid their CEOs in excess of US$15M in the last two available fiscal years; had a negative return to stockholders over the last five years; and underperformed their peers over the same period.  The study examines in detail the incentive policies at each of the 11 companies; finding high proportions of fixed pay, poorly chosen performance metrics, and rewards for below median performance. The report also looks at the make-up of the compensation committees at the companies, listing the members by name, along with their compensation. The report also gives examples of Pay for Success compensation.   The full report is available for a fee from the [Corporate Library website](http://www.thecorporatelibrary.com/tcl-store/PressReleases/865mm_in_ceo_compensation_while.htm" \t "_new).  **1.21 What directors know about their companies: survey**  Boards of directors are becoming much more knowledgeable about and actively involved in their companies' core performance and value creating activities, according to the executives who responded to the latest McKinsey Quarterly survey. The results of the survey were published in March 2006. However, in one controversial area of corporate governance - compensating executives with stock options and bonuses tied to earnings growth - these more active board members have effected relatively little change.  In a previous survey, conducted in early 2005, directors expressed an eagerness to spend more time on topics such as their companies' talent, skills, and current performance. Directors appear to have made significant progress: nearly two thirds of all respondents to the current survey say that boards have become more actively involved in strategy, finance, and other core areas of corporate performance and in value creation than they were five years ago. Further, the proportion of boards that are more active varies little from region to region, even though reforms in corporate governance regulation have differed significantly around the world. Larger companies and publicly held ones are somewhat more likely to have more active boards.  Notably, CEOs, CFOs, and other "C-level" executives, who have the closest contact with the board, indeed, many are on it, see less dramatic change in the directors' roles in the past five years than other executives do: a third say that no change has taken place in the board's level of activity, a view held by only 20 percent of other executives. In addition, C-level executives are less likely than others to say that board members fully understand their companies' strategies, financial position, and risks. Although the survey did not probe this issue more deeply, several possible reasons could explain the disparity. One might be a difference in perception between C-level executives, who may think that boards were more actively involved in the past, and other respondents. It is also possible that the changes are more rhetoric than reality.  Even so, executives at all levels say that directors have made real progress in learning more about their companies' strategies, financial position, and risks. Last year, 63 percent of board members said they had a good or complete understanding of the risks facing their companies; this year, 75 percent of respondents say so. On the board's understanding of corporate strategy, the share reporting a solid understanding has risen to 84 percent, from 73 percent. Nine out of ten respondents to the current survey say that their boards have a good or complete understanding of the financial position of their companies.  The biggest knowledge gap for boards continues to be about risk: while 34 percent of the respondents say that the directors have a complete knowledge of strategy, only 18 percent credit them with the same command of risk. One year ago, the figure was 11 percent in both categories. Some 48 percent of the respondents say that their boards have a complete grasp of their companies' finances.  Directors do not seem to be putting their newfound knowledge to work by addressing controversial pay practices such as stock options, stock grants, and bonuses tied to earnings growth. Two thirds of the executives say that their companies' use of such pay practices has not diminished in the past five years. Companies in North America are the least likely to have changed: only 15 percent did so. Companies in the developed countries of the Asia-Pacific region, at 25 percent, are the likeliest to have changed pay practices.  The McKinsey Quarterly conducted the survey in February 2006 and received 1,468 responses from a worldwide representative sample of business executives from publicly and privately held businesses across a full range of industries.  **1.22 UK executive pay survey**  UK companies are placing growing emphasis on pay for performance, according to a survey by Mercer Human Resource Consulting published in March 2006, which found that salary increases for executive directors and senior executives decreased slightly last year, while bonuses went up. The study covered reward arrangements for 46 top management roles in 44 UK companies, mainly FTSE 100 companies and other large multinationals.  **(a) Base pay and bonuses**  Median salary increases dropped to 5% of base pay from 6% in 2004, though arrangements varied considerably between and within organisations.  Median annual bonuses in the companies surveyed increased to 41% of salary in 2005 from 39% in 2004. The survey also found bonus payments varied significantly between companies, reflecting organisational performance. For example, bonuses for Group Chief Executives ranged between 16% and 153% of salary while those for Finance Directors were between 19% and 140% of salary.  According to the survey, 20% of organisations deferred a proportion of their executives' bonus payouts in 2005, down from 25% in 2004.   The survey also found the majority of bonus plans used a combination of financial and non-financial measures. The most widely used mix of financial to non-financial indicators was 50:50.  **(b) Long-term incentives**  Performance share plans replaced share options as the main form of long-term incentive. The proportion of companies offering share options to senior management during the year dropped from 48% to 33%, while 36% of companies offered performance share plans.  Copies of the survey report are available from the [Mercer website](http://www.mercerhr.com/pressrelease/details.jhtml/dynamic/idContent/1211975" \t "_new).  **1.23 Research report: employee share ownership schemes - two case studies**  The Centre for Corporate Law and Securities Regulation and the Centre for Employment and Labour Relations Law at the University of Melbourne have published a new research report titled "Employee share ownership schemes - two case studies". Employee share ownership (ESO) has recently been the subject of significant public policy debate in Australia and internationally. In these debates, ESO schemes are usually said to be implemented for a variety of reasons including alignment of employer and employee interests, increased employee productivity, improved workplace harmony, and increased employee remuneration.  This study explores, through case studies of ESO schemes at two Australian companies, three key issues relevant to the implementation of ESO schemes and the policy and regulation applicable to ESO schemes. These issues are: (1) whether ESO schemes better align the interests of employees with those of their employer, leading to better enterprise performance; (2) whether the objectives of companies in implementing ESO schemes are primarily "ownership objectives", "remuneration objectives" or "workplace change objectives"; and (3) whether the concessional taxation treatment of ESO schemes provides an incentive for the implementation of schemes in a way that leads to improved enterprise performance.  The report is available on the [Centre for Corporate Law and Securities Regulation website](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/index.cfm" \t "_new).  **1.24 Corporate fraud and misconduct survey**  In March 2006, KPMG published a report titled "Integrity Survey: 2005-2006". The report contains responses from 4,056 US employees, spanning all levels of job responsibility, 16 job functions, 11 industry sectors and 4 thresholds of organisational size.  Nearly three out of four employees reported that they had observed misconduct in the prior 12 month period, with half of employees reporting that what they had observed was serious misconduct that could cause "a significant loss of public trust if discovered."  Between 2000 and 2005, employees reported:   * Consistent levels of overall misconduct, with 74 percent reporting in 2005 that they had observed misconduct, compared with 76 percent in 2000 * Consistent levels of serious misconduct, with 50 percent in 2005 characterizing the misconduct they had observed as serious, compared with 49 percent in 2000.   Although the level of observed misconduct has remained constant, employees reported that the conditions that facilitate management's ability to prevent, detect, and respond to fraud and misconduct within companies are improving.  Between 2000 and 2005, employees reported the following positive changes in conditions and attitudes:   * Pressure to engage in misconduct to meet business objectives has decreased. * The adequacy of resources available to meet targets without cutting corners has improved. * Apathy and indifference toward codes of conduct have declined. * Comfort levels in using a hotline to report misconduct have risen. * Confidence that appropriate action would be taken in response to alleged improprieties has increased. * Confidence that whistleblowers would be protected from retaliation has increased. * Perceptions of chief executive officers and other senior executives as positive role models have improved. * The perception that top management is approachable if employees have questions about ethics or need to deliver bad news has increased. * The perception that business leaders would respond appropriately if they became aware of misconduct has increased.   Employees who work in companies with comprehensive ethics and compliance programs reported more favorable results across the board than did those who work in companies without such programs. For instance, employees who work in companies with such programs reported fewer observations of misconduct and higher levels of confidence in management's commitment to integrity.  At companies with ethics and compliance programs:   * Employees reported fewer observations of misconduct. * A significantly higher percentage of employees reported that their colleagues felt motivated and empowered to "do the right thing." * A significantly higher percentage of employees reported that their colleagues felt comfortable raising and addressing ethics concerns. * A significantly higher percentage of employees believed their CEOs and other senior executives valued ethics and integrity over short-term business goals.   **1.25 Unfair contract terms: The Victorian experience**  Dr Elizabeth Lanyon  Associate Professor in Law, Monash University Senior Policy Adviser, Consumer Affairs Victoria  **(a) The Context**  **(i) Victorian legislation**  Unfair terms in consumer contract provisions are located in Part 2B of the [Fair Trading Act 1999 (Vic)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "Default), which commenced in October 2003. There is no equivalent in any other Australian legislation. Section 32W provides that an unfair contract term is a term which, "contrary to the requirements of good faith and in all the circumstances, causes a significant imbalance in the rights and obligations arising under the contract to the detriment of the consumer." Part 2B applies only to consumer contracts: contracts for the supply of goods or services of a kind ordinarily acquired for personal, household and domestic use, but acquired for that use by the person. Part 2B does not currently apply to consumer credit contracts. A term which is expressly permitted or required by law is not an unfair contract term, but only to the extent expressly permitted or required. An unfair contract term is void.  The standard set out in section 32W is accompanied by a list of factors in section 32X which gives the Court a guide in assessing whether a contract term is unfair. Some examples drawn from section 32W are a term which avoids or limits performance, a term which penalizes the consumer but not the supplier on breach or termination, terms permitting a unilateral variation of price, the characteristics of goods or services or contract terms and a term which permits assignment of the contract to the detriment of the consumer without the consumer's consent.  The Director of Consumer Affairs Victoria can apply to the court for a declaration that a term is unfair or seek an injunction. The Governor-in-Council can prescribe a standard term as unfair.  **(ii) International context**  Unfair contract regulations have existed in the United Kingdom for over ten years and are now embodied in The Unfair Terms in Consumer Contracts Regulations 1999. The concept of unfair contract terms is quite familiar in the European context. The Victorian legislation is modeled on the United Kingdom regulations but there are some important differences. For example, core terms or price are not excluded from Part 2B. Individually negotiated contract terms can still be unfair. The [Office of Fair Trading](http://www.oft.gov.uk/default.htm" \t "_new) in the United Kingdom regularly publishes bulletins about its compliance and enforcement actions and its website is a good source of information.  **(b) Implementation strategy**  In November 2003, preliminary Guidelines were issued and the Director announced that the priorities for Consumer Affairs Victoria's implementation strategy included mobile phones, hire cars and fitness centers contract terms. The decision to give priority to those areas was based on the level of complaints, the prevalence of similar or the same terms throughout the industry and the fact that in those particular areas, there were major suppliers with large market shares so that it would be productive to engage in individual dealings with those particular suppliers. As was announced at that time, the enforcement and compliance strategy was to begin with education and negotiation ahead of litigation.  Consumer Affairs Victoria develops an implementation strategy for each industry sector it identifies as a priority, taking into account the size and number of suppliers in the particular industry, whether there are national players for whom it would be sensible and practicable to individually analyze particular contracts, and whether there are suppliers with legal advisors who will assist them in dealing with an analysis of the contract. The compliance and enforcement strategy also factors in whether the particular industry has shown a commitment to meeting Consumer Affairs Victoria's concerns.  Proceedings were issued by the Director of Consumer Affairs Victoria against AAPT Limited in the Victorian Civil and Administrative Tribunal. The matter was heard by Justice Morris in November 2005. The judgment, expected shortly, is likely to resolve a number of threshold issues about the interpretation and operation of Part 2B, such as the meaning of "good faith", whether relevant circumstances include upstream contracts between AAPT and telecommunications carriers and in what circumstances an injunction will lie.  **(c) The future**  Priorities for 2006 and 2007 include domestic building contracts, pay-TV contracts, internet service provider contracts, on line auction terms and booking and entertainment contracts. Consumer Affairs Victoria will also be seriously considering the case for applying Part 2B to credit contracts regulated by the Consumer Credit Code, an option flagged in the recently released Review of the Consumer Credit Code. The need for a nationally consistent legislative framework to deal with unfair contract terms is also being actively considered by the Ministerial Council on Consumer Affairs.  Corporations with retail customers in Victoria and their legal advisers need to review existing and new contracts to ensure the terms strike a fair balance at the outset between the parties. |
| **2. Recent ASIC Developments** |
| **2.1 Discussion paper on managing conflicts of interest**  On 19 April 2006, the Australian Securities and Investments Commission (ASIC) released a discussion paper on managing conflicts of interest in the financial services industry.  The discussion paper uses hypothetical case studies illustrating real or perceived conflicts of interest across the financial services industry to explain ASIC's views on how those conflicts should be managed. A number of the case studies are loosely based on real life examples of conflicts ASIC has seen.  Since 1 January 2005, financial services licensees have been required to have in place adequate arrangements to manage conflicts of interest and the discussion paper is intended to assist licensees by identifying realistic scenarios across a variety of industry sub-groups.  The discussion paper suggests practical ways of managing different types of conflicts of interest and covers financial advisers (wholesale and retail), licensees, research report providers, product issuers and fund managers. The aim of the paper is educative and ASIC invites submissions during the consultation period.  Following the consultation period, the case studies will most likely be incorporated in ASIC Policy Statement 181 "Managing conflicts of interest".  The discussion paper is available on the [ASIC website](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/Policy+proposal+papers+and+papers+for+public+comment?openDocument" \t "_new).  **2.2 Latest ASIC report on financial services providers' relief applications**  On 10 April 2006, the Australian Securities and Investments Commission (ASIC) released its latest report outlining some of its decisions on applications made by financial service providers for relief from the licensing, conduct, disclosure and managed investments provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  The report, "Overview of Decisions on Relief Applications from Financial Services Providers" (September to December 2005), provides an overview of situations where ASIC has exercised, or refused to exercise, its exemption and modification powers. ASIC is vested with these powers under the financial services provisions of Chapter 7 (inserted by the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "Default)) and the managed investments provisions of Chapter 5C of the Act. The report covers relief applications considered by ASIC between 1 September 2005 and 31 December 2005.  The report also outlines decisions ASIC made as to whether it would adopt a no-action position regarding specified non-compliance with Chapters 5C and 7 of the Act. It includes an appendix detailing the relief instruments ASIC has executed for the matters referred to in the report. For ease of reference, the appendix contains cross-references linking the instruments to the relevant paragraph(s) of the report.  **Background**  ASIC considers applications for relief from Chapters 5C and 7 of the Act. The criteria that ASIC will apply in considering applications for relief are most recently outlined in:   * Information Release [IR 03-29] ASIC issues additional guidance for FSR relief applicants; * Policy Statement 136 Managed investments: Discretionary powers and closely related schemes [PS 136]; * Policy Statement 167 Licensing: Discretionary powers and transition [PS 167]; * Policy Statement 169 Disclosure: Discretionary powers and transition [PS 169]; * Policy Statement 176 Licensing: Discretionary powers - wholesale foreign financial services providers [PS 176]; * Policy Statement 178 Foreign collective investment schemes [PS 178]; * Policy Statement 182 Dollar disclosure [PS 182]; and * Policy Statement 185 Non-cash payment facilities [PS 185].   ASIC is required to publish a copy of each exemption and/or modification instrument issued in the ASIC Gazette.  More information on applying for relief is available on the [ASIC website](http://www.asic.gov.au/asic/asic_polprac.nsf/byheadline/Applying+for+relief+from+the+FSR+provisions?openDocument" \t "_new).  **2.3 Survey finds quality of advice on superannuation still needs improvement**  On 6 April 2006, the Australian Securities and Investments Commission (ASIC) released the results of its Shadow Shopping Survey on Superannuation Advice.  The purpose of the survey was to assess whether the advice given to consumers after the introduction of Super Choice complied with the law.  The survey assessed 306 examples of advice given to real consumers who were recruited by Roy Morgan Research. The survey covered 259 individual advisers who were representatives of 102 Australian financial services licensees.  Overall, the survey revealed a wide range in the quality of advice - from highly sophisticated advice at one end, with basic but valuable advice in the middle, through to negligent and inappropriate advice at the lower end.  'The most positive finding was that the 'strategic' advice provided by advisers was generally helpful to consumers', said ASIC Chairman, Mr Jeffrey Lucy. This advice covered issues such as asset allocation, how much to contribute to superannuation and tax advantages.  'However, the survey found the financial advice industry still has significant work to do before the quality of advice will be consistently at a level that ASIC and consumers would regard as acceptable.'  The survey revealed that:   * 16% of advice was not reasonable, given the client's needs (as required by law) and a further 3% was probably not reasonable; * where consumers were advised to switch funds, a third of this advice lacked credible reasons and risked leaving the consumer worse off; * unreasonable advice was three to six times more common if the adviser had an actual conflict of interest over the advice given to the client. These conflicts were commonly created where either the adviser stood to get higher remuneration if the recommendation was followed, or the recommended product was associated with the adviser's licensee; and * in 46% of cases, advisers failed to give a written Statement of Advice (SOA) when one was required. In a fifth of those cases, however, the advice was verbal advice to stay in an existing fund.   ASIC will be conducting specific follow up action with 14 licensees in response to issues raised in the survey. The survey raised particular concerns about the ability of these licensees to ensure their representatives are complying with the law.  ASIC will be sending the survey results to each licensee whose advisers participated in the survey. ASIC expects that these licensees will act quickly to fix any problems identified in the survey.  Mr Lucy said the survey should send a clear message to those who create the working environment for advisers the licensees and financial conglomerates. 'The survey shows that, while some progress has been made, the cultural changes mandated by the Financial Services Reform Act are not happening quickly enough.'  Common problems areas seen by ASIC in the survey included:   * advisers not investigating the client's current super fund before recommending a new fund; * advisers overlooking the client's insurance within an existing super fund; * SOAs not adequately disclosing the reasons for recommended action; and * SOAs not adequately disclosing the consequences of switching super funds.   A striking finding of the survey was that consumers were rarely able to detect bad advice. 'This shows the importance of advisers ensuring their recommendations are properly researched and appropriate for the client's needs,' said Mr Lucy.  **Background**  The Shadow Shopping Survey involved Roy Morgan Research recruiting a random sample of participants and gathering examples of their superannuation advice between June and December 2005.  The advice was then assessed for legal compliance. This assessment was undertaken by a team of ASIC staff, including people with financial planning qualifications and experience.  A copy of the report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=shadow_shop_report_2006_pdf" \t "_new).  **2.4 Superannuation disclosure**  On 29 March 2006, the Australian Securities and Investments Commission (ASIC) announced that it has intensified its review of superannuation disclosure practices following the introduction of choice of superannuation legislation in July 2005. The work being undertaken by ASIC on superannuation product disclosure statements (PDSs) is part of ASIC's increased focus on the superannuation area more generally in light of superannuation choice, and aims to ensure that industry is responding responsibly to the introduction of superannuation choice.  ASIC's review of superannuation disclosure practices includes PDSs, advertising and websites.  **(a) Past performance information**  As a result of recent disclosure reviews, ASIC has noted that the superannuation industry frequently includes past performance information in disclosure materials, including PDSs and information available on issuer websites. ASIC is concerned that past performance may be misleading in some situations, particularly where no warning is given that past performance is not a reliable indicator of future return.  ASIC encourages issuers to review the ASIC Guide on the Use of Past Performance in Promotional Material. Issuers are also reminded that in some situations where promotional material, including website information, is misleading, ASIC may impose stop orders pursuant to section 1020E of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).  **(b) Risk disclosure**  Several PDS reviewed provided insufficient information about the risks associated with the product, providing only generic risk information, while other PDS failed to cover the risks associated with the underlying products such as overseas shares, property or hedge funds.  On a number of occasions, ASIC found that the risk disclosure included in the Member Investment Choice brochures, prepared by the trustees for the purposes of regulation 4.02(2)(b) of the [Superannuation Industry (Supervision) Regulations 1994](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8413" \t "Default) (the SIS Regulations), would meet the requirements under paragraph 1013D(1)(c) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), if this information was also included in the PDS.  ASIC encourages issuers to review the information supplied in ASIC's QFS 137 What Information About Investment Choice Must a Trustee of a Superannuation Fund include in its Product Disclosure Statement? QFS137 provides guidance to issuers as to their options in meeting the dual disclosure requirements under the SIS Regulations and the Act.  **(c) Prospective financial information**  Many superannuation PDSs reviewed included prospective financial information, generally in the form of an investment objective, which did not appear to have a reasonable basis. ASIC considers that investment objectives may require disclosure which addresses whether there is a reasonable basis for the investment objectives, where those objectives constitute forward looking statements for the purpose of section 769C of the Corporations Act. ASIC refers issuers to its Policy Statement 170 Prospective Financial Information. If superannuation trustees wish to disclose their investment strategy and objectives, particular care should be taken to ensure that forward looking statements are adequately supported. This is an area that ASIC will focus on in the future.  **(d) Out of date information**  Investors are entitled to expect that a PDS will contain up to date information about significant superannuation issues that may impact upon them. A number of PDSs have not been updated to take account of, for example, changes relating to the superannuation surcharge and to eligibility criteria for the superannuation co-contribution.  **(e) Fee disclosure**  In general terms, ASIC has found that most superannuation issuers have made a good attempt to meet the requirements of the new [Corporations Regulations 2005 (No 1)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83651" \t "Default) (the Enhanced Fee Disclosure Regulations). However, ASIC is taking further action in relation to issuers who have failed to include the basic, prescribed text, including the consumer advisory warning, the mandated fee template and the worked dollar examples. ASIC may also raise concerns with an issuer's fee disclosure if there are other issues in the PDS that are of concern to ASIC.  ASIC has acted in relation to PDSs, and advertising, that include claims that one fee applies to a product when in fact additional transaction costs apply. This action follows ASIC's announcement in relation to advertising. ASIC is not sympathetic to arguments from issuers that there is a distinction to be drawn between a 'fee' and a 'cost'. ASIC's view is that consumers who read a statement saying that there is only one fee assume, unless clearly told otherwise, that there are no other costs associated with this product that they will incur.  In addition, ASIC has found that transaction costs, particularly buy/sell spreads, are sometimes poorly described in the PDS.  Further information in relation to ASIC's approach to the Enhanced Fee Disclosure Regulations is available from the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.5 Misleading reverse mortgage advertising**  On 29 March 2006, the Australian Securities and Investments Commission (ASIC) called on all reverse mortgage providers to ensure that their advertising material is clear and accurate, following its action against a credit union in relation to the misleading promotion of a reverse mortgage product.  ASIC has accepted an enforceable undertaking from Transcomm Credit Co-operative Limited (Transcomm) after an investigation found the credit union's advertising material featured claims that its Annuity Plus Reverse Mortgage product had:   * 'no impact on pension entitlements'; * 'the most competitive interest rates of any reverse mortgage' and 'lower fees and charges'; * 'an inbuilt safety measure' to guard against 'runaway' or 'negative equity'; and was * 'designed so that the final balance owed will not exceed 50 per cent of the estimated future value of your property'.   ASIC considered the statements, as well as the overall message of the advertisements, to be misleading because they:   * included false claims about the product's impact on pension entitlements and its competitiveness, and * misrepresented the extent to which consumers' interests were protected by some of the product's design features.   ASIC's Deputy Chairman, Mr Jeremy Cooper, said the Transcomm product was recently awarded 'Reverse Mortgage Product of the Year 2005' by Personal Investor Magazine, but has a number of features that differ from most reverse mortgages which may result in borrowers being disadvantaged.  'The Annuity Plus Reverse Mortgage allows Transcomm to reduce the amounts advanced to borrowers and, in some circumstances, even require early repayment. Unlike other reverse mortgages, the product is a fixed-term loan meaning consumers are likely to have to repay the loan in their lifetime,' Mr Cooper said.  'It's also important potential borrowers are made aware that this product does not have a no negative equity guarantee. Put simply, this means borrowers may eventually owe more than the value of their property. This is a good example of the need for consumers to understand the product they are considering.'  Under the terms of the enforceable undertaking, Transcomm will:   * refrain from making the misleading claims in any future advertising or promotional material; * place corrective advertisements on the Transcomm website; * provide existing borrowers with an opportunity to undo their loans and to claim compensation for any loss suffered in reliance on the representations; and * implement a compliance program concerning all future advertising material and legal documents. |
| **3. Recent ASX Developments** |
| **3.1 ASX and SFE to merge**  On 27 March 2006, the Australian Stock Exchange Limited ("ASX") and SFE Corporation Limited ("SFE") announced an agreed proposal to merge their businesses and create the leading financial markets exchange in the Asia-Pacific region. It will be the 9th largest listed exchange group globally.  The Board of SFE unanimously recommends that all SFE shareholders support and accept the merger proposal, in the absence of a superior proposal. Board members intend to vote in favour of the proposal.  **(a) The merger proposal**  Under the terms of the proposed merger, to be effected by a scheme of arrangement, SFE shareholders will receive 0.51 ASX shares per SFE share. The proposal values SFE ordinary shares at $16.93. This represents a 25% premium to the volume weighted average SFE share price for the period 10 to 21 March 2006. This also represents a 21% premium to an exchange ratio calculated using the twelve month volume weighted average ASX share price and the twelve month volume weighted average SFE share price.  Alternatively, SFE shareholders will be able to receive $2.58 cash per SFE share plus a variable ratio of ASX shares per SFE share such that the value of the cash and scrip alternative is equivalent to the all scrip proposal, immediately prior to the scheme meeting.  Following the merger, ASX intends to undertake a capital management initiative of up to $100 million in cash to all existing and new shareholders, subject to tax advice and any necessary approvals. This will exceed and supersede ASX's previously announced $50 million capital return.  **(b) Regulatory approvals**  Conditions to the merger proposal include clearance by the Australian Competition and Consumer Commission ("ACCC") and the approval of the Federal Treasurer.  **(c) Key outcomes**  The merged company will be owned up to 40.2% by former SFE shareholders and 59.8% by existing ASX shareholders.  Based on current market values, the merged group would be valued at up to $5.3 billion, placing it around 50th in rank of the largest companies listed on ASX.  **(i) Benefits for ASX and SFE shareholders**   * Participation in a larger entity, financially and operationally. * A critical mass upon which to expand equity and equity index futures business including an improved environment for trading in the SPI contract. * Better positioning the combined group to participate in global and regional exchange consolidation. * Access to synergies. * A combination of two complementary businesses with minimal product duplication. * A better platform for product innovation. * ASX intends to retain its dividend pay-out policy of 90% for the merged entity and expects dividends will be fully franked.   **(ii) Benefits to existing ASX shareholders**  The ASX Board sees the following benefits for ASX shareholders:   * Provides a scale entry into the interest rate derivatives market and a new revenue stream. * Access to a team of proven leaders in derivatives exchange management in SFE. * Expected to be EPS positive in calendar year 2008, subject to volumes in financial markets and the progress of integration.   **(iii) Benefits to existing SFE shareholders**  The SFE Board sees the following benefits for SFE shareholders:   * Strong premium to recent share price performance. * Expected to be strongly EPS positive in the first year on a SFE share equivalent basis. * Increased dividend payout ratio for merged entity. * Provide a scale entry into cash equities.   **(iv) Benefits to ASX and SFE participants**  ASX's new pricing structure announced in December will, as previously advised, commence on 1 July 2006. It is intended that SFE's existing pricing policy will be maintained.  In time, the primary participant benefits are expected to include one front-line market supervisor, an improved environment for trading in the SPI contract, and one clearing & settlement system (with associated reduced back-office requirements). Some of these initiatives may not be finally implemented for two to three years as they remain subject to detailed scoping. Participants will be fully consulted during this process.  **(v) Synergies and integration**  ASX and SFE will form an integration team to plan for the integration of the businesses. ASX proposes a phased implementation plan aimed at balancing synergy benefits with integration and business risks.  Subject to the results of integration scoping, ASX expects cost synergies through:   * Consolidation of premises. * Integration of IT environment including a move to common systems. * Administration and business efficiencies. * Personnel reductions in areas of direct overlap.   ASX also believes further potential for revenue benefits exists in the medium to longer-term from:   * Higher trading in the SPI which has a greater affinity with ASX's core business. * Broader platform for product innovation encouraging development across debt and equity (e.g. retail derivative products).   In the medium term, ASX expects annual cost synergies in the order of $14 to $18 million by the year ended 30 June 2008. For the longer term, whether and to what extent further cost synergies exist, will be the subject of detailed work by the integration team.  ASX has approved and committed finance facilities for the cash component of the offer.  **(d) Merger implementation agreement**  ASX and SFE have entered into a Merger Implementation Agreement under which they have agreed to proceed with a merger by way of a scheme of arrangement between SFE and its shareholders. Implementation of the merger is conditional on the satisfaction of a number of conditions precedent.  SFE has applied to the Australian Securities and Investments Commission ("ASIC") for ASIC, instead of ASX, to supervise its compliance with ASX Listing Rules.  The merger will be implemented through an SFE scheme of arrangement and is currently expected to be implemented by July/August 2006. Key steps include obtaining ACCC clearance and Treasurer approval; lodging scheme documents with ASIC; first court hearing; SFE shareholders' meeting; and second court hearing.  **(e) Shareholder information**  Further information on the merger proposal will be lodged with the ASX and included on the [ASX website](http://www.asx.com.au/supervision/rules/changes/index.htm" \t "_new) and [SFE website](http://www.sfe.com.au/" \t "_new).  **3.2 Amended ASX market rules guidance notes and migration to integrated trading system**  The migration of trading from SEATS to the Integrated Trading System (ITS) and the introduction of new trading functions has implications for users of Automated Order Processing (AOP) systems. To assist users of AOP systems during this migration ASX has revised a number of ASX Market Rule Guidance Notes to communicate its expectations for the management of various ITS related issues.  The amended ASX Market Rule Guidance Notes are: Guidance Note 11 "Client Order Priority", Guidance Note 19 "Automated Order Processing - Certification", Guidance Note 20 "Crossings Arising From Automated Order Processing", and Guidance Note 22, "Automated Order Processing - Operational Requirements". |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Alinta Limited 01 - Panel decision**  On 23 April 2006, the Takeovers Panel advised that it had made a declaration of unacceptable circumstances and final orders in relation to one of two applications dated 3 April 2006 from The Australian Gas Light Company (AGL) in relation to the bid (AGL Offer) by AGL for Alinta Limited (Alinta) and the bid by Alinta Group Holdings Pty Limited for AGL (Alinta Offer).  The Panel's orders require each bid to be subject to a number of conditions which cannot be waived without the consent of the Panel. These are intended to allow the bids to proceed and to avoid unacceptable circumstances as outlined below.  The Panel's orders allow a clearly successful bidder (i.e. it achieves over 50% of the shares in its target) to complete its takeover quickly and conclusively if it gains the requisite support and the other bidder does not (i.e. it achieves less than 50% of the shares in its target).  The Panel's reserve power to consent to either of the bidders waiving the Panel's conditions gives the Panel the flexibility to break a stalemate if one develops, or if there is a clear and conclusive outcome available consistent with the law and an efficient, competitive and informed market.  Alinta has advised the Panel that it intends to make an application for review of the Panel's decision. On that basis the Panel has stayed its current orders until either the date by which a review application must be made, or the determination of any review proceedings.  **(a) Alinta 01 application**  In the first application, AGL sought a declaration of unacceptable circumstances and orders to prevent the problems which might arise from two conflicting offers.  **(b) Alinta 02 application**  AGL's second application was in relation to the content of Alinta's bidder's statement and supplementary bidder's statement. The Panel published a Media Release in relation to that application on Friday 21 April 2006 (TP06-40).  **(c) Alinta 01 application- discussion**  The Panel's declaration and orders are in response to the unusual circumstances of two companies concurrently making takeover offers for each other (compounded by the fact that both offers are scrip offers).  **(i) Orders**  The Panel has required that both Alinta and AGL include defeating conditions in their offers which require them to acquire more than 50% of the shares in their target, and the rival bidder to have acquired less than 50% of them, before their offers can become unconditional. These conditions cannot be waived without the consent of the Panel. The Panel has also required that the successful offer be open for at least two weeks after it becomes unconditional in order to allow shareholders the time to reassess their positions once control of the two companies has been decided.  **(ii) Primary problem**  AGL described the primary issue before the Panel as being:  (a) if AGL were to receive sufficient acceptances to give it a relevant interest in more than 50% of Alinta's Shares; and   (b) Alinta's Offer is unconditional; and  (c) a takeover contract under Alinta's Offer completes so that AGL Shares are transferred to Alinta,  then any purported transfer of the AGL Shares to Alinta under Alinta's offer would be void under section 259C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Alinta would be precluded from processing acceptances received from AGL shareholders because of section 259C (Conflicting Control Scenario).  This analysis applies, of course, equally to the AGL Offer if Alinta had achieved more than 50% of AGL's shares.  However, the Panel notes that while the above scenario could cause protracted and expensive complications for the companies and their shareholders, a more complicated scenario and analysis would come where one of the bidders had acquired less than 50%, but asserted that it had acquired "control" as defined under section 259E, which is not a 'bright line' test but requires a detailed analysis of whether a company has the capacity to determine the outcome of decisions about an entity's financial and operating policies.  Setting the Conflicting Control Scenario in terms of section 259C introduces the potential issue of contention between parties as to whether or not either or both of the offerors controlled the other, and if so, at what point in time. The definition of control in section 259E for the purposes of section 259C is not a bright line test, and whether one or other of two competing offerors "controlled" the other at any particular time may well be capable of vigorous dispute and great uncertainty.  In the case of two competing bids, control under section 259E would be exceedingly difficult to assess where the effective control of a bidder had never been tested, and could never be, on the floor of a general meeting or in a boardroom vote.  **(iii) Operation of Panel decision**  The Panel's orders operate to prevent either offer from becoming unconditional (and contracts crystallising) unless it is clear that one offer has been successful and that the other has not. Preventing either bid becoming unconditional, and thus preventing transfers which might later be voided, will promote certainty for shareholders of both companies. The Panel's object is to ensure that there is a clear basis on which the offers can proceed and to provide certainty of an outcome in the circumstances where one party has clearly acquired control of the other but with a residual ability for the parties to return to the Panel in other circumstances.  The Panel was extremely concerned that leaving the outcome of two closely contested takeovers to litigation as to which company "controlled" the other, and at what point of time, and the potentially uncertain test of control under section 259E would not ensure a competitive, informed and efficient market for control of shares in either company. If shareholders had accepted either offer and litigation was required to assess which takeover had succeeded, and whether transfers had been voided, their shares would likely be tied up for a long period.  **(iv) Stalemate**  One of the issues put before the Panel was that it should map out now, a roadmap for a number of situations which might arise in the contest between the two companies other than the clear outcome which the Panel's current orders allow. However, neither of the two companies was able to give the Panel any certainty about the range of circumstances which might arise when the two takeover bids close. Nor could either company provide any assurance that the Panel could specify now, solutions which would avoid uncertainty and complication outside the single type of scenario which the Panel's orders allow to proceed to a clear and timely result in keeping with an efficient, competitive and informed market.  In the absence of any certainty as to what the landscape might look like, the Panel advised both parties that it would accept undertakings, or make orders, which facilitated a clear outcome but would not attempt to determine now, what arrangements, should be accepted in any of the uncertain outcomes. Therefore the Panel's orders allow for a bid to become unconditional only where one bidder has gained unarguable control and the other has not. The Panel advised both parties that it would wait until the actual circumstances were clear before deciding where the interests of shareholders lay in the range of circumstances which might eventuate where neither of the bidders had conclusively won. The Panel's ability to consent to either of the bidders freeing their offers from conditions allows it the flexibility to review the circumstances after the bids have proceeded and the outcomes become clearer.  **(v) Disclosure**  The Panel has ordered that each of the bidders provide their target shareholders with a plain English explanation of the problems which the Panel's decision and orders are intended to address and the effects and operations of the Panel's declaration and orders.  **(vi) Undertakings**  The Panel initially proposed an outcome under which both parties would offer undertakings to the Panel in relation to their takeover offers which would ensure the type of clear and timely outcomes which the Panel considered desirable for an efficient competitive and informed market. Alinta declined to provide the undertakings requested by the Panel, instead, offered undertakings which Alinta submitted would provide an acceptable outcome in circumstances where the clear and unarguable outcome which the Panel considered desirable had not eventuated. However, the Panel considered that the Alinta proposals could allow outcomes which were not in the interests of an efficient, competitive and informed market.  AGL offered to provide the undertakings which the Panel requested. In the absence of both parties providing undertakings which the Panel was able to accept, the Panel considered that it would be most efficient to make essentially identical orders which regulate both bids identically rather than make orders in relation to one bid and accept AGL's offers of undertakings in relation to its bid.  **(vii) Review**  The Panel notes that Alinta has advised that it intends to seek review of the Panel's decision under section 657EA. The Panel will appoint three different Panel members to consider any review application which is made in relation to these proceedings.  **4.2 Patrick Corporation Limited - Panel decision**  On 5 April 2006, the Takeovers Panel advised that in relation to the application by Patrick Corporation Limited dated 25 March 2006 (see TP06/29), it has declined the part of the application relating to the acceptability of the "Institutional Acceptance Facility" which Toll Holding Limited has established (Acceptance Facility).  The Acceptance Facility is a facility put in place by Toll, but managed by an investment bank, for professional investors which hold at least 100,000 Patrick shares. The Acceptance Facility allows them to indicate their intention to accept the Toll Offer if Toll reaches 50.1% of Patrick (calculated by acceptances under the Toll Offer and indications of intention to accept through the Acceptance Facility, which will be disclosed by Toll to the market).  Patrick had asked the Panel to revoke the Acceptance Facility, make it available for all Patrick shareholders, or, instead, offer all Patrick shareholders a withdrawal right.  Patrick submitted that the Acceptance Facility contravenes the principle in section 602(c) of the Corporations Act, namely, that all target company shareholders must have a reasonable and equal opportunity to participate in any benefits under a takeover bid.  The Panel considered that the Acceptance Facility might influence when and how a Patrick shareholder might accept the Toll Offer, but it did not consider that the Acceptance Facility was a benefit which would influence a Patrick shareholder's decision whether or not to accept the Toll Offer. The Panel considered that the disclosure arrangements for the Acceptance Facility will ensure that the market remains properly informed. The Panel also considered that the terms of the Corporations Act and the Acceptance Facility will ensure that other Patrick shareholders will have adequate time to consider their acceptance decision if the 50.1% condition for the Acceptance Facility is triggered and the eligible shareholders' shares are accepted into the Toll Offer.  **4.3 Rusina Mining NL - Panel decision**  On 5 April 2006, the Takeovers Panel advised that it has decided not to make a declaration of unacceptable circumstances in response to an application dated 14 March 2006 from Rusina Mining NL (see TP06/26).  Rusina complained about the lack of disclosure made by New Frontier Investment Limited under both the substantial holding notice provisions and the beneficial interest provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The application was generated by New Frontier failing to respond to the issue by Rusina of a beneficial ownership tracing notice under section 672A of the Corporations Act on 17 February 2006. New Frontier was the registered holder of 9.14% of the voting shares on issue in Rusina.  During the Panel proceedings New Frontier acknowledged to the Panel that it had failed to provide a substantial shareholder notice as required under section 671B. However, in relation to the beneficial ownership provisions, New Frontier submitted that it had not received a copy of the notice which Rusina had sent to it. Following contact from the Panel, New Frontier lodged both substantial holding notices, and a response to Rusina's beneficial ownership notice relating to its holding in Rusina.  The Panel considered that although New Frontier had not given a substantial holding notice when it had acquired the shares in Rusina, it had responded promptly and diligently when informed by the Panel of its obligations under the substantial holding notice provisions and when it had actually received the beneficial ownership tracing notice from Rusina. The Panel considered that the market for shares in Rusina was now properly informed.  On that basis, the Panel decided that in the circumstances, particularly in a non-takeover situation, not to make a declaration of unacceptable circumstances, and that orders vesting New Frontier's Rusina shares in ASIC were not required.  **4.4 Wattyl Limited - Panel decision**  On 28 March 2006, the Panel advised that it has accepted undertakings from Wattyl Limited and Barloworld Limited in response to the application made by AEP Financial Investments Pty Ltd, a subsidiary of Allco Equity Partners Ltd (see TP06/22). On the basis of the undertakings and the further disclosure, the Panel has declined the application by AEP.  **(a) Disclosure**  Wattyl undertook to the Panel to produce and dispatch a third supplementary target's statement, approved by the Panel, addressing those matters on which the Panel required further disclosure.  Accordingly, the Panel has approved the dispatch of Wattyl's third supplementary target's statement. The Panel required the following:  a. Given the Wattyl directors' published intention (in an ASX announcement annexed to its second supplementary target's statement to the AEP offer) to recommend acceptance of the bid proposed by Barloworld, further disclosure was required regarding:  (i) a statement made by the chairman of Wattyl to the annual general meeting in October 2005, following discontinuation of the merger discussions with Barloworld in September 2005, that: "the opportunity or chance of turning that [ACCC decision] around right now would be very low"  The statement was a response to a question whether Wattyl could now purchase the Taubmans paint business. The ACCC decision that the chairman was referring to was the ACCC's opposition to Wattyl's proposal in 1996 to purchase Taubmans;  (ii) the history of ACCC opposition to a merger between Wattyl and Taubmans in 1996 and that since then Barloworld has made further acquisitions of competitive businesses in the Australian market; and  (iii) the fact that Barloworld's proposed bid will be subject to a Regulatory Approval (Competition) Condition (ACCC Condition), but the satisfaction or triggering of the condition is unlikely to be known within the time frame of the current AEP offer.  b. Further disclosure with respect to the special dividend Wattyl had originally announced in its target's statement it would pay if the AEP offer closed unsuccessfully. In particular, given Wattyl had withdrawn the special dividend, whether Wattyl intended it to be reintroduced at any stage and the timing of any reintroduction.  **(b) Break fee**  The Panel also accepted undertakings from both Barloworld and Wattyl to amend the break fee agreed by Wattyl with Barloworld. In summary, Barloworld and Wattyl have agreed to amend their pre-bid agreement so that the break fee will not be payable if:  a. the ACCC Condition is not satisfied by 13 August 2006; or  b. prior to 13 August 2006, the approval needed to satisfy the ACCC Condition is refused and that decision is accepted by Barloworld (i.e. no appeal, litigation, request for authorisation etc. is pursued).  Wattyl will publish a copy of the terms of the amendments to the pre-bid agreement on ASX following finalisation of the terms.  **(c) Forecasts**  AEP submitted that the absence of a basis for the Directors assumptions underlying the revenue forecasts made by Wattyl in its target's statement, and a statement that directors believed the assumptions to be reasonable, in connection with the forecast financial performance in the target's statement, gave rise to unacceptable circumstances. The Panel did not find that Wattyl is required to make additional disclosure. The Panel noted the explanations that Wattyl provided in the forecasts, the investigating accountant's report prepared by PriceWaterhouseCoopers, and the customary nature of the negative assurance given by PriceWaterhouseCoopers.  **(d) The no shop provision**  The Panel found that the exclusivity provision in clause 8 of the pre-bid agreement between Wattyl and Barloworld (referred to in the agreement as a "no shop" clause) is very close to one that would be unacceptable. It would be unacceptable if it extended to a prohibition on Wattyl talking to other bidders or prospective bidders (often referred to as a "no talk" clause). However each of the parties to the agreement has assured the Panel that the provision is not a "no talk" provision. The Panel therefore does not consider this circumstance to be an unacceptable circumstance, although if, in practice, the parties act as if the provision is a "no talk" provision, that could be grounds for the Panel to reconsider the clause on a new application.  **(e) The assistance provision**  AEP also sought, in its submission, an additional order that clause 3 of the pre-bid agreement be cancelled. Clause 3 deals with Wattyl providing assistance and information to Barloworld to pursue its takeover offer. The Panel did not find clause 3 gave rise to unacceptable circumstances. |
| **5. Recent Corporate Law Decisions** |
| **5.1 Priority treatment of insurance liabilities in a winding up: when is a liability a 'liability in Australia'?**  (By Kate Johnson, Mallesons Stephen Jaques)  AssetInsure Pty Limited (Formerly Gerling Global Reinsurance Company of Australia Pty Limited) v New Cap Reinsurance Corporation Limited (in liquidation) [2006] HCA 13, High Court of Australia, Gleeson CJ, Kirby, Hayne, Heydon and Crennan JJ, 7 April 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2006/april/2006hca13.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2006/april/2006hca13.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The High Court, by a majority of 3:2, held that section 31(4) of the [Insurance Act 1973 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "Default) ("Insurance Act") is not an exhaustive definition of whether a contract of insurance is a 'liability in Australia' for the purposes of section 116 of the Insurance Act, but that it supplements the general law.  The court unanimously held that section 562A of the [Corporations Act 2001 Cth](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act") applies to contracts of reinsurance and re-reinsurance in order to determine priority treatment of assets in a winding up.  **(b) Facts**  New Cap Reinsurance Corporation Limited ("New Cap") was an Australian company involved in reinsurance. New Cap went into voluntary administration in April 1999 and the creditors resolved for the company to be wound up in September 1999.  Faraday Underwriting Ltd ("Faraday") and AssetInsure Pty Ltd ("AssetInsure") were insured by New Cap under contracts of reinsurance. One of the contracts between New Cap and Faraday, referred to as "FC3A", insured Faraday for risks from events which could only occur outside of Australia. AssetInsure was the retrocede under a contract of retrocession with New Cap.  Proceedings were brought at first instance in the Supreme Court of New South Wales to seek directions about questions arising from the winding up of the company, and declaratory relief.  Special leave was granted to AssetInsure to appeal to the High Court of Australia. Faraday was the third respondent in this appeal. The questions on appeal were:   * Whether liabilities arising from contracts of insurance in Australia are exhaustively defined by section 31(4) of the Insurance Act, and consequently whether FC3A was a liability in Australia for the purposes of section 116(3) of the Insurance Act; and * Whether section 562A of the Corporations Act applies to contracts of re-reinsurance.   **(c) Decision**  At first instance, Windeyer J held that section 31(4) does not provide an exhaustive definition of liabilities in Australia for the purposes of section 116, but that it operates as a supplement to the general law. This was affirmed on appeal to the New South Wales Court of Appeal. Windeyer J took a broad view of section 562A and held that it applies to contracts of reinsurance. This aspect of the decision at first instance was overturned on appeal to the New South Wales Court of Appeal, and the court found that contracts of reinsurance were not contracts of insurance for the purposes of section 562A - the intention of the provision was not to extend protection to professional bodies, but to protect ordinary insured parties.  **(i) The Insurance Act**  Section 116(3) of the Insurance Act provides that in the winding up of a body corporate authorised to carry on an insurance business in Australia, the assets of that body corporate are not to be applied to discharge liabilities other than its liabilities in Australia (unless it has no liabilities in Australia). Section 116(4) provides that section 31 has effect for the purposes of section 116.  Section 31(4) sets out certain circumstances in which liabilities under contracts of insurance made in and outside of Australia will be liabilities in Australia. The relevant question was "whether the purpose of section 31(4) and section 116(4) was to exclude the general law in relation to contracts of insurance, or to supplement it".  Gleeson CJ, Heydon and Crennan JJ held in a 3:2 decision that section 31(4) operates to supplement the general law and clarify when certain insurance liabilities would be 'liabilities in Australia' where they would otherwise not be at general law.  If section 31(4) was taken to be an exhaustive definition of liabilities in Australia, section 116 would operate to give insurance policy holders priority in a winding up over all other general creditors (such as suppliers or banks), and the majority concluded that this would not have been the intention of the legislature.  The majority referred to Pt III of the Insurance Act under which the Australian Prudential Regulation Authority ("APRA") has power to authorise a body corporate to carry on insurance business in Australia upon satisfaction of certain conditions relating to capital adequacy. Once a body corporate is so authorised, it is subject to continued regulation under Pt III, including section 29(1)(c)(iii) which examines any "outstanding claims provision in respect of liabilities in Australia". The majority accepted that section 29(1)(c)(iii) refers to insurance liabilities specifically, however they held that section 29(1)(c) has application to liabilities generally so that APRA's supervision of an insurer's capital adequacy is not restricted.  Pt III applies to companies that are incorporated and operate both in and outside of Australia and therefore the legislature specified, for clarity, certain circumstances in which insurance liabilities would be a 'liability in Australia'. As an Australian company, it was presumed that New Cap's liability under a chose in action (contract FC3A) would be discharged in its place of residence. Under general law, the liability would have been a liability in Australia and the operation of section 31(4) does not provide otherwise.  The appeal was therefore dismissed and the decision of Windeyer J was upheld. Contract FC3A was a liability in Australia despite the fact that the insured events could only occur outside of Australia.  In their dissenting judgment, Kirby and Hayne JJ took a narrow view of the priority provisions and found that section 31(4) is an exhaustive definition of 'liabilities in Australia' for the purpose of priority treatment under section 116 in a winding up. They found that the apparent policy of the sub-section is to confine the priority application in a winding-up to a specific class of creditors, and not to Australian creditors generally. Specifically, they found that the term "outstanding claims provision" in section 29(1)(c)(iii) is consistent with liabilities being under an insurance contract. Furthermore, they found that the differing language in sub-sections 31(1) and 31(4) indicates a different legislative intent.  **(ii) Section 562A of the Corporations Act**  Section 562A, by operation of section 1401 of the Corporations Act, applied to the winding up of New Cap. The provision relates to the priority of distribution of receipts from reinsurance in a winding up, and applies where:  "(1)(a) a company is insured, under a contract of reinsurance…against liability to pay amounts in respect of a relevant contract of insurance or relevant contracts of insurance; and (b) an amount in respect of that liability has been or is received by the company or liquidator under the contract of reinsurance."  The relevant question was whether 'relevant contract of insurance' in section 562A(1) includes contracts of reinsurance (and thus whether the contract of re-reinsurance between New Cap and AssetInsure was subject to the provisions of section 562A).  In a unanimous decision, delivered by Kirby and Hayne JJ (Gleeson CJ, Heydon and Crennan JJ concurring), the High Court held that the provision should be read to include contracts of reinsurance. The court found that the wording of the section was "no more than a drafting device" that distinguished between two contracts of insurance, but that did not exclude its application to contracts of re-reinsurance between professional insurers.  The court considered the legislative history of the provision and found that prior to the enactment of statutory provisions to the contrary, an amount received in the winding up of a primary insurer under a reinsurance policy would form part of the general assets of the company, and would not be paid in priority to the policy holder of the contract of primary insurance. Later legislative provisions allowed for the preferential treatment of those liabilities in certain circumstances. The General Insolvency Inquiry of the Australian Law Reform Commission in 1988 ("Harmer Report") concluded that, in the winding up of a company, it would be unfair to allow an insured party priority on the basis that their insurance policy was reinsured, while other policies were not.  However, the [Corporate Law Reform Act 1992 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12036" \t "Default) inserted section 562A to allow the proceeds of a contract of reinsurance to be applied in priority to the relevant contract of insurance. The High Court held that the legislature's clear intention was to reject the recommendations of the Harmer Report and there was therefore no basis to confine section 562A to contracts of insurance.  **5.2 Issues in relation to an adjournment of originating process seeking a winding up order**  (By Julia Hammon, Blake Dawson Waldron)  Bechara v Sotrip Pty Ltd [2006] NSWSC 208, New South Wales Supreme Court, Barrett J, 30 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc208.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc208.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The defendant company Sotrip Pty Ltd (applicant) applied for the adjournment of an originating process seeking a winding up order. The application was supported by a creditor (Mr Gino Cassaniti), and was opposed by the plaintiff (Mr Buddy Bechara).  Under section 440A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), the court must adjourn the hearing of a winding up application in respect of a company under Part 5.3A administration if it "is satisfied that it is in the interests of the company's creditors for the company to continue under administration rather than be wound up."  The applicant argued that the court should be so satisfied on the basis of a draft deed of company arrangement, which contained a proposal to make monies available to creditors.  The court found that the draft deed of company arrangement was based on false premises and was misleading. The court refused the application for adjournment of the winding up application since the applicant had failed to put forward "persuasive evidence" that there are or would be assets under a deed of company arrangement which would produce a larger return to creditors than a winding up would produce.  **(b) Facts**  The applicant company's only activity at relevant times was to hold a parcel of real property at Mudgeeraba, Queensland.  A winding up application was filed on 11 January 2006. On 7 February 2006, the applicant company contracted to sell the property to a company called McInnes Perpetual Pty Ltd. McInnes Perpetual Pty Ltd was wholly owned and controlled by Mr Gino Cassaniti. On 22 February 2006, the sole director of the applicant company appointed an administrator under Part 5.3A. The administrator's report was given to creditors on 14 March 2006. On 22 March there was a second meeting of creditors in Part 5.3A administration, which resolved to adjourn for up to 60 days.  A proposal for a deed of company arrangement with a deed fund of $300,000 was put forward in the administrator's report of 14 March 2006. This proposal was withdrawn before the meeting.  At the meeting on 22 March 2006, the creditors were informed that a new proposal of $50,000 had been received. The proposal had been set out in a letter from the applicant's sole director. After the meeting had adjourned, 11 creditors notified the administrators in writing of their support for the $50,000 proposal.  Barrett J found that the letter setting out the $50,000 proposal was misleading on a number of grounds. The proposal was conditional on the finalisation of the sale of the property; however Barrett J found that this timing factor was uncertain and unascertainable. There was also doubt as to the source of the funds to be provided in the proposal, and uncertainty about when the $50,000 would become available.  **(c) Decision**  **(i) Winding up of the company**  The court considered that there were two possibilities which would be open for examination in the winding up of the applicant company. First, the administrators had stated in their 14 March 2006 report that investigations into the company by a liquidator would be warranted in relation to possible preferences and possible insolvent trading. Second, the sale of the property- as regards timing, identity of buyer and price as against valuations- could call for scrutiny by a liquidator. These opportunities would be lost if a deed of company arrangement was adopted.  **(ii) Draft deed of company arrangement**  The onus was on the applicant company to put forward "persuasive evidence" to show that there were or would be assets under a deed of company arrangement regime that would produce a larger return to creditors than a winding up would produce.  The court found that the draft deed of company arrangement was based on false premises, involved funds said to be coming from an indeterminate source by unidentified means, and entailed uncertainties of timing which had no apparent solutions.  The court found that it could not be satisfied that the $50,000 under the proposed deed of company arrangement would ever be forthcoming. As a result, the creditors who expressed support for it did so on the basis of a misleading description.  The court therefore found that the applicant had failed to produce "persuasive evidence," and refused the application for the adjournment of the winding up application.  **5.3 Employee liability for actions within the scope of actual authority**  (By Tarryn Billings, Phillips Fox)  Arms v Houghton [2006] FCAFC 46, Federal Court of Australia, Full Court, Nicholson, Mansfield and Bennett JJ, 30 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fcafc46.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fcafc46.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20" \t "_new)  **(a) Summary**  A single judge of the Federal Court found a company, WSA, liable for damages in respect of misleading or deceptive conduct pursuant to section 52 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) ('the TPA'). At the same time, an application against two employees of the company, Houghton and Student (the Respondents) was dismissed. The claim was one of misleading and deceptive conduct in trade or commerce and was made pursuant to section 9 of the [Fair Trading Act 1999 (Vic)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "Default) ('the FTA'). The appeal was brought against the dismissal of the application against the respondents.  The primary judge found that there was no existing authority for an employee being held personally liable under section 9 of the FTA for statements made in the course of their employment by an employer who was engaged in trade or commerce. His Honour further found that no independent trading or commercial interest could be imputed to the respondents and therefore the application should be dismissed.  On appeal, the court held that the primary judge made an error of law in holding that it was not open to him to find that an employee, acting within the scope of his or her actual authority, could be liable under section 9 of the FTA. The appeal was allowed and the orders of the primary judge were varied to give effect to this result.  **(b) Facts**  The appellant proposed to establish a business servicing wineries. The concept involved a website through which retail purchasers could purchase wines and pay online by credit card using an 'e-Gate' facility provided on behalf of the ANZ bank by the appellant.  The concept allowed the vendor wineries to be directly credited with the purchase whilst the appellant's company received a commission for each sale made through the website. There was no requirement that sales tax be paid on 'cellar door sales'.  Prior to the appellant contracting with the wineries, WSA represented to the appellant that in order to become an ANZ e-Gate merchant the winery would merely have to complete the documents contained in a 'Trade Presentation Kit', particularly an ANZ form with certain banking details. The representation arose from two sources:   * a statement by the respondents that wineries could be added to the website by simply filling in a form and paying a small setup fee; and * approval by the respondents on behalf of WSA of a form, contained in the Trade Presentation Kit, in March 2000.   The appellant travelled around Australia and, in reliance on the above representations, signed up wineries. It was later disclosed by one of the respondents that the procedure for the vendor wineries to become ANZ e-Gate merchants was in fact far more complicated than had been represented.  This disclosure made it impossible for the appellant to require the 30 or so wineries he had already signed up to comply with the conditions necessary to become individual merchants. He was forced to make an urgent application for his own company to become an accredited merchant and to change the way in which the business operated so that his company became a retailer of wines. As a consequence, the sales were not 'cellar door' sales and hence sales tax could not be avoided.  The new business structure was not viable, but the appellant was forced to maintain this arrangement for 12 months in order to preserve his credibility and goodwill. He therefore brought an application seeking declarations that the respondents 'were or have been directly or indirectly knowingly concerned in or party to' the alleged contraventions by WSA under the TPA. This claim was later amended from one of accessorial liability to a claim under section 9 of the FTA.  Whilst the company was found liable, the application against the respondents personally was dismissed by the primary judge for the following reasons:   * although section 9 of the FTA had been in force for two decades, there was not a single authority in which an employee had been held personally liable for statements made in the course of his or her employment by an employer who was engaged in trade or commerce; and * the common basis on which liability for deceptive and misleading conduct in trade or commerce is erected by both the TPA and FTA led to the conclusion that it did not extend to the conduct of the respondents. No independent trading or commercial interest could be imputed to them under the facts given.   On appeal, the appellant contended that there was an error of law, made by his Honour, when he found that an employee would not be held personally liable for statements in the course of his or her employment by an employer which was concededly engaged in trade or commerce.  **(c) Decision**  **(i) The relevant provisions of the Fair Trading Legislation in Victoria**  The Full Federal Court began by reviewing the legislation under which the application against the respondents was brought. The Court considered the surrounding provisions in the FTA, as well as the Minister's Second Reading Speech, and found that the provisions relating to unfair practices were referable to 'a person'.  The court then turned to definitions of the word 'person' in both the FTA and the [Interpretation of Legislation Act 1984 (Vic)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=439" \t "Default). Whilst the FTA did not contain a definition of 'person', the Interpretation of Legislation Act defined 'person' to include 'a body politic or corporate as well as an individual'. The Court found nothing in section 9 of the FTA that relevantly contradicted this definition.  The final matter considered in reference to the Fair Trading Legislation in Victoria was that of the provision for accessorial liability. The FTA (as it was passed in 1999) contained no equivalent to section 75B of the TPA. This is the provision which requires the person in respect of whom accessorial liability is alleged to be shown to have had knowledge of the essential elements of the contravention, whether or not that person knew that the matters amounted to a contravention, so that the person was in that sense an intentional participant.  The FTA as it was in 1999 contained no section providing for accessorial liability, the consequence being that section 9 of the FTA did not emulate the Commonwealth trade practices legislation by including a provision in terms of section 75B of the TPA.  **(ii) The relevant case law**  Whilst the primary judge based his decision on the authorities relating to employees attracting liability for statements such as those in issue in this case, the appellant contended that his Honour failed to take certain authorities into account. The respondents contended that these authorities did not apply to the facts in question.  The first case considered by the Court was Arktos Pty Ltd v Idyllic Nominees Pty Ltd (2004) ATPR 42-005. The Full Court held in this case that a director of a company, who had written a memorandum accompanying financial statements in the sale of the company, could be liable under the [Fair Trading Act 1987 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15168" \t "Default) for misleading and deceptive conduct. The Full Court stated that:  … corporate officers acting in the course of their employment, or in the scope of their authority as agents causing the corporation to be liable under section 84(2) also have personal liability.  The court then considered Citibank Ltd v Liu [2003] NSWSC 569, where the general manager of a company was held directly liable under section 42 of the [Fair Trading Act 1987 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3955" \t "Default), the equivalent to section 9 of the FTA. On the issue of misrepresentation, the judge in that case noted that it had long been established that the liability of an agent for a fraudulent misrepresentation is not precluded by the fact that it has been made on behalf of the principal (citing Australian Competition and Consumer Commission v McCaskey (2000) 104 FCR 8, where French J had made orders against the employee who had engaged in the fraudulent conduct).  The decision in Arktos was affirmed by the NSW Court of Appeal in Wong (as executor of the Estate of Wong (dec'd)) v Citibank Ltd [2004] NSWCA 396, where Beazley JA observed:  Provided that a party alleging the contravention is able to establish that the agent is liable within the principles stated in Yorke v Lucas, then liability under the section attaches, notwithstanding that the agent in question is an employee acting within authority in the course of employment.  The court, after examining the above cases found that there was authority for the position that, under certain circumstances, an employee can 'be found to have engaged in misleading or deceptive conduct for actions taken within the scope of his actual authority; that is, not independently of such authority'.  **(iii) The reasoning of the court**  The court accepted that there had been an error in law in the primary judge's reasoning on the issue of whether the respondents could be liable for their acts within the scope of their actual authority.  The authorities considered by the court supported the principle that there was no basis for distinguishing the liability of an employee from that of a director in the relevant context. The court held that the applicable principles stated in those authorities applied in this case and should be followed. The appeal was therefore allowed and the orders of his Honour varied to give effect to this result.  **5.4 Corporations Act prevails over NSW gaming laws**  (By Chris Dynon, Mallesons Stephen Jaques)  IG Index v New South Wales [2006] VSC 108, Supreme Court of Victoria, Bongiorno J, 24 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/march/2006vsc108.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/march/2006vsc108.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case examines an inconsistency between Part 7 (Financial Services and Markets) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) and sections 8(1)(a), 9 and 11 of the Unlawful Gambling Act 1998 (NSW) (UG Act) and section 30(1) of the [Racing Administration Act 1998 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10356" \t "Default) (RA Act). This kind of inconsistency is governed both by section 109 of the Australian Constitution (Constitution) and Part 1.1A of the Corporations Act.  In this case, Bongiorno J held that the NSW gaming provisions were directly inconsistent with the Corporations Act provisions and, as a consequence, inoperative to the extent of this inconsistency.  The implications of this case are that:   * If a person is the holder of an Australian Financial Services Licence under the Corporations Act, and engages in activities authorised by that licence in NSW, then those activities will not be illegal even if they fall within the scope of the NSW gaming laws; * It is not necessary for such persons to obtain relevant gaming licences under the NSW State law to engage in these activities. Subject to the specific provisions of gaming laws in other States, it would seem likely that these implications could be extended to other States; and * More generally, if the Corporations Act authorises a particular activity, that activity need not comply with relevant State laws to be legal if the State laws are directly inconsistent with the Corporations Act.   **(b) Facts**  IG Index plc (IG Index) and IG Australia Pty Ltd (IG Index's authorised representative) operates a market in respect of derivatives. It holds an Australian Financial Services Licence issued under section 913B of the Corporations Act (ASIC licence). This licence permits it to provide advice, deal in and make a market for derivatives.  In an article published in The Australian on 12 August 2002, the New South Wales Minister for Gaming, the Honourable Richard Face, made comments alleging that IG Index's operation of the derivatives market flouted New South Wales gaming laws. He stated that the operation of the market constituted 'spread betting', and that engaging in spread betting without the necessary licences under the NSW gaming laws was illegal. Mr Face was quoted in the article as saying that he had no doubt that what IG Index was doing was illegal.  IG Index claimed damages against the State of New South Wales for defamation in respect of the statements attributed to the Minister in The Australian.  As part of its defence to the defamation claim, the State of New South Wales raised justification. It argued that the Minister's statements were true because IG Index's activities were in fact illegal.  In reply to this defence, IG Index raised the fact that it held an ASIC licence which authorised its conduct. IG Index pleaded that because of this licence, its activities were lawful, notwithstanding any law of New South Wales.  The key issue for consideration in this case was therefore whether section 109 of the Constitution or Part 1.1A of the Corporations Act renders NSW gaming laws inoperative to the extent that they purport to regulate the conduct of a person acting pursuant to an ASIC licence.  **(c) Decision**  Bongiorno J held that the provisions of the NSW gaming laws were directly inconsistent with the Corporations Act provisions. As a consequence, the relevant provisions of the NSW gaming laws do not apply to IG Index in this context.  **(i) The application of the NSW gaming laws**  Bongiorno J initially discussed the application of the UG Act and RA Act to IG Index. He commented that the vast majority of provisions in these Acts relate to sporting contingencies, horse racing and bookmakers. The relevant provisions that IG Index were alleged to have breached were:   * Section 8(1)(a) of the UG Act, which prohibits all forms of betting other than those specifically authorised by the UG Act unless both parties to the bet are present at a licensed racecourse and one of them is a bookmaker; * Section 9(1) of the UG Act, which renders bookmaking illegal other than by a licensed bookmaker (licensed under the RA Act); * Section 11(1) of the UG Act, which creates an offence of having a financial interest in a bookmaking business conducted in contravention of the Act; and * Section 30(1) of the RA Act, which prohibits the publication of any advertisement that relates to any 'gambling operations or services' carried on by a person who is not a licensed bookmaker (because IG Index published an advertisement for spread betting in the Australian Financial Review on 31 July 2002).   The fact that IG Index may have breached some or all of these provisions was sufficient for Bongiorno J to assess the inconsistency point.  **(ii) Inconsistency under section 109 of the Constitution**  Bongiorno J discussed a number of High Court cases which deal with the rules for interpreting section 109 of the Constitution. In summary, these cases say that:   * If a Federal Act evinces an intention to 'cover the whole ground' with respect to a particular subject of legislation, then legislation of a State jurisdiction on the same subject matter would produce inconsistency. This applies irrespective of the express words of the legislation and whether or not it is possible to obey both statutes. This intention to 'cover the field' is determined as a matter of common sense; * When a 'covering the field' inconsistency exists, unless the Federal law was intended to be supplementary or cumulative upon the State law, the State law is invalid to the extent it covers the same subject matter as the Federal law; and * Where a State law would, if valid, 'alter, impair or detract from' the operation of a Federal law then to that extent it is invalid. This would be a direct inconsistency.   Bongiorno J then analysed the arguments of both parties in light of these principles. IG Index argued that the Corporations Act covers the field in the area of financial services and financial markets (some of which may consist of gambling) in the Corporations Act. The State argued, on the other hand, that the UG Act and RA Act are capable of operating concurrently without inconsistency and that IG Index should have obtained the relevant licences under the Acts in addition to its ASIC licence.  Bongiorno J accepted the argument of IG Index. He accepted it because:   * The NSW gaming laws specifically prohibited what the Corporations Act authorised; and * The additional requirements of the NSW gaming laws (namely, that IG Index would have to obtain a bookmakers licence and have to conduct its activities at a racecourse) 'alter, impair or detract from' the operation of the Corporations Act.   Bongiorno J did not accept the argument of the State because 'concurrent operation' would be possible only by diminishing the effect of the Corporations Act. Accordingly, there is a direct inconsistency and the Corporations Act prevails.  **(iii) Section 5E of Part 1.1A of the Corporations Act**  Having established a direct inconsistency, Bongiorno J also reviewed the application of Part 1.1A of the Corporations Act, which covers the interaction between Corporations legislation and State and Territory laws. It is possible that despite a section 109 inconsistency, Part 1.1A of the Corporations Act may 'save' the State provisions.  Section 5E(1) of the Corporations Act states that the Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory. Section 5E(2) explains the intention that the Corporations legislation not exclude or limit concurrent operation of a State law which imposes 'additional obligations or liabilities (whether civil or criminal) on …' a company or its officers.  However, section 5E(4) limits the operation of section 5E to those cases where there is no direct inconsistency between the State law being considered and the Corporations legislation.  The meaning of 'direct inconsistency' in the context of Part 1.1A was considered by Winneke P in Tat Sang Loo v DPP. He held that it is to be interpreted in the same way as 'direct inconsistency' under section 109 of the Constitution.  To reconcile sections 5E(2) and 5E(4), Bongiorno J concluded that the concurrent application of State law and the Corporations Act is permitted, but only to the extent that the State law is not directly inconsistent with the Corporations Act. For the reasons stated above in explaining the section 109 inconsistency, section 5E does not save the NSW gaming laws.  **(iv) Section 5G of Part 1.1A of the Corporations Act**  Arguments were also raised as to whether section 5G of the Corporations Act, which also deals with the interaction between State laws and the Corporations legislation, could save the NSW gaming laws.  If a State provision meets certain criteria set out in section 5G(3), the State provision will remain operative (because the relevant Corporations legislation provision does not apply in that State to the extent necessary to ensure no inconsistency arises). Section 5G does not apply to a State law capable of concurrent operation with the Corporations legislation.  The relevant criteria from section 5G(3) in this case are:   * That the State law must have been enacted and have come into force before the commencement of the Corporations Act; * It must not have been materially amended after the commencement of the Corporations Act; and * It must have operated despite the provision of the then Corporations Law of the State which corresponds to the Commonwealth provision.   In applying the third criteria, counsel for the State argued that sections 778 and 1141 of the then NSW Corporations Law correspond to section 1101I of the Corporations Act. Bongiorno J cited previous cases which indicated that 'correspond' does not mean 'is identical to', but means 'to harmonise with' or 'to be suitable to'.  In this particular instance, sections 778 and 1141 dealt with exempting certain activities from gaming and wagering laws. This was specifically confined to dealings in options and futures. In contrast, section 1101I of the Corporations Act exempts a much more extensive range of transactions from the operation of State gambling and wagering laws.  Bongiorno J, however, then stated that the correspondence was unnecessary to consider because the relevant chapter of the Corporations Act in this case was Chapter 7. Whether any earlier provisions are equivalent to section 1101I is irrelevant. There were no earlier NSW Corporations Law provisions that correspond to Chapter 7 of the Corporations Act.  Accordingly, section 5G could not save the State gaming laws.  **5.5 Enforceability of the replaceable rules in a contest for company control**  (By Richard Hillman, Freehills)  Smolarek v Liwszyc [2006] WASCA 50, Supreme Court of Western Australia, Court of Appeal, Steytler P, Mclure JA and Buss JA, 29 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/march/2006wasca50.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/march/2006wasca50.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Smolarek v Liwszyc provides guidance upon the circumstances under which a State Supreme Court will grant interlocutory relief where there are allegations that procedures in the replaceable rules of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) have not been complied with. The core of the decision by the Court of Appeal looked at whether there was a serious issue to be tried concerning several alleged breaches of the replaceable rules. The breaches all had repercussions for the composition of the board of Eznut Pty Ltd (Eznut), which was the key aspect of the litigation. The enforceability of the rules is an interesting issue given that two provisions in the Act, sections 135(3) and 1322(2), limit the relief that may be obtained where a lack of compliance with procedural rules is alleged.  **(b) Facts**  Smolarek incorporated Eznut with Liwszyc to commercialise an invention. Both parties were the directors of the company, although Smolarek held a majority of the share capital. Eznut was incorporated without a constitution, instead operating under the replaceable rules in the Act. Duta was employed by Eznut to give engineering advice and became a director of the company on 1 July 2003.  Early in 2005 significant disputes arose between Smolarek and the other directors as to the direction of the company. At this time Smolarek continued to hold a majority of the share capital in Eznut, with the remainder held by Liwsyc, Duta and various others. On 4 March 2005 Smolarek called a general meeting for 27 May 2005 to vote on two resolutions, one seeking the removal of Liwszyc from the board and the other seeking the appointment of her daughter. Shortly after, in April 2005, the issue of 1.5 million shares to shareholders was discussed by the board. The share issue was allegedly approved by a majority of directors and allotments were made to all shareholders except Smolarek, who did not participate. If the share issue was valid, it would deprive Smolarek of her majority position in Eznut upon the registration of the allotted shares.  The resolutions were purportedly passed by the shareholders at the general meeting, although only Smolarek and her daughter were present. Two issues of substance arose concerning this meeting:   * whether a transfer of shares by Smolarek to her daughter before the meeting, without the approval of the board, was validly registered; and * whether there was a quorum of two shareholders at the general meeting as required by the replaceable rule in section 249T.   An issue also arose as to whether Duta had ceased to be a director of Eznut, by virtue of the failure of its shareholders to confirm his appointment within two months as required by the replaceable rule in section 201H(2).  **(c) Decision**  In a single judgment, the Court of Appeal made the following findings on the key issues:  **(i) Standing**  The court noted that Liwszyc and Duta would only have standing to seek an injunction under section 1324 of the Act where they could establish their interests were affected by conduct constituting a contravention of the Act. Where their claim related to a breach of the replaceable rules, they would have to rely on the ordinary jurisdiction of the Supreme Court to seek an injunction based on a breach of the statutory contract between the company and each shareholder. This contract is established under section 140, however, according to the modern formulation of the rule in Foss v Harbottle a shareholder can only claim relief where the conduct complained of infringes a personal right pertaining to that shareholder. The Court accepted that it was arguable that Liwszyc and Duta had personal rights to bring an action to have the changes in the composition of the board (as purportedly achieved by the resolutions) carried out in accordance with the replaceable rules.  **(ii) Approval for registration of transfer**  The replaceable rule in section 1072G provides that the directors of a proprietary company may refuse to register a transfer of shares in the company for any reason.  The court found that it was plainly arguable that this rule implicitly requires board approval of the registration of a transfer of shares, even where there was no basis for an objection to the transfer.  The court doubted that section 1322(2), which provides that a proceeding under the Act is not invalidated because of a procedural irregularity (unless the court orders to the contrary in circumstances where a substantial injustice would be caused), had any application in relation to section 1072G. If board approval was required for a valid registration then arguably the fact that no attempt had been made to obtain it would mean that the irregularity was a substantive one.  **(iii) Quorum**  The absence of a quorum at a general meeting is a procedural irregularity (see section 1322(1) of the Act). The court accepted, nevertheless, that there was an argument that the irregularity occasioned substantial injustice in this case. The failure to adjourn the meeting until a quorum was present deprived Liwszyc and Duta of the opportunity to put their case and that of other minority shareholders to Smolarek concerning the resolutions. The circumstances giving rise to the court's view on the consequences of the irregularity were:   * the significance of the resolutions passed at the meeting; * the issue whether Smolarek would become a minority shareholder on registration of the share issue; * an issue whether Liswszyc had a legitimate expectation of an entitlement to participate in the management of Eznut as a director (arising out of an understanding with Smolarek); and * evidence that Smolarek wished to impose her own will on the future direction of Eznut, contrary to the wishes of Liwszyc, Duta and the other shareholders.   **(iv) Cessation of Duta's directorship**  The court found there was no serious issue to be tried as to the cessation of Duta's directorship. The operation of the replaceable rule in section 201H(2) of the Act meant that Duta ceased to be a de jure director two months after his appointment. No unilateral act of Smolarek removed him from this position, even though he had continued to act as a de facto director after his appointment ceased. The failure of the shareholders to confirm Duta's appointment was not a mere procedural irregularity, since the replaceable rule in section 201H does not authorise the board to appoint a new director other than for a period of two months without confirmation by the shareholders.  **5.6 Issues faced by deed administrators seeking to pool assets and liabilities of a group of companies into one company**  (By Phillip Kandov, Blake Dawson Waldron)  In the matter of Ansett Australia Ltd [2006] FCA 277, 22 March 2006, Federal Court of Australia, Goldberg J, 22 March 2006  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fca277.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fca277.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Introduction**  Following Ansett's entry into voluntary administration, the Deed Administrators of Ansett Australia Limited (Ansett) and subsidiaries of Ansett (the Ansett Group) sought to pool all assets and liabilities into Ansett. An application was made to the court under sections 447A(1) and 447D(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  The two sections provided that the court may make orders it considered appropriate (in relation to administrators fulfilling deed requirements), and that directions may be sought from the court about a matter arising in connection with the exercise of an administrator's powers.  **(b) Facts**  **(i) Why directions were sought from the court under section 447A(1) and 447D(1)**  A conflict of interest was identified by the Administrators in that they must act in the interest of all creditors, whilst simultaneously exercising their power in the most efficient and expeditious manner possible. The proposed pooling, although in the overall interests of the creditors of the Ansett Group as a whole, may not be in the interests of particular creditors of particular companies in the Ansett Group.  The Administrators therefore asked for directions of the court pursuant to section 447D(1) allowing the Administrators to act contrary to the interests of the beneficiaries of whose trusts they are the trustees.  **(ii) Pooling of assets of all companies**  Administrators of each of the companies of the Ansett Group had proposed to call a meeting of all creditors to propose a pooling of all assets and liabilities into one company through a deed of compromise.  Pooling was sought by the Administrators for a number of reasons. These included that, in the Administrators view:  1. the Ansett Group operated as a single business, with Ansett companies providing cash to others without taking security or even requiring repayment;  2. companies within the Ansett Group shared Ansett Group employees between various companies, and the Ansett Group workforce was viewed as a single team;  3. companies in the Ansett Group shared numerous assets and resources. For example, aircraft engines were owned and swapped across various companies, making it difficult for the Administrators to determine which Ansett company owned a particular aircraft or engine; and  4. the Ansett Group was treated as a single tax group. If pooling did not occur, time and costs would be required to raise charge-backs between various companies of the Ansett Group. Furthermore, pre-administration Ansett Group tax issues would need to be reviewed.  As such, it was submitted by the Administrators that if the assets and liabilities of the Ansett Group were not pooled, they would need to undertake a detailed, costly and time-consuming investigation that would hinder the administration process and be detrimental to the creditors of the Ansett Group as a whole.  The Administrators' estimates for the net realisation of the Ansett Group indicated that pooling would have different effects for priority and non-priority creditors. Under the pooling arrangement priority creditors (employees) would be better off. Under a no pooling arrangement, non-priority creditors would be better off. If pooling were not to occur however, the overall amount creditors would receive would be substantially lessened due to the administration costs that would be incurred by each company within the Ansett Group.  **(c) Decision**  The Administrators submitted that pooling was justified for reasons earlier mentioned, and relied on a number of supporting United States of America authorities, namely:  1. the reliance test as a single economic unit;  2. the entanglement test, that is to say the interrelationship of the companies in the group is so hopelessly inter-related that to disentangle would be time and cost prohibitive; and  3. the balancing test, where the benefits of the consolidation outweigh the harm it would cause the creditors if there was no consolidation.  The court, while accepting these general propositions, pointed out that co-mingling justifies consolidation only when every creditor will benefit from the consolidation, or where the overall benefit to creditors will outweigh the detriments. Mere benefits to some creditors or an administrative benefit would not meet the requirement. In this case, the benefit gained through pooling was not considered sufficient enough to displace the loss non-priority creditors would have suffered. Goldberg J therefore concluded that there was no authority or support for the view that a court will approve a pooling proposal in circumstances where a number of the creditors of one or more of the companies will be disadvantaged.  His Honour pointed out that it would not be impossible or impractical to determine the ownership of various assets of the Ansett Group. Rather this could not be done without incurring substantial time, costs and resources. This however, should not be a valid reason to disadvantage creditors who would otherwise receive a particular distribution in a no-pooling situation. Had it been demonstrated to the court that the extra administration costs resulting from a no-pooling scenario would be less advantageous to all creditors than a pooling situation, then the court may have been inclined to approve the Administrators' application.  His Honour further noted that although the Ansett Group operated as a single entity it did not appear that various creditors of each company dealt with various companies as a single economic unit when their debts were incurred. For this reason it would not be fair to non-priority creditors to allow for pooling of assets of the Ansett Group.  Accordingly, the court held that it would be inappropriate to give the Administrators directions for the approval they sought under sections 447A(1) and 447D(1) on the basis that the approval related to a transaction which was contrary to the interests of the trustees.  **5.7 What constitutes an 'unjust' contract?**  (By James Williams, Phillips Fox)  Perpetual Trustee Company Limited v Albert and Rose Khoshaba [2006] NSWCA 41, New South Wales Supreme Court, Court of Appeal, Spigelman CJ, Handley JA, Basten JA, 20 March 2006  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswca41.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswca41.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The Appellant, Perpetual Trustee Company Limited, applied for leave to appeal from Rolfe DCJ's decision in the District Court of New South Wales that the loan agreement ('the Agreement') entered into between the Appellant, as trustee for a securitised mortgage program, and the Respondents, Albert and Rose Khoshaba, was 'unjust' pursuant to section 7 of the [Contracts Review Act 1980 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "Default) ('the Act'). Spigelman CJ, Handley JA and Basten JA granted the Appellant leave to appeal, but then dismissed the appeal on the basis that the loan agreement was unjust under the Act.  **(b) Facts**  The Respondents were pensioners and members of the Assyrian community in Sydney. In late 2000, the Respondents decided to invest in a trolley-collecting business operated by Karl Suleman Enterprizes Pty Ltd ('KSE').  KSE referred the Respondents to Combined Home Loans Pty Ltd ('CHL'). CHL then submitted a loan application to Australian Mortgage Wholesalers Pty Ltd ('AMW'), which was responsible for assessing loan applications on behalf of the Appellant. The loan application submitted on behalf of the Respondents falsely described Mr Khoshaba as being employed and earning $43,000 a year and the purpose of the loan was not stated on the application. After being submitted, the application was amended to include Mrs Khoshaba as a joint applicant, and Mrs Khoshaba's signature was forged.  In February 2001, the Appellant entered into the Agreement and mortgage as trustee for a securitised mortgage program managed by RESIMAC Limited ('RESIMAC'). RESIMAC had entered into a Mortgage Origination and Management Deed ('MOMD') with AMW. It was AMW's role under the MOMD to assess loans on behalf of RESIMAC. The terms of the MOMD required AMW to satisfy itself as to the correctness of the information contained in the loan application by carrying out certain steps in compliance with RESIMAC's internal lending guidelines ('the Guidelines').  Under the Agreement, the Appellant lent the Respondents $120,000 and took a mortgage over the Respondent's family home as security for the loan. The Respondents forwarded $100,000 of the loan amount to their daughter, who then invested the money in KSE pursuant to an investment agreement. KSE then collapsed, at which time the Respondents still owed $87,572 to the Appellant. The Respondents received a total benefit under the Agreement of $81,103.39. This amount represented $16,103.39 not invested in KSE and $65,000 that the Respondents received under the investment agreement.  The Respondents claimed the Agreement was unjust pursuant to section 7 of the Act. Rolfe DCJ found that the Agreement was unjust and granted relief by way of reducing the Respondent's debt to the Appellant to $29,803.57, being the balance of the total benefit received by the Respondents and not repaid by them. In reaching the decision, his Honour cited the Appellant's failure, contrary to prudent lending practice, to follow its own lending guidelines in assessing the Respondents' loan application and the Appellant's failure to recommend to the Respondents that they receive independent legal or accounting advice. The Appellant applied for leave to appeal from Rolfe DCJ's decision.  **(c) Decision**  Spigelman CJ delivered the leading judgment. Both Handley JA and Basten JA concurred with the Chief Justice, making a number of additional observations.  **(i) The appeal**  Spigelman CJ initially considered what constituted the appropriate test for appellate intervention in relation to a first instance finding under section 7 of the Act that the contract was unjust. However, his Honour ultimately concluded that it was unnecessary to resolve this issue because Rolfe DCJ had committed an appellable error. His Honour cited the fact that Rolfe DCJ had referred to the 'prudent lending practices' contained in RESIMAC's guidelines in his reasons for finding the Agreement to be unjust. His Honour found that Rolfe DCJ had erred in relying on the Guidelines as constituting prudent lending practice and should not have determined the case on the basis that the Appellant's failure to follow the Guidelines was a departure from prudent lending practice.  Spigelman CJ held that under normal circumstances it would have been appropriate to remit the matter for redetermination. However, the fact that the legal costs were already a substantial proportion of the amount in dispute, coupled with the parties' request for the court to determine the matter, meant the court should hear the appeal.  **(ii) Was the contract unjust?**  Handley JA discussed the agency issues raised by the case. His Honour held that AMW's knowledge, including the fact it was aware that the Guidelines had not been complied with, was for legal purposes the knowledge of RESIMAC and therefore the knowledge of the Appellant, as it was the trustee for RESIMAC.  The Appellant sought to rely on West v AGC (Advances) Ltd (1986) 5 NSWLR 610 ('West') in a bid to demonstrate the Agreement was not unjust for the purposes of the Act. In discussing the most appropriate approach to the evaluation of justness, Spigelman CJ held that '[w]hen Parliament adopts so general, and inherently variable, a standard as that of 'justness', Parliament intends for courts to apply contemporary community standards about what is just.' His Honour noted that such standards were subject to change over time, and therefore the principles established in West twenty years ago were not necessarily relevant to this case.  Spigelman CJ rejected the Appellant's argument based on McHugh JA's judgment in West, that a distinction should be drawn between the Agreement and the investment in KSE. His Honour held that the purpose for which a loan is sought is a relevant circumstance in determining the question of justness and cited section 9(2)(1) of the Act, which states that a court shall have regard to '[t]he commercial or other setting, purpose and effect of the contract.'  Spigelman CJ then considered the Appellant's claim that the failure to observe the Guidelines was only a relevant consideration, rather than a substantial consideration, because the Guidelines were designed to protect the lender and not the borrower. His Honour stated that although the benefit of a properly executed risk assessment may benefit a borrower indirectly, it does not mean that it is not entitled to significant weight in the determination of unjustness, as a substantial purpose of the legislative scheme is to protect persons who are not able to protect themselves. His Honour discussed the Appellant's failings in relation to the Agreement and said that they demonstrated that the Appellant was prepared to lend on the value of the security alone.  Spigelman CJ rejected Rolfe DCJ's finding that the Agreement was unjust because of the Appellant's failure to inquire as to whether the Respondents had obtained independent advice. His Honour held that a failure to recommend that a person obtain advice is not 'entitled to significant weight when the advice is relevant to that part of the transaction which does not involve the rights and obligations or interests of the person who is said to have failed to make the recommendation.'  The Appellant further argued that a court should not grant relief under section 7 of the Act where the party against whom relief is claimed is unaware of the circumstances giving rise to the injustice. Spigelman CJ referred to the indifference of the Appellant to the purpose of the loan in deciding that the Appellant was not an innocent party of the kind referred to in the relevant authorities. His Honour dismissed the appeal and ordered the Appellant to pay the Respondents' costs.  In separate judgments, both Basten JA and Handley JA agreed with the orders proposed by the Chief Justice. Their Honours broadly concurred with the reasons for judgment, subject to certain specific matters that were considered in each of their Honours' judgments.  **5.8 Employee creditors not favoured when apportioning proceeds of sale of assets belonging to a group of companies in liquidation**  (By Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)  Application by Robert William Whitton (as liquidator of Global Gossip group of companies) [2006] NSWSC 163, Supreme Court of New South Wales Equity Division, Austin J, 20 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc163.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc163.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In this case, the liquidator of a group of companies applied to the court for a direction regarding how to apportion the proceeds of the sale of assets amongst the companies within the group. The two alternatives proposed were:  1. prioritising employee creditors; or  2. paying each company which owned the assets the respective value of their asset sales.  Austin J ordered the second alternative, despite it not being the preferred approach of the liquidator on the basis that in the absence of a pooling arrangement in the manner permitted by law, neither the court nor the liquidator has discretion to authorize distribution where one company would benefit from assets of another. His Honour reflected that his decision was a 'hard reality'. Both factual and legal circumstances lead his Honour to this decision.  **(b) Facts**  The Global Gossip group (the Group) was a group of ten related companies connected with managing stores located in tourist destinations around Australia and offering communications services to budget travellers. On 14 June 2002 voluntary administrators were appointed. On 25 September 2002, deeds of company arrangement which made a provision for employee entitlements (specifically, unremitted superannuation contributions) were executed.  In August 2003, the deed administrator agreed to the sale of assets of the Group. Only three of the Group companies held any assets. The asset purchase agreement contained a clause that the vendors would be responsible for the apportionment of the purchase price between them.  On 19 September 2003, after being provided with a report by the deed administrator, six of the Group's companies terminated their deeds of company arrangement and were wound up (the Liquidated Companies). The report estimated returns to creditors on liquidation on a group basis rather than on a separate company basis. However, there was no reference to this in the creditors' resolutions to wind up the companies.  Approximately $177,000 was available for distribution to creditors. The liquidator proposed two alternatives for distributing these funds:  1. The funds would be apportioned amongst the three Liquidated Companies which had liabilities to employee creditors. Under this alternative, the employees would receive an equal distribution.  2. The funds would be apportioned amongst the three vendor companies. Under this alternative, the distribution amounts would vary between the employees in each company.  **(c) Decision**  Austin J stated that in the absence of a pooling arrangement in the manner permitted by law, neither the court nor the liquidator has discretion to authorize distribution where one company would benefit from assets of another. Further, as the deeds of company arrangement were terminated, the provision in the deeds for distribution to employee creditors was not applicable. His Honour noted that when placing the companies in liquidation, the creditors did not opt for a strategy for managing the administration of related companies, such as schemes of arrangement under section 411 of the Corporations Act.  Austin J indicated that the second alternative was the appropriate one and directed that the proceeds of sale be allocated between the vendor companies in the proportions of the value of their respective assets at liquidation. In doing so, his Honour reflected that it was important that creditors, when dealing with a company based on an assessment of the company's net worth, are not subjected to uncertainty. Austin J considered that uncertainty would arise if a court, at a later stage, made a company's assets available to meet the claims of creditors of other entities whose obligations the company had not guaranteed.  **5.9 Receivers' duties in relation to the exercise of power of sale**  (By Svetlana Zarucki, Clayton Utz)  Deangrove Pty Limited (Receivers and Managers Appointed) v Buckby [2006] FCA 212, Federal Court of Australia, Branson J, 14 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fca212.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/march/2006fca212.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Richard William Buckby and John Dennis (the First and Second Respondents) were appointed as receivers and managers by the Commonwealth Bank of Australia ("the Bank") over the undertaking, property and assets of Deangrove Pty Limited ("Deangrove") pursuant to the terms of the Bank's securities. Prior to the appointment, Deangrove had executed a deed with Islands Hotels Limited ("Islands"), IHL Australia Pty Limited ("IHL") and John Anthony Jeans in relation to 50 units owned by it in a resort development. By the deed, Deangrove agreed to sell to IHL certain rights in respect of the 50 units and IHL agreed to indemnify Deangrove against liabilities to the Bank. Islands and IHL expected both the Bank and the Respondents to recognise the deed. The Respondents entered into negotiations with BM Culley and Associates Pty Limited ("Culley") to purchase Deangrove's property and rejected an offer made by Islands and IHL. In doing so, Deangrove alleged that the Respondents had exercised their power of sale without taking all reasonable care to sell the property for the best price then reasonably obtainable as a result of which it suffered financial damage.  Branson J held that Deangrove had failed to establish that the Respondents failed to take all reasonable care to sell the property of Deangrove for the best price then reasonably obtainable or otherwise breached any duty owed by them to Deangrove or that Deangrove had suffered financial damage because of the manner in which the Respondents exercised their power of sale in respect of the property.  **(b) Facts**  Deangrove was the registered proprietor of certain strata units within a resort development ("the Development"). The Bank advanced finance to Deangrove for the purpose of the Development. To secure the advance made by the Bank to Deangrove, the Bank held a registered first mortgage granted by Deangrove over unsold units in the Development and an equitable charge over the assets and undertaking of Deangrove. The term of the mortgage ended on 30 April 2000.  On 29 November 1999, Deangrove entered into a deed with Islands, IHL and John Anthony Jeans in respect of 50 units in the Development ("the Deed"). By the Deed, IHL agreed, amongst other things, to:   * buy from Deangrove certain rights in respect of 50 units in the Development; * indemnify Deangrove against its liabilities to the Bank under its registered first mortgage in respect of a principal amount of $4.6 million (i.e. $92,000 per unit); and * cause to be allotted to Deangrove or its nominee 7,323,785 fully paid ordinary shares in Islands.   The term of the Deed ended on 30 November 2000.  On 6 January 2000, the Respondents were appointed by the Bank as receivers and managers of Deangrove. At that time, the property of Deangrove included 49 units that remained subject to the Deed and 15 other unsold units in the Development.  By letter to the Respondents, Islands stated its position as being that it expected both the Bank and the Respondents to recognise the Deed and foreshadowed a claim pursuant to section 52 of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) should the Bank not immediately "remove the receiver" (which proceedings were subsequently commenced).  Shortly after 27 January 2000, Culley (the builder of the Development) submitted two written offers to purchase units in the Development using a related company. One offer was for the 15 units not subject to the Deed. The other was for the 49 units subject to the Deed. In each case, Culley agreed to pay, among other things, $98,000 per unit.  On 13 April 2000, a contract for sale of the 15 units was executed by the Respondents and Valemed Pty Limited ("Valemed"), a company related to Culley.  On 30 April 2000, the term of the Bank's mortgage ended. Islands and IHL failed to pay to the Bank the sum of $4.5 million in exchange for the release of its mortgage over the 49 units. However, Islands and IHL proposed to pay $1.7 million for the units immediately with the balance to be paid in 14 days and sought an extension of the Bank's mortgage for a further term to 30 November 2000. At that time, neither Culley nor Valemed had paid the deposit due under the contract for the sale of the 15 units.  By letter dated 5 May 2000 to the solicitors for Islands and IHL, the Respondents' solicitors noted the terms of the offer received from Valemed in relation to the 49 units subject to the Deed and informed Islands and IHL that their "offer" to purchase the units was rejected.  Shortly thereafter, a deed was executed by, among others, Islands and IHL which included recitals that as a consequence of the appointment by the Bank of receivers and managers, Islands and IHL had elected not to exercise their rights granted under the Deed in respect of the Development. Islands also issued an announcement to the ASX on 21 June 2000 which stated that it did not proceed with the acquisition of the units because, among other things, the latest valuation indicated that the value of the property had dropped considerably.  Culley/Valemed did not settle on the 15 units.  A contract dated 11 September 2000 for the sale of all 64 units at a price of $4.945 million (i.e. $77,267 per unit) was completed on 18 October 2000.  **(c) Decision**  Deangrove's primary allegation was that the Respondents had breached their general law and statutory duties to Deangrove in respect of the decision made by them (in the letter dated 5 May 2000) to reject the "offer" made by IHL to purchase the 49 units.  Branson J noted that the general law duties of a receiver co-exist with the statutory duty of care and diligence imposed by section 180 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") and with the more rigorous duty specifically in relation to the power of sale imposed by section 420A of the Act.  Branson J observed that:   * the effect of section 420A of the Act is to substitute a statutory test of liability for the traditional test when determining whether a receiver or mortgagee has breached its general law duty in the exercise of a power of sale; * in forming a judgment as to whether a receiver took all reasonable care as required by section 420A of the Act, it is necessary to have regard to the sale process adopted by the receiver. The issue to be determined is whether that process was not one where all reasonable care was taken to sell the property for its market value, whatever that value was, or alternatively for the best price reasonably obtainable; and * section 420A of the Act is concerned generally with the duty of a controller when exercising a power of sale in respect of property of a corporation. A controller will commonly act in the exercise of a power of sale well ahead of any actual sale of property and his or her conduct at that time may affect the price ultimately achieved for that property.   Deangrove alleged that the Respondents' conduct in authorising the sending of the letter of 5 May 2000 gave rise to a breach of their duties for a number of reasons. First, Deangrove argued that the Respondents should have known that their dealings with Culley were unlikely to be profitable because Culley had shown itself to be unable to pay even the deposit due on the contract for the sale of the 15 units.  Branson J accepted the evidence of the First Respondent, Mr Buckby, as to why he had formed the view that IHL (as opposed to Culley) was unlikely to be able to complete the purchase of the 49 units. Mr Buckby thought that the request on behalf of IHL to have the Bank's mortgage extended from 30 April 2000 to 30 November 2000 indicated that IHL was unlikely to be able to complete a purchase of the 49 units. Mr Buckby also stated that the erratic nature of communications he had with IHL caused him to have little confidence in them. He considered Culley to be a safer bet than IHL because Culley had already entered into a contract for the purchase of the 15 units and indicated a willingness to commit.  Secondly, Deangrove complained that while Mr Buckby and his associates communicated directly with officers of Culley by telephone, Mr Buckby communicated with IHL in writing on a solicitor to solicitor basis and did not personally follow up IHL's interest in acquiring the units.  Branson J rejected Deangrove's contention. Her Honour noted that the form of the letter dated 5 May 2000 revealed that negotiations concerning the purchase of the 49 units by IHL were seen by those involved as negotiations which might lead to the settlement of the legal proceedings instituted by IHL against the Bank and Deangrove. In that respect, Mr Buckby was entitled to proceed on the basis that the negotiations ought to continue on a solicitor to solicitor basis.  Thirdly, Deangrove complained that Mr Buckby acted prematurely in rejecting IHL's offer outright on 5 May 2000 given the state of negotiations with Culley.  Her Honour held that whilst it could be seen, with the benefit of hindsight, that a more cautious course of action might have been appropriate, Mr Buckby was not to be criticised for seeking to bring IHL and Culley into competition as potential purchasers. Branson J accepted that Mr Buckby had reasonable grounds for believing that if IHL genuinely wished to purchase the 49 units it would respond to the letter of 5 May 2000 with a counter-offer.  Branson J found that in authorising the sending of the letter of 5 May 2000, Mr Buckby had made a "business judgment" within the meaning of section 180(3) of the Act. The Respondents had not breached section 180 of the Act, section 420A of the Act or any common law duty in authorising the sending of the letter of 5 May 2000.  In relation to whether Deangrove suffered financial damage because of the rejection of its offer, Branson J concluded that had IHL's offer to purchase the 49 units been accepted by the Respondents, IHL would not have been able to raise the funds necessary to complete the purchase. Branson J also concluded that IHL would not have entered into a written contract to purchase the units at any time after 3 May 2000 and had the letter of 5 May 2000 not been sent, would have withdrawn its offer to purchase the 49 units.  **5.10 Confidential information - limestone location is confidential**  (By Conor Seenan, Freehills)  Artedomus v Del Casale [2006] NSWSC 146, New South Wales Supreme Court, Burchett AJ, 13 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc146.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc146.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Mr Del Casale and Mr Savini founded a company named Stone Arc and imported into Australia limestone from a specific location in Italy which they obtained from their earlier employment with another company named Artedomus. Both of them were held to have acted in breach of their equitable duty of confidentiality to Artedomus. The conduct also breached a non-compete provision in a contract and section 183 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  **(b) Facts**  Artedomus (Aust) Pty Ltd (Artedomus) was an Australian company that imported into Australia from Italy limestone marketed in Australia as 'Isernia'. The limestone was supplied to Artedomus by an Italian company named Arredo Italia and was extracted from boulders in the ground in the province of Ragusa, Sicily.  Mr Del Casale and Mr Savini were each former employees and directors of Artedomus. They formed a new company named Stone Arc Pty Ltd (Stone Arc) at about the time they each left Artedomus. Mr Savini became a director of Stone Arc, whilst Mr Del Casale supplied significant finance to Stone Arc via another company he controlled.  Stone Arc began to import Timpa or Pietra di Ragusa limestone from an Italian supplier named Italia Lithos for retail in Australia. Italia Lithos extracted its limestone from a place about one kilometre from where Arredo Italia extracted Isernia. Expert evidence indicated that both types of limestone were almost identical.  First, Artedomus claimed that Mr Del Casale and Mr Savini breached their duty of confidentiality owed to Artedomus and that Stone Arc had knowingly profited from both these breaches of duty.  Second, Artedomus claimed that Mr Del Casale had breached certain fiduciary duties he owed to Artedomus as a director under:   * sections 182 and 183 of the Corporations Act 2001; and * under the express terms of an agreement that related to the termination of Mr Del Casale's employment with Artedomus and the sale by Toghill Pty Ltd (which was a company controlled by Mr Del Casale) and another entity of shares they each own in Artedomus. In Clause 6, the agreement required Mr Del Casale not to compete with Artedomus for three years and "to keep confidential any commercially sensitive information he may be in possession of…during his employment" with Artedomus.   Finally, Artedomus claimed that Mr Savini knowingly assisted in Mr Del Casale's breaches of fiduciary duty and that Stone Arc knowingly profited from Mr Del Casale's breaches of fiduciary duty.  **(c) Decision**  **(i) Duty of confidentiality**  Burchett AJ held that Mr Del Casale and Mr Savini had breached their respective duties of confidentiality to Artedomus. In addition, Stone Arc had knowingly profited from each of these two breaches of confidence.  In reaching this conclusion, Burchett AJ considered that the source of Artedomus' Isernia, namely the province of Ragusa in Sicily, and identity of Artedomus' supplier, namely Arredo Italia, were confidential information.  Burchett AJ observed that, in Thomas Marshall (Exports) Ltd v Guinle [1979] Ch 227 (at 248), Megarry V-C said that whether something is confidential should be "judged in the light of the usage and practices of the relevant industry". Applying this test, Burchett AJ held that keeping confidential information that is similar in nature to the above information, as conceded by Mr Savini, is "a common practice with everyone, with all businesses in the area".  Burchett AJ decided that this confidential information was imparted to Mr Del Casale and Mr Savini in circumstances imparting an obligation of confidence. Burchett AJ noted that Artedomus had undertaken 'an elaborate and expensive exercise' to highlight the great importance that was attached to the confidentiality of the source from which Artedomus obtained Isernia. Such steps by Artedomus included:   * repeated emphasis by Mr Schepis, one of the founders of Artedomus, that the relevant information must not be disclosed; * naming the product Isernia after a province in Italy which tended to divert attention from the province of Ragusa in Sicily where the limestone is actually unearthed; * attempting to ensure that no customer every spoke to the factory staff to determine the location of the limestone; * only imparting the information to senior management, the head of their warehouse and the accountants who organised payment to the supplier; and * ensuring there was no information on the website of Artedomus relating to the supplier of Isernia or the region from which Isernia originated, even though similar information was available for other products of Artedomus.   Mr Del Casale and Mr Savini had made unauthorised use of that confidential information by quickly and cheaply locating the origin of the limestone and an Italian supplier for it.  **(ii) Clause 6 of the agreement**  Burchett AJ held that Mr Del Casale breached a fiduciary duty he owed to Artedomus as a director of Artedomus by failing to keep confidential commercially sensitive information as required by clause 6 of the agreement governing the termination of Mr Del Casale's employment with Artedomus and the sale of certain shares in Artedomus. He added that Mr Savini knowingly assisted in Mr Del Casale's breach of fiduciary duty and that Stone Arc knowingly profited from it.  Burchett AJ held that Mr Del Casale had committed a breach of contract by failing to adhere to clause 6 of the above agreement in which he agreed "not to compete with [Artedomus] for a period of three years". Here, Mr Del Casale's liability was in contract. The fact that Mr Del Casale competed with Artedomus via a company named Stone Arc and not personally was irrelevant because, in the words of Lindley LJ in Smith v Hancock [1894] 2 Ch 377 (at 385), the company was a "mere cloak" for Mr Del Casale's activities.  According to the principle in H&R Block Ltd v Sanott [1976] 1 NZLR 213 (at 220), Burchett AJ could not attribute liability to Mr Savini or Stone Arc here because neither was a party to the contract that was breached.  **(iii) Section 183 of the Corporations Act**  Burchett AJ held that Mr Del Casale breached section 183 of the Corporations Act because he was a director of Artedomus and improperly used information obtained from that position to gain an advantage for himself and others. Mr Savini and Stone Arc were also held to be liable under section 183(2) because both were "involved" in the contravention.  **5.11 Scheme of arrangement stares down a Chapter 6 bid**  (By Stephen Magee)  Citect Corporation Ltd [2006] NSWSC 143, Supreme Court of New South Wales, Barrett J, 10 March 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc143.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/march/2006nswsc143.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The court adjourned a section 411 scheme meeting to allow amendments to the scheme in response to a Chapter 6 bid.  **(b) Facts**  Citect proposed a merger by scheme of arrangement with Schneider Electric.  At the first section 411 court hearing, on 5 December 2005, the court set 12 January 2006 as the scheme meeting date for Citect shareholders.  On 6 January, TCEP announced a Chapter 6 bid for Citect, at a higher price than the scheme consideration. The scheme meeting was held on 12 January and voted to adjourn until 9 February or such other date as was set by the court.  On 25 January, Schneider agreed to increase the price being offered under the scheme. On 31 January, the court set 16 February as the adjourned meeting date. On 10 February, TCEP raised the price being offered under its Chapter 6 bid. This was "overbid" five days later by Schneider.  The adjourned meeting was held on 16 February and adjourned to 9 March or such other date as was set by the court. At the same time an application was made to the Takeovers Panel in respect of TCEP's activities.  On 20 February, the court set a second adjournment date of 9 March. On 27 February 2006, the Takeovers Panel froze voting rights attached to TCEP's 15% stake in Citect. The meeting went ahead on 9 March and voted in favour of the scheme, with amendments reflecting the higher consideration.  **(c) Decision**  At the 30/31 January hearing of Citect's first application for an adjournment, the court apparently noticed that Citect intended that the adjourned meeting would vote on a motion for the approval of a scheme different from that in respect of which notice had been given in accordance with the orders of 5 December (the difference being the increase in the consideration in accordance with the revised agreements between Citect and Schneider).  The court expressed the view that a meeting convened under section 411(1) to consider a particular scheme could not, simply at the behest of the company, consider some different scheme. The meeting must have before it the scheme that the court had originally directed should be submitted for consideration of members. The court could not, except upon a renewed application for orders under section 411(1), order that a different scheme be placed before a meeting of members.  However, since the original meeting notice stated that the meeting was "to consider and, if thought fit, to agree (with or without modification) to" the proposed scheme, the meeting could vote to modify the scheme.  Accordingly, said the court, Citect could put forward both the original scheme and amendments to it, along with sufficient information about the amendments to allow the members to make an informed decision.  To that end, the court made orders "to facilitate Citect's placing before members and option holders updated information relevant to a foreshadowed proposal for amendment to be placed before and considered by each adjourned meeting, with the proposed schemes to which the s.411(1) orders related as the basis against which the amendment proposal would be advanced and considered by each meeting."  This whole process was repeated on 20 February 2006, in response to the increase in TCEP's (and then Schneider's) offer price. As noted above, the members eventually voted for the scheme and amendments.  The court, at the section 411 approval hearing, had to consider the effect of the Panel's order to freeze TCEP's voting rights. If those shares had been voted against the scheme, it would not have received the required majority. However, this did not prevent the court exercising its discretion in favour of approving the scheme: by the time of the meeting, TCEP had been "overbid" by the scheme and had not upped its own bid in response. In the court's view, therefore, it was just as likely that TCEP would have voted for the scheme as voted against it.  **5.12 Does Gambotto apply to stapled security schemes?**  (By Michelle Bakhos, Clayton Utz)  Abacus Funds Management Ltd [2006] NSWSC 80, New South Wales Supreme Court, Barrett J, 20 February 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc80.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/february/2006nswsc80.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The court made orders by way of judicial advice under the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default) that the trustee of two unit trusts was justified in implementing a merger of two stapled groups notwithstanding that under the stapling proposal stapled securities held by persons in certain foreign jurisdictions could not receive new stapled securities and instead had their stapled securities compulsorily sold (with the net proceeds remitted to them). In so doing, Barrett J did not apply the principles in Gambotto v WPC Limited (1995) 182 CLR 432 (Gambotto) to the stapling proposal.  **(b) Facts**  Abacus Funds Management Ltd (the plaintiff) is the responsible entity for two managed investment schemes that hold property under separate unit trusts. The units in one unit trust are stapled to shares of a listed company (Abacus Property Group) and the units of the other unit trust are stapled to an unlisted company (Abacus Diversified Income Fund).  The plaintiff sought to staple together the existing stapled securities of the Abacus Property Group and the Abacus Diversified Income Fund (stapling proposal).  As is now common, the plaintiff approached the court for judicial advice under the Trustee Act for an order that it was justified in holding meetings of the two trusts to consider the stapling proposal. The [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482) scheme of arrangement provisions do not apply to trusts and, in light of the Gambotto decision, trustees want to protect themselves in merger proposals by obtaining such orders.  In December 2005, Campbell J made orders that the plaintiff was justified in holding meetings of members of the two managed investment schemes and associated companies regarding the stapling proposal.  All resolutions were approved:   * by more than 99.9 per cent of the votes cast in person or proxy in relation to the Abacus Property Group; and * by more than 98.8 per cent of the votes cast in person or by proxy in relation to the Abacus Diversified Income Fund.   The plaintiff then went back to court seeking advice in relation to the implementation of the approved proposal.  Some stapled securities were held by persons resident in foreign jurisdictions including the United Kingdom (Minority).  The legal regimes of some of the foreign jurisdictions made it impracticable or impossible to issue new securities to residents of those jurisdictions. Accordingly, to ensure that the stapling proposal did not contravene those regimes, it was necessary that the securities were effectively expropriated by being compulsorily sold by a broker (on behalf of the Minority but regardless of their consent) in the market after listing was achieved. The net sale proceeds would then be remitted to the relevant Minority security holders. There were about a dozen such Minority security holders in the UK.  The court considered whether the discriminatory treatment of the Minority security holders offended the principles established by the High Court in Gambotto, which may restrict in many circumstances a company's ability to amend its constitution to expropriate the shares of minority members.  **(c) Decision**  Barrett J concluded that the plaintiff was justified in implementing a merger of two stapled groups notwithstanding that under the stapling proposal stapled securities held by persons in certain foreign jurisdictions could not receive new stapled securities.  Barrett J noted the very high level of approval of the stapling proposal at the members meetings. This satisfied his Honour that the judicial advice sought should be given in the absence of some particular factor indicating otherwise.  Barrett J then focussed on the issue of whether the expropriation of the Minority offended the principles in Gambotto. Barrett J agreed with the submissions considered at the first judicial advice hearing, namely that:   * the analysis in Cachia v Westpac Financial Services Limited (2000) 170 ALR 65 that the Gambotto principles were based on company law principles and therefore did not extend to interests under a unit trust may well be correct (see also Australand Holdings Limited (2005) 219 ALR 728); * the procedure being followed by the plaintiff was broadly analogous to the procedure in a section 411 scheme of arrangement - Gambotto generally does not apply where the expropriation is taking place under a statutory procedure with court supervision; and * in obiter, the High Court in Gambotto found that expropriation was justified if it were necessary in order to ensure that the company could continue to comply with the regulatory regime governing the principal business it carried on. In the case of Abacus, it might well be said that expropriation was necessary in order to ensure that the stapled entities did not contravene the relevant foreign regulatory regimes.   The court also noted the absence of and representation of the Minority at the hearing and furthermore, the absence of any objection by the Minority. This was a compelling impression that the Minority were not sufficiently concerned about the impact of the stapling proposal. |
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