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The recent judgments section of the Bulletin will return in the February issue. |
| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Review of the 2005 AGM season**  Corporate Governance International has published its review of proxy voting at meetings of Australian Stock Exchange (ASX) top 200 companies for the period 1 July to 30 November 2005. Following is the executive summary.  1. Proxy votes lodged for director-election resolutions at annual general meetings of 83 widely held ASX200 companies in the second half of 2005, including the main 2005 Proxy (AGM) Season, represented on average 50% of total voting capital.  Comparable results (with some difference in sample companies that do not invalidate the conclusions) were: 2004: 47% 2003: 44% 2002: 41%  2. Proxy votes lodged for remuneration report resolutions at annual general meetings of widely held ASX200 companies in the second half of 2005 represented on average 48.6% of total voting capital. The concluding section of the report addresses in more detail this first Australian experience of such resolutions.  3. As was the case with the prior year studies, there is no evidence of a materially higher level of the overall proxy vote (aggregate of For, Against, left to the proxy's Discretion & Abstain) on controversial resolutions (all resolutions where CGI had recommended an Against or Abstain vote) among the 83 widely held companies (49.3% of total voting capital) in comparison with director-election resolutions in the same companies (49.4% of total voting capital).  4. In the 2005 sample, 5 people nominated themselves as directors. None were voted onto boards.  5. There were no cases in the 2005 sample of shareholders using their rights either to put an item on the agenda at an annual or other general meeting or to convene a (separate) meeting under the 100 shareholder rule.  6. The 107 companies in the 2005 sample held 114 shareholder meetings and submitted 675 resolutions in their 2005 notices of meeting for proxy (or other) vote. Of those 675 resolutions 668 were board sponsored, 5 were outside nominations to the board (one of which was withdrawn before the meeting) and a shareholder proposed 2 resolutions (which were subsequently withdrawn). Two companies withdrew a total of 3 board-sponsored resolutions from shareholder vote prior to or at their meetings. All remaining 665 board-sponsored resolutions were passed.  The full report is available on the [CGI website](http://www.cgi.au.com/user1/1232/frameset_general.html" \t "_new).  **1.2 Report on ASIC's implementation of financial services licences**  On 24 January 2006, the Australian National Audit Office (ANAO) published its report titled "ASIC's Implementation of Financial Service Licences". Following is an extract from the executive summary.  **(a) Introduction**  The Australian financial sector is responsible for managing assets of almost $2 trillion. It is regulated primarily by the Australian Securities and Investments Commission (ASIC). ASIC is responsible for regulating company and financial services laws to protect consumers, investors and creditors. From 11 March 2002, its responsibilities include the licensing of entities engaged in the business of providing financial services, broadly defined.  This responsibility was conferred by the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "Default) (the FSR Act). It amended the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act) to replace a number of existing financial sector licences with a single licence. Potentially, the new licence extended to a range of financial activities not covered by earlier Corporations Act licences, particularly in the superannuation, insurance, deposit-taking, payment service and foreign exchange sectors.  The primary objectives of the reforms were to benefit the industry through more uniform regulation and to give consumers a more consistent framework of consumer protection in which to make their financial decisions. To achieve these, ASIC received Budget funding of $63 million over the years 2001-02 to 2005-06. This included funds for licensing and for granting relief from licensing, for surveillance and enforcement, and for the development of industry guidance.  The audit objective was to examine the effectiveness and efficiency of ASIC's implementation of Australian financial services licences. In particular, the audit examined ASIC's planning for the introduction of financial services licences; the roles of the Department of the Treasury (Treasury) and ASIC in defining the effective scope of licensing; ASIC's assessment and processing of licence applications; and ASIC's supervision of licensees.  **(b) Overall audit conclusions**  A single licence regime is now in place for the financial services sector. By the transition deadline of 10 March 2004, ASIC had issued 3,738 financial services licences. By 30 June 2004, this had risen to 3,853 financial services licences. The number of licences had risen to 4,135 by 30 June 2005.  The broad definitions underpinning the Corporations Act licence regime could bring many entities offering financial services within its regulatory scope, either as licensees or authorised representatives. However, statutory exemptions have served to limit the scope of the licensing regime, as have ASIC's statutory powers to grant relief from financial services licensing requirements. Together, these have reduced the need for licences.  Two-thirds of all the licences granted during the two year transition period were granted during the last six months. ASIC successfully dealt with the late influx, and the generally poor standard of applications, by reallocating resources from other activities, such as the surveillance of licensees (so that surveillance staff could be available to achieve licensing targets), and by curtailing analysts' scrutiny of applications (to reduce processing time). ASIC's licence systems did not properly record critical elements of its licence decisions, such as ASIC's assessment of the applicant's character or its assessment of the applicant's evidence that they could meet their licence obligations. Overall, important regulatory risks were not systematically addressed until after the end of the transition period.  The end of the transition period has seen ASIC re-structure it's licensing activities. From March 2005, licensing operations are carried out within ASIC's Regulation Directorate and licensee surveillance activity within its Compliance Directorate. This better reflects the complexity of ASIC's enforcement and regulatory tasks and the need to have a strong enforcement and regulatory presence in all the areas of the financial services industry. To this end, ASIC is making greater use of risk analysis.  **(c) Recommendations and responses**  ANAO has made seven recommendations, six to ASIC alone. Of these, three are aimed at improving the documentation of ASIC's licence processing, the useability of its public licensee database and the reporting of ASIC's compliance performance. The remainder focus on improving ASIC's processes for identifying and managing regulatory risks.  Treasury and ASIC are the joint respondents to the remaining recommendation, that they consider the benefits of making licence applicants' certifications more enforceable than at present.  ASIC and Treasury agreed with the relevant recommendations.  **(a) Recommendation No 1**  ANAO recommends that ASIC and Treasury consider the merits of seeking legislative amendments to provide for enforceable declarations and certifications as part of a financial services licence application.  **(b) Recommendation No 2**  ANAO recommends that ASIC improve its licence application process and assessment recording systems such that ASIC's licence assessments and decisions are adequately documented and properly authorised.  **(c) Recommendation No 3**  ANAO recommends that ASIC improve the useability of the public licensee database in order that consumers are able to access relevant and reliable information about licensees and authorised representatives.  **(d) Recommendation No 4**  ANAO recommends that ASIC undertake a systematic assessment of the regulatory risks posed by financial services licensing, so as to better inform judgments about the appropriate balance between managing operational and regulatory risks.  **(e) Recommendation No 5**  ANAO recommends that ASIC integrate its existing monitoring and early warning systems to assist it to target, plan and conduct its surveillance of financial services licensees.  **(f) Recommendation No 6**  ANAO recommends that ASIC review its methodology for targeting and conducting its surveillance activities to maximise value for money for the resources allocated to these activities.  **(g) Recommendation No 7**  ANAO recommends that ASIC develop and implement performance measures for its financial services licences compliance activities.  The full report is available on the [ANAO website](http://www.anao.gov.au/" \t "_new).  **1.3 SEC votes to propose changes to disclosure requirements concerning executive compensation and related matters**  On 17 January 2006, the US Securities and Exchange Commission (SEC) voted to publish for comment proposed rules that would amend disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters, and security ownership of officers and directors. The proposed rules would affect disclosure in proxy statements, annual reports and registration statements. The proposals would require most of this disclosure to be provided in plain English. The proposals also would modify the current reporting requirements of Form 8-K regarding compensation arrangements.  **(a) Executive and director compensation**  The proposals would refine the currently required tabular disclosure and combine it with improved narrative disclosure to elicit clearer and more complete disclosure of compensation of the principal executive officer, principal financial officer, the three other highest paid executive officers and the directors.   New company disclosure in the form of a Compensation Discussion and Analysis would address the objectives and implementation of executive compensation programs - focusing on the most important factors underlying each company's compensation policies and decisions.  Following this new section, executive compensation disclosure would be organized into three broad categories: compensation over the last three years; holdings of outstanding equity-related interests received as compensation that are the source of future gains; and retirement plans and other post-employment payments and benefits.  A reorganised Summary Compensation Table would be the principal vehicle for showing three-year compensation and would include additional information:   * A new column would report total compensation. * A dollar value will be shown for all stock-based awards, including stock and stock options, measured at grant date fair value, computed pursuant to Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 123 (revised 2004), Share-Based Payment, to provide a more complete picture of compensation and facilitate reporting total compensation. * The "All Other Compensation" column would include the aggregate increase in actuarial value of pension plans accrued during the year and all earnings on deferred compensation that is not tax-qualified. * The threshold for disclosing perquisites would be reduced to US$10,000 and interpretive guidance is provided for determining what is a perquisite. * Two supplemental tables would report Grants of Performance-Based Awards and Grants of All Other Equity Awards.   Disclosure regarding outstanding equity interests would include:   * the Outstanding Equity Awards at Fiscal Year-End Table, which would show outstanding awards representing potential amounts that may be received in the future; and * the Option Exercises and Stock Vested Table, which would show amounts realized on equity compensation during the last year.   Retirement plan and post-employment disclosure would include:   * the Retirement Plan Potential Annual Payments and Benefits Table, which would disclose annual benefits payable to each named executive officer; * the Nonqualified Defined Contribution and Other Deferred Compensation Plans Table, which would disclose year-end balance, and executive contributions, company contributions, earnings and withdrawals for the year; and * disclosure of payments and benefits (including perquisites) payable on termination or change in control, including quantification of these potential payments and benefits.   A Director Compensation Table, similar to the Summary Compensation Table, and related narrative would disclose director compensation for the last year.  **(b) Related person transactions, director independence and other corporate governance matters**  The proposals would update, clarify, and slightly expand the disclosure provisions regarding related person transactions. Principal changes would include a disclosure requirement regarding policies and procedures for approving related party transactions, a slight expansion of the categories of related persons and a change in the threshold for disclosure from US$60,000 to US$120,000. The requirement to disclose these transactions would also be made more principles-based, and would require disclosure if the company is a participant in a transaction in which a related person has a direct or indirect material interest.  A proposed new item (Item 407 of Regulations S-K and S-B) would require:   * disclosure of whether each director and director nominee is independent; * a description of any relationships not otherwise disclosed that were considered when determining whether each director and director nominee is independent; and * disclosure of any audit, nominating and compensation committee members who are not independent.   Proposed Item 407 also would consolidate corporate governance related disclosure requirements currently set forth in a number of places in the proxy rules and Regulations S-K or S-B. This would include disclosure regarding board meetings and committees, and specific disclosure about nominating and audit committees. Proposed Item 407 would also require similar disclosure regarding compensation committees and a narrative description of their procedures for determining executive and director compensation.  **(c) Security ownership of officers and directors**  The proposals would require disclosure of the number of shares pledged by management.  **(d) Form 8-K**  The proposals would modify the disclosure requirements in Form 8-K to capture some employment arrangements and material amendments thereto only for named executive officers. The proposals would also consolidate all Form 8-K disclosure regarding employment arrangements under a single item.  **(e) Plain English disclosure**  The proposals would require companies to prepare most of this information using plain English principles in organization, language and design.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2006-10.htm" \t "_new).  **1.4 Report on voting for directors of US companies**  On 17 January 2006, the Committee on Corporate Laws of the Section of Business Law (the "Committee") of the American Bar Association (the "ABA") released a Preliminary Report detailing possible amendments to the Model Business Corporation Act (the "Model Act") relating to voting by shareholders for the election of directors. The amendments that the Committee is considering would, if ultimately adopted, address the issue of majority voting, which has been prominently and actively debated in many circles.  The Committee has now reached a preliminary consensus on the substance of the proposed amendments that would permit shareholders of individual corporations to put in place a form of majority voting that can be achieved through a limited bylaw amendment. The details of these and other proposed changes relating to director elections, along with the Committee's rationale, are described in its 38-page Preliminary Report and 8-page Annex. The Committee has concluded, nevertheless, that it would benefit from further comments of interested persons.  The heart of the Committee's proposal is a carefully tailored majority voting bylaw standard that can be adopted unilaterally by either the board of directors or the shareholders. This approach, coupled with other measures described in this Preliminary Report, would generally have the effect of not seating, for more than a 90-day transitional period, a director whose election or re-election has effectively been rejected by a majority of votes cast. In addition, and in response to stated concerns regarding the validity of voluntarily adopted board policies concerning director elections, the Committee has separately proposed a statutory method to facilitate and enforce resignations tendered by directors.  The Preliminary Report contains the following Executive Summary that briefly explains the proposals the Committee is considering, and which are set forth more fully in the text of the Preliminary Report:   (a) To complement the enabling system of section 7.28(a) of the Model Act, which permits articles-of-incorporation provisions that establish director election voting requirements different from the plurality default rule provided in section 7.28(a), the Committee proposes an amendment to section 8.05(e) of the Model Act that would permit articles-of-incorporation provisions modifying or eliminating the section 8.05(e) "holdover" rule specifying that incumbent directors remain in office until their successors are elected and qualify. This amendment would permit corporations to fashion majority voting systems in which an incumbent director could not be seated on the board or could be seated only for a limited period of time if that director fails to receive a required vote.   (b) To enable either the shareholders or the board of directors of public corporations (other than those that provide shareholders with cumulative voting rights) unilaterally to adopt a majority voting standard that will not pose a risk of harm to the corporation, the Committee proposes adoption of a new section 10.22 that would permit such corporations to replace plurality voting with a modified plurality voting rule under which a director would be elected by a plurality vote but would serve only for a period of time not exceeding 90 days following the election if the director receives more votes against than for his or her election. Under a section 10.22 bylaw, the directors would be empowered to fill the vacancy created by that early termination with any qualified individual.   (c) To facilitate adoption of majority voting policies in which directors agree to submit their resignation to the board upon failing to receive the required vote, the Committee proposes the adoption of amendments to section 8.07 of the Model Act that would clarify and expressly recognize that a director's resignation can be effective upon the happening of specific events (such as the failure to achieve a majority shareholder vote coupled with board acceptance of the resignation) and that a director may submit a binding irrevocable resignation.  The Preliminary Report also explains the Committee's preference for facilitating alternative director election systems, which can be adopted through private ordering, rather than changing the current statutory plurality default rule that continues to govern in the absence of a joint decision by directors and shareholders to adopt an alternative voting system for director elections in the articles of incorporation.  The Committee believes that the matter of voting by shareholders for the election of directors is a vitally important aspect of the Model Act, and therefore the Committee is seeking further comment on the amendments it is considering before publishing them as proposed amendments. Accordingly, the Committee is releasing the Preliminary Report and Annex that includes proposed amendments to the Model Act and Official Comments, with the request that interested persons submit their comments by 20 February 2006.  The Preliminary Report is available on the [ABA website](http://www.abanet.org/dch/committee.cfm?com=CL270000" \t "_new).  **1.5 IAASB proposes enhanced requirements for auditors to consider related parties**  The involvement of related parties, such as directors, owners, and management, in major corporate scandals encouraged the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) to review its current auditing standard on the subject. On 3 January 2006, the IAASB issued an exposure draft (ED), proposed International Standard on Auditing (ISA) 550 (revised), Related Parties, as a result of its review, and is inviting comments on proposed requirements for auditors regarding the audit of related party relationships and transactions.  The current standard requires the auditor to perform certain specified procedures. The proposed standard would extend current practice by requiring the auditor to obtain an understanding of the nature and business rationale of an entity's related party relationships and transactions sufficient to identify, assess and respond to the risks of material misstatement resulting from them. It also places greater emphasis on the difficult task for the auditor of attempting to identify related party relationships and transactions not identified or disclosed by management.  The proposed standard places new emphasis on evaluating the effects of related party relationships and transactions on the financial statements, even in circumstances where the financial reporting framework does not establish related party accounting or disclosure requirements.  Further information is available on the [IFAC website](http://www.ifac.org/" \t "_new).  **1.6 European Commission report on developments in financial services in 2005**  On 10 January 2006, the European Commission published its regular Progress Report on the Single Market in Financial Services, looking back on developments since mid-2004. The report concludes that significant strides have been made in terms of building European financial integration. Not only were 98% of the actions under the Financial Services Action Plan completed by the deadline, but work also started on the implementation of these measures. In addition, considerable progress has been made in the areas of corporate governance and company law, combating financial crime, accounting and auditing.  Some of the key achievements included in the Progress Report are the approval of the Capital Requirements Directive; the adoption of the Reinsurance and 5th Motor Insurance Directives; the adoption of the Cross-Border Mergers Directive, the 8th Company Law Directive on Statutory Audit and the third Anti-Money Laundering Directive; and the decision to extend the Lamfalussy approach to banking, insurance and investment funds.  Although the Progress Report is primarily a look back at progress made since 2004, it also makes reference to ongoing programmes such as the Commission's proposal for a Directive on a New Legal Framework for Payments, and the Green Papers on investment funds and mortgages published in 2005. These will be the areas where work is expected to continue in the coming years. The Commission's overall strategy for financial services over the next five years was set out in the White Paper on Financial Services Policy (2005-2010), published on 5 December 2005 (IP/05/1529).  The White Paper contains a commitment to publish a detailed report covering progress and developments in the financial services on an annual basis. The next progress report can therefore be expected before the end of 2006.  The full text of the current report is available on the [Europa website](http://europa.eu.int/comm/internal_market/finances/progress-report/index_en.htm" \t "_new).  **1.7 European Commission proposals on exercising shareholder rights**  On 10 January 2006, the European Commission presented a proposal for a Directive to facilitate the cross-border exercise of shareholders' rights in listed companies, through the introduction of minimum standards. The proposed Directive seeks to ensure that shareholders, no matter where in the EU they reside, have timely access to complete information and simple means to exercise certain rights notably voting rights at a distance.  On average, about one third of the share capital of EU listed companies is held by non-residents. Key obstacles to voting faced by non-resident shareholders include share blocking, insufficient or late access to information, and overly burdensome requirements on distance voting.  Two public consultations were launched in September 2004 and May 2005. Respondents to both consultations supported the introduction of minimum standards at EU level for the organisation of General Meetings and the exercise of shareholders rights.   The Commission proposes the following minimum standards which would eliminate the main obstacles in the cross-border voting process and enhance certain other rights of shareholders:   * General Meetings should be convened with at least one month's notice. All relevant information should be available on that date at the latest, and posted on the issuer's website. The meeting notice should contain all necessary information. * Share blocking should be abolished and replaced by a record date which should be set no earlier than 30 days before the meeting. * The right to ask questions should be accessible to non-residents. The maximum shareholding thresholds to benefit from the right to table resolutions should not exceed 5%, in order to open this right to a greater number of shareholders while preserving the good order of general meetings. * Proxy voting should not be subject to excessive administrative requirements, nor should it be unduly restricted. Shareholders should have a choice of methods for distance voting. * Voting results should be available to all shareholders and posted on the issuer's website.   **1.8 Statement of the SEC concerning financial penalties against corporations**  On 4 January 2006, the US Securities and Exchange Commission (SEC) issued a statement concerning financial penalties. Following is an extract from the statement.  The Commission's view of the appropriateness of a penalty on the corporation in a particular case, as distinct from the individuals who commit a securities law violation, turns principally on two considerations:  **The presence or absence of a direct benefit to the corporation as a result of the violation.** The fact that a corporation itself has received a direct and material benefit from the offence, for example through reduced expenses or increased revenues, weighs in support of the imposition of a corporate penalty. If the corporation is in any other way unjustly enriched, this similarly weighs in support of the imposition of a corporate penalty. Within this parameter, the strongest case for the imposition of a corporate penalty is one in which the shareholders of the corporation have received an improper benefit as a result of the violation; the weakest case is one in which the current shareholders of the corporation are the principal victims of the securities law violation.  **The degree to which the penalty will recompense or further harm the injured shareholders.** Because the protection of innocent investors is a principal objective of the securities laws, the imposition of a penalty on the corporation itself carries with it the risk that shareholders who are innocent of the violation will nonetheless bear the burden of the penalty. In some cases, however, the penalty itself may be used as a source of funds to recompense the injury suffered by victims of the securities law violations. The presence of an opportunity to use the penalty as a meaningful source of compensation to injured shareholders is a factor in support of its imposition. The likelihood a corporate penalty will unfairly injure investors, the corporation, or third parties weighs against its use as a sanction.  In addition to these two principal considerations, there are several additional factors that are properly considered in determining whether to impose a penalty on the corporation. These are:  **The need to deter the particular type of offence.** The likelihood that a corporate penalty will serve as a strong deterrent to others similarly situated weighs in favour of the imposition of a corporate penalty. Conversely, the prevalence of unique circumstances that render the particular offence unlikely to be repeated in other contexts is a factor weighing against the need for a penalty on the corporation rather than on the responsible individuals.  **The extent of the injury to innocent parties.** The egregiousness of the harm done, the number of investors injured, and the extent of societal harm if the corporation's infliction of such injury on innocent parties goes unpunished, are significant determinants of the propriety of a corporate penalty.  **Whether complicity in the violation is widespread throughout the corporation.** The more pervasive the participation in the offence by responsible persons within the corporation, the more appropriate is the use of a corporate penalty. Conversely, within this parameter, isolated conduct by only a few individuals would tend not to support the imposition of a corporate penalty. Whether the corporation has replaced those persons responsible for the violation will also be considered in weighing this factor.  **The level of intent on the part of the perpetrators.** Within this parameter, the imposition of a corporate penalty is most appropriate in egregious circumstances, where the culpability and fraudulent intent of the perpetrators are manifest. A corporate penalty is less likely to be imposed if the violation is not the result of deliberate, intentionally fraudulent conduct.  **The degree of difficulty in detecting the particular type of offence.** Because offences that are particularly difficult to detect call for an especially high level of deterrence, this factor weighs in support of the imposition of a corporate penalty.  **Presence or lack of remedial steps by the corporation.** Because the aim of the securities laws is to protect investors, the prevention of future harm, as well as the punishment of past offences, is a high priority. The Commission's decisions in particular cases are intended to encourage the management of corporations accused of securities law violations to do everything within their power to take remedial steps, from the first moment that the violation is brought to their attention. Exemplary conduct by management in this respect weighs against the use of a corporate penalty; failure of management to take remedial steps is a factor supporting the imposition of a corporate penalty.  **Extent of cooperation with Commission and other law enforcement.** Effective compliance with the securities laws depends upon vigilant supervision, monitoring, and reporting of violations. When securities law violations are discovered, it is incumbent upon management to report them to the Commission and to other appropriate law enforcement authorities. The degree to which a corporation has self reported an offence, or otherwise cooperated with the investigation and remediation of the offence, is a factor that the Commission will consider in determining the propriety of a corporate penalty.  This framework for the consideration of the propriety of corporate penalties is grounded in the Commission's statutory authority and supported by the legislative history underlying that authority. It is the Commission's intent that the elucidation of these principles will provide a high degree of transparency to its decisions in these and future cases, and will be of assistance to the Commission's professional staff, to corporate issuers and their counsel, and to the public.  **1.9 Securities fraud class actions in the US declining**  A report released on 3 January 2006 by the Stanford Law School Securities Class Action Clearinghouse in cooperation with Cornerstone Research finds the number of securities fraud class actions filed in the US in 2005 decreased more than 17 percent compared to 2004 levels, falling from 213 filings to 176. The 2005 filing rate is nearly 10 percent below the 1996 - 2004 historic average of 195.  Significantly, the study also finds that investor losses related to these lawsuits decreased dramatically in 2005. The Clearinghouse's Disclosure Dollar Loss Index (DDL Index™) measures the decline in the defendant firm's market capitalization at the end of the class period (usually the time of the disclosure of the alleged fraud).  The DDL decreased 33 percent, from US$147 billion in 2004 to US$99 billion in 2005. Compared to 2001 and 2002, the DDL was off by more than 49 percent and 51 percent, respectively.  Lawsuits filed in 2005 also tended to allege misrepresentations in financial reporting and false forward-looking statements more frequently than in the past. The percentage of filings alleging misrepresentations in financial documents increased from 78 percent in 2004 to 89 percent in 2005, and the percentage of filings alleging false forward looking statements increased from 67 percent in 2004 to 82 percent in 2005. The percentage of filings alleging GAAP violations and insider trading remained relatively stable.  As for filings by industry, the study found that the technology and communications sectors - with filings down more than 32 percent from 2004 levels and 36 percent from historic averages - were no longer the major driver of securities fraud litigation in 2005. Instead, the consumer non-cyclical sector (e.g., biotechnology, commercial services, cosmetics/personal care, food, healthcare-products, healthcare-services pharmaceuticals, etc.) now gives rise to the most litigation.  The full text of the 2005 report can be found on the [Clearinghouse website](http://securities.stanford.edu/" \t "_new).  **1.10 Joint Forum issues consultation papers on high-level business continuity principles**  On 20 December 2005, the Joint Forum released for consultation a paper entitled High-level principles for business continuity which was developed in response to a request from the Financial Stability Forum. The objective of this initiative is to support international standard setting organisations and national authorities in their efforts to improve the resilience of financial systems to major operational disruptions.  The paper promotes a common base level of resilience across national boundaries by establishing a consistent context for the development of business continuity arrangements. It provides authorities with a broad framework for developing business continuity arrangements that are more closely tailored to their unique sectoral and local circumstances. The high-level principles in the paper are directed at both financial industry participants and financial authorities globally.  The Joint Forum is comprised of the Basel Committee on Banking Supervision, the International Organisation of Securities Commissions and the International Association of Insurance Supervisors.  The paper is available on the following websites:  Bank for International Settlements: [http://www.bis.org](http://www.bis.org" \t "_new) IOSCO: [http://www.iosco.org](http://www.iosco.org" \t "_new) IAIS: [http://www.iaisweb.org](http://www.iaisweb.org" \t "_new)  **1.11 NACD Commission report on director liability**  On 6 December 2005, a Blue Ribbon Commission convened by the US National Association of Corporate Directors (NACD) issued a report that provides board members with a guide to their potential sources of director liability under US federal and state law, as well as the protections against them. The report also recommends specific practices that directors and management can adopt in order to overcome undue risk aversion and engage strategically beyond the limits of compliance.   Entitled "Report of the NACD Blue Ribbon Commission on Director Liability: Myths, Realities, and Prevention", the report demonstrates how board members can wield powers of oversight with a clear understanding of both the opportunities and personal liabilities in doing so. Specifically, the report:   * clarifies the sources of potential personal liability for directors, and the protections against them, under both federal and state law; * analyzes the role of directors and their relationship with management; and * outlines best practices for directors to become more effective in their jobs, including: how to determine when and if the board should be involved in an issue; managing information flow to the board; and developing board structures that create independent perspective.   Copies of the report are available for a fee from the [NACD website](http://www.nacdonline.org/" \t "_new).  **1.12 Boards and corporate responsibility**  A new UK report provides guidance for effective board action on corporate responsibility. The report is titled "Rewarding Virtue - Effective Board Action and Corporate Responsibility". It is the result of an inquiry by Business in the Community, the FTSE Group and Insight Investment.  The report recommends boards:   * Set values and standards for the business. Be clear about the terms of the corporate responsibility contract, set explicit standards and values for the business. * Think strategically about corporate responsibility in the context of market pressures. Understand the problems in the markets, and design a business model that avoids them. * Be constructive about regulation, delivering self-regulation and supporting government intervention to correct market failure. * Align performance management, rewarding responsible success over the long-term. Reward responsible success over the long-term, and not just meet financial targets over the short-term. * Create a culture of integrity, setting the right tone at the top and cultivating the right values in the corporate culture. * Use internal control to secure responsibility, safeguarding standards with robust audit and control systems.   The report is available at: [http://www.insightinvestment.com/responsibility/rewardingvirtue.asp](http://www.insightinvestment.com/responsibility/rewardingvirtue.asp" \t "_new) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC provides guidance on compliance with FSR refinements regulations**  On 23 January 2005, ASIC provided guidance to financial service providers about compliance with regulations made on 15 December 2005. The regulations implement the Australian Government's Refinements to Financial Services Regulation proposals paper issued in May 2005.  **(a) ASIC's approach**  ASIC will take into account the spirit and intent of the new regulations in administering them and determining whether entities are complying with their obligations. ASIC will be guided by the Explanatory Statement to the regulations and related information package, and the original proposals paper, Refinements to Financial Services Regulation (May 2005).  The regulations make significant changes to the FSR framework. ASIC recognises that industry may need time to properly adjust to these changes. In administering the law, ASIC will adopt a reasonable and pragmatic approach to compliance with the new requirements during the initial settling in period.  This general position is subject to circumstances where the conduct is, or is likely to:   * materially harm or disadvantage consumers; and/or * undermine the confident and informed participation of consumers in the financial market.   **(b) Expectations of industry**  ASIC expects financial service providers to follow the spirit and substance of the new regulations, particularly where there might be some uncertainty as to how a regulation applies. Financial service providers should act fairly, especially where their conduct involves retail clients.  **(c) Breach notification**  ASIC expects Australian financial services licensees (AFS licensees) to continue to identify breaches, or likely breaches of the new regulations, to consider carefully whether they are significant, and if so, provide timely notification to ASIC. For more information, see Breach reporting by AFS licensees - An ASIC guide (October 2004).  **(d) ASIC publications**  ASIC is currently reviewing its publications and instruments of relief to determine what, if any, amendments need to be made as a result of the new regulations. ASIC will provide more information on this review in coming months.  For further information about the regulations, including the proposals paper and information package is available on the [Treasury website](http://www.treasury.gov.au/home.asp?ContentID=521" \t "_new) and the [Comlaw website](http://www.comlaw.gov.au/" \t "_new).  **2.2 AIFRS transition**  On 20 January 2005, the Australian Securities and Investments Commission (ASIC) released the findings of ASIC's latest review of financial report disclosures made by listed entities explaining the impact of adopting the Australian equivalents to International Financial Reporting Standards (AIFRS).  AIFRS apply for financial reporting periods beginning on or after 1 January 2005.  ASIC reviewed the disclosures made in financial reports by over 1250 listed entities with balance dates between 30 June 2005 and 31 July 2005.  All entities reviewed had successfully provided the required disclosure under AASB 1047 'Disclosing the Impacts of Adopting Australian Equivalents to International Financial Reporting Standards' by providing a narrative explanation of the key differences in accounting policies they expected to arise as a result of adopting AIFRS.  ASIC found only 19 entities of the 1250 reviewed concluded there would be no material impact arising from adopting AIFRS so did not list key differences.  The ASIC review also found that, in most cases, entities had been able to quantify or disclose the financial impact of the adoption of AIFRS in their financial reports. About 700 of the entities provided disclosure of the quantitative impact for each of the key differences. A further 480 entities had quantified some of the key differences they identified.  Of the 700 entities, 170 had chosen to apply the first time adoption exemption available to defer the date of transition of AIFRS relating to financial instruments to 1 July 2005, recognising that the new standards applying to financial instruments are a significant challenge.  While the overall result of the review was very positive, ASIC also noted 50 entities had not quantified the impact of any of the key differences they had identified. A further 20 entities had not finalised their determination of the impact of the key differences.  **Background**  In July 2002 the Financial Reporting Council (FRC), the oversight body for the independent standard setter, to the Australian Accounting Standards Board (AASB), issued a broad strategic direction that Australia would adopt international accounting standards by 1 January 2005.  Companies and entities required to prepare financial reports under the requirements of Chapter 2M of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) are required to comply with AIFRS for reporting periods beginning on or after 1 January 2005.  Entities with 30 June year ends will publish their first AIFRS financial reports for the half-year ended 31 December 2005 and for the year ended 30 June 2006.  Australian Accounting Standard AASB 1047, 'Disclosing the Impacts of Adopting Australian Equivalents to International Financial Reporting Standards' requires entities to explain how the transition to the AIFRS is being managed and a narrative explanation of the key differences in accounting policies that are expected to arise from adoption of AIFRS.  ASIC outlined its views about the nature and extent of disclosures required by AASB 1047 in Information Release [IR 05-16] ASIC Guidance on disclosing the impact of AIFRS for full-year financial reports (26 April 2005). ASIC believes that, in most cases, entities would have been able to quantify AIFRS impacts in their 30 June 2005 full year financial reports.  A copy of ASIC's report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.3 ASIC reissues practice note on fees for relief applications**  On 13 January 2005, the Australian Securities and Investments Commission (ASIC) released an update on its practice note concerning fees for financial services providers seeking relief on 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).  Released under Practice Note 58 - How ASIC charges fees for relief applications [PN 58], the changes reflect legislative developments since the practice note was originally issued.  A copy of [PN 58] is available from [ASIC's website](http://www.asic.gov.au/asic/asic.nsf" \t "_new) or from ASIC Infoline by calling 1300 300 630.  **2.4 ASIC provides guidance on superannuation advice to employers**  On 22 December 2005, the Australian Securities and Investments Commission (ASIC) provided guidance to corporate superannuation advisers to assist them in complying with their obligations as Australian Financial Services (AFS) licensees when providing advice to employers.  The guidance, which takes the form of a frequently asked question (QFS 160), responds to industry requests for guidance. It clarifies that all employers, regardless of their size or sophistication, must be treated as 'retail clients' when giving advice about superannuation.  The introduction of super choice on July 1, 2005 and Australian Prudential Regulation Authority (APRA) licensing requirements have contributed to the need for employers to seek advice on superannuation.  This advice may be about who to nominate as a 'default fund' under Choice fund; whether or not to wind up their corporate superannuation fund, and if so whether to transfer member benefits into a larger superannuation fund or master trust; and what level of superannuation benefits to include in their remuneration packages for employees.  When advising employers about these issues, advisers may take into account:   * the number of employees; * the employer's overall human resources strategy; * manual or non manual occupation of employees; * insurance arrangements; and * any industry award relevant to the employer.   If advisers take these circumstances into account, then the advice is considered personal financial product advice. In this case, advisers will require the appropriate license authorisation and will have to give the employer a Statement of Advice.  ASIC is currently conducting nation-wide surveillances to monitor the advice that superannuation trustees, licensed advisers, and tender consultants, give employers when they seek information about superannuation.  QFS 160 is available on the [ASIC website](http://www.asic.gov.au/fsrfaq" \t "_new).  **2.5 ASIC relief facilitates pricing discretions by responsible entities**  On 22 December 2005, ASIC issued a class order which permits the exercise of discretion by responsible entities of registered managed investment schemes (registered schemes) when making pricing decisions.  The new class order relief is contained in Class Order [CO 05/1236], which varies Class Order [CO 05/26] Constitutional provisions about the consideration to acquire interests.  The relief allows a scheme constitution to provide a formula or method for determining the issue price and/or withdrawal amount that gives the responsible entity discretion to determine a matter or factor that forms part of the issue price and/or the withdrawal amount. ASIC has executed the class order to ensure that the operation of section 601GA of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) does not unreasonably restrict responsible entities in setting the issue price and/or the withdrawal amount.  Class Order [CO 05/26] modifies the application of section 601GA of the Act to responsible entities of registered schemes. Paragraph 601GA(1)(a) requires the constitution of a registered scheme to make adequate provision for the consideration to acquire an interest in the scheme (issue price). Subsection 601GA(4) provides that, if members have a right to withdraw from the registered scheme, the constitution must specify that right and set out adequate procedures for dealing with withdrawal requests, including the amount (withdrawal amount) to be paid to members withdrawing interests from the scheme.  In ASIC's view, the policy underlying section 601GA requires the issue price or withdrawal amount to be set out in the constitution in a way that enables decisions made on unit prices to be objectively tested. This means the responsible entity or a third party has limited scope for the exercise of discretion in determining the issue price or withdrawal amount.  The relief is effective from the date the class order is recorded on the Federal Register of Legislative Instruments (FRLI) in electronic form. The FRLI may be accessed at [http://www.frli.gov.au](http://www.frli.gov.au" \t "_new). Compliance with the conditions of the relief is not required until 1 May 2006 to allow responsible entities time to review their current practices.  The relief provided in [CO 05/1236] will not affect registered schemes that include fixed issue prices and/or withdrawal amounts in the scheme's constitution.  A copy of Class Order [CO 05/1236] and Class Order [CO 05/26] are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.6 ASIC issues latest report on relief applications from financial service providers**  On 21 December 2005, 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 (May to August 2005), provides an overview of situations where ASIC has exercised, or refuse 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 May 2005 and 31 August 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.  A copy of the report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.7 ASIC releases policy on calculators**  On 20 December 2005, ASIC released its policy on the regulation of generic financial calculators and issued Class Order [CO 05/1122] Relief for providers of generic calculators, to give effect to the policy. Generic financial calculators are tools that make numerical calculations relating to financial products, but that do not advertise or promote a specific financial product. Generally these tools allow consumers to input various facts to calculate the estimated value of total superannuation, savings or investments or the level of contributions required to reach a particular goal.  ASIC's relief will ease the licensing, conduct and disclosure requirements for providers of generic financial calculators and promote the provision of high-quality information to consumers through calculators. This relief means that providers of generic financial calculators will not require an Australian Financial Services (AFS) licence with an advice authorisation or, if already licensed, will not need to meet the conduct and disclosure requirements in Part 7.7 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) subject to certain conditions.  The release of this policy and class order follows extensive consultation with industry bodies. In August 2005, ASIC released a consultation paper, 'Online Calculators', and received a number of submissions in response.  ASIC is still considering its policy regarding other types of calculators such as product-specific calculators (ie calculators that do advertise or promote specific financial products) and risk-profilers. It may be necessary for ASIC to consult further with industry before finalising its policy.  ASIC's policy on the regulation of generic financial calculators is set out in section F of Policy Statement 167 Licensing: discretionary powers [PS 167].  [CO 05/1122] provides licensing or disclosure and conduct relief for providers of financial calculators that meet certain minimum conditions. The relief only applies where:   * the calculator does not advertise or promote a specific financial product; * if the calculator is an electronic facility or device, the calculator enables a person using it to alter the default assumptions applied by the calculator (other than a statutory assumption that reflects a rate or amount of fixed by legislation) and performs a calculation using the changed assumptions; * the default assumptions applied by the calculator are, unless changed by the user, reasonable; * the calculator will display to the user in the ordinary course of its use or have printed on it all of the following:   + a clear and prominent statement about the purpose and limitations of the calculator;   + a clear and prominent explanation of why the default assumptions, including any statutory assumption, are reasonable;   + a clear and prominent explanation of the impact of any significant limitation of the calculator;   + where the calculator estimates an amount payable at a future time—a clear and prominent statement specifying whether or not the estimate takes into account an assumed change in the cost of living between the time of the preparation of the estimate and the future time; and   + a clear and prominent statement to the effect that the calculator is not intended to be relied on for the purposes of making a decision in relation to a financial product and that the user should consider obtaining advice from a financial services licensee before making any financial decisions; * if the calculator is an electronic facility or device—the calculator does not prevent the user from readily printing or electronically storing the estimate; and * the provider keeps a copy of the calculator for 7 years from when it is first made available.   [CO 05/1122] also revokes Class Order [CO 05/611] Relief for providers of superannuation calculators. [CO 05/611] provided licensing or conduct and disclosure relief to providers of generic superannuation calculators. Providers of generic superannuation calculators can now rely on [CO 05/1122].  Copies of the Class Order are available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new).  **2.8 ASIC releases annual EFT code monitoring report**  On 16 December 2005, ASIC released its annual monitoring report on the Electronic Funds Transfer (EFT) Code.  The EFT Code (the code) is a voluntary code however all banks, building societies and credit unions that provide retail EFTPOS and ATM services or telephone or internet banking subscribe to it. The code provides protections for consumers by requiring that key disclosures are made and privacy protections are in place. Importantly, the code sets down the rules for resolving disputes about unauthorised transactions.  The report covers the period 2003 to 2004.  Between 2003 and 2004, 138,775 EFT complaints and 2.5 billion EFT transactions were reported.  The most common source of complaints was again in relation to ATM cash dispensing problems. The majority of these complaints (84 per cent) were resolved in the customers' favour. Overall, 71 per cent of complaints were resolved in favour of the customer.  Since the scope of the code was broadened in 2002 there have been some difficulties associated with data collection and quality. In particular, many institutions are not able to provide data broken down by delivery channel. This has resulted in the delayed production of the current report. ASIC is continuing work with institutions to resolve these issues so that a better understanding of consumer problems and concerns can be obtained.  A copy of the report is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 Amendments to the ASX Market Rules**  On 3 January 2006 amendments to the ASX Market Rules came into effect. These amendments change a participant’s obligations relating to the maintenance and retention of trading records. The trading record amendments are accompanied by a new ASX Market Rule Guidance Note No.33 - Trading Records. The amendments also change the contract specifications of certain grain futures market contracts. |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Panel publishes final guidance on rights issues**  On 10 January 2005, the Takeovers Panel (Panel) released Guidance Note 17 on Rights Issues which provides guidance on the circumstances in which the Panel may consider unacceptable circumstances exist in relation to a rights issue which has the potential to have an effect on control of a company.  Guidance Note 17 follows a draft Guidance Note on rights issues which the Panel released for comment in November 2005 and an Issues Paper on rights issues which the Panel released for comment in July 2005.  Guidance Note 17 is substantially similar to the draft Guidance Note. Guidance Note 17 is available on the [Panel's website](http://www.takeovers.gov.au/display.asp?ContentID=122" \t "_new).  **4.2 Axiom Properties Limited — decision**  On 10 January 2005, the Takeovers Panel (Panel) advised that it had considered the application by Pivot Group Pty Ltd (Pivot), and the application by Saramac Nominees Pty Ltd (Saramac) in relation to the affairs of Axiom Properties Limited (Axiom).  **(a) The applications**  The Pivot application related to a draft Notice of Meeting and Explanatory Memorandum relating to resolutions seeking shareholder approval in respect of two alternative proposals to provide funds to Axiom for its Port Geographe project. One proposal has been put forward by Pivot (the Pivot Proposal) and the other by Saramac (the Saramac Proposal). Pivot alleged the draft Notice of Meeting and Explanatory Memorandum gives rise to unacceptable circumstances because it does not provide Axiom shareholders with:   * sufficient information to enable them to assess the merits of the Pivot Proposal or the Saramac Proposal; and * all information known to Saramac, Pivot and Axiom that is material to the decision on how to vote on the resolutions.   The Saramac application related to an agreement between Axiom and Pivot (the Pivot Agreement) regarding the Pivot Proposal which Saramac alleged:   * contains a "no shop and no talk" provision that constitutes unacceptable circumstances because the Pivot Agreement does not contain an appropriate fiduciary exception allowing Axiom's directors to respond positively to an alternative proposal if the directors consider to do so would be in the best interests of Axiom shareholders, contrary to the policy set out in section 602(a) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Cth) and the Panel's Guidance Note 7 — Lock-up Devices; and * Pivot's actions in relation to the Pivot Agreement (ie enforcing or threatening to enforce the "no shop and no talk" provision) constitute unacceptable circumstances.   The "no shop and no talk" provision in the Pivot Agreement, in summary, seeks to restrict Axiom from negotiating or entering into discussions with third parties in relation to (amongst other things) proposals similar to the Pivot Proposal for the period from entry into the Pivot Agreement until the resolutions to be put to the Axiom shareholders regarding approval of the Pivot Proposal are not passed.  **(b) Background**  **(i) Saramac Proposal**  Pursuant to the Saramac Proposal, Saramac would be entitled to nominate 4 directors to the Axiom Board. Currently that would be a majority.  **(ii) Pivot Proposal**  Pursuant to the Pivot Agreement, Pivot would be entitled to nominate 3 directors to the Axiom Board.  **(iii) The Port Geographe Joint Venture**  Axiom is party to a joint venture (the PGJV) to complete the development of the Port Geographe Canal Project in Busselton, Western Australia.  There are two participants in the PGJV, MacSea Nominees Pty Ltd (MacSea) and Tallwood Nominees Pty Ltd (Tallwood) (a wholly owned subsidiary of Axiom). MacSea has a 60% interest in the PGJV and Tallwood has a 40% interest. Tallwood's 40% interest in the PGJV is Axiom's major asset.  MacSea and Saramac are both owned in equal shares by interests associated with Macquarie Bank Limited and Mr Luke Saraceni.  There are various agreements which constitute and relate to the PGJV between different parties.  **(c) Decision**  The Panel considered that the following give rise to unacceptable circumstances:   * the failure of the draft Notice of Meeting and Explanatory Memorandum to disclose adequately the nature and substance of a potentially material conflict of interest which may arise for the directors of Axiom nominated by Saramac; and * the absence of a "fiduciary exception" as described in the Panel's Guidance Note 7 — Lock-up Devices, from the Pivot Agreement. Such a "fiduciary exception" would allow: * Axiom shareholders to choose between the Pivot and Saramac proposals without the threat of litigation over breach of the Pivot Agreement; * the Axiom directors freely to advise their shareholders as to the two proposals before them; and * Axiom and Saramac to enter an agreement which is as similarly binding on all parties as is the Pivot Agreement.   When making its declaration of unacceptable circumstances in relation to adequacy of disclosure in the draft Notice of Meeting and Explanatory Memorandum, the Panel was mindful that there had been no suggestion that the Saramac nominee directors of Axiom would not fulfil their fiduciary obligations to Axiom shareholders — simply that the potential for conflict of interest clearly exists and had been inadequately disclosed and described.  **(d) Orders**  The Panel made orders requiring Axiom to provide to the Panel a revised draft Notice of Meeting and Explanatory Memorandum addressing those matters the Panel was concerned with for the Panel's approval and restraining Axiom from dispatching the draft Notice of Meeting and Explanatory Memorandum to shareholders until receipt of the Panel's approval.  The Panel also made orders that have the effect of cancelling the "no shop and no talk" provision in the Pivot Agreement and restraining Pivot from seeking, or threatening, to enforce the provisions of, or seeking any damages as a consequence of any alleged breach of, certain provisions of the Pivot Agreement (including the "no shop and no talk" provision) as a consequence of the Axiom directors carrying out their fiduciary duties in making a recommendation between the Pivot and Saramac proposals.  The Panel will publish its reasons for this decision in due course on the [Panel website](http://www.takeovers.gov.au/" \t "_new). |
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