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| **Brief Contents** |
| |  |  |  | | --- | --- | --- | | [**1. Recent Corporate Law and Corporate Governance Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#h1)  [**2. Recent ASIC Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#h2)  [**3. Recent ASX Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#h3)  [**4. Recent Takeovers Panel Developments**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#h4)  [**5. Recent Corporate Law Decisions**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#h5) |  | [**6. Contributions**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#7)  [**7. Subscription**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#8)  [**8. Change of Email Address**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#9)  [**9. Website Version**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#10)  [**10. Copyright**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#11)  [**11. Disclaimer**](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#12) | |
| **Detailed Contents** |
| **[1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm" \l "1)**  [1.1 Study: CEO tenure](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#011) [1.2 NASD Mutual Fund Task Force report on soft dollars and portfolio transaction costs](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#012) [1.3 Corporate governance rating agencies need to lift their game](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#013) [1.4 Survey: fraud in Australia and New Zealand](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#014) [1.5 Study: Australia’s socially responsible companies](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#015) [1.6 US financial regulation: industry changes prompt need to reconsider regulatory structure](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#016) [1.7 Adoption of IFRS – prudential implications](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#017) [1.8 Australian corporate regulation - extension of the referral of corporations power](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#018) [1.9 New guide on rebates and commissions for financial products](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#019) [1.10 Investigation of malpractices in th European investment fund industry](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0110) [1.11 Organisations failing to report on people issues to key stakeholders](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0111) [1.12 New UK corporate governance laws](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0112) [1.13 European Commission proposes to simplify the formation, maintenance and alteration of companies’ capital](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0113) [1.14 European Commission proposes collective board responsibility and more disclosure on transactions, off-balance sheet vehicles and corporate governance](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0114) [1.15 SEC proposes securities offering reform requires registration of hedge fund investment advisers](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0115) [1.16 Report on crimes against business](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0116) [1.17 SEC sanctions KPMG and four auditors for improper professional conduct](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0117) [1.18 SEC proposes IPO allocation reforms](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0118) [1.19 Proposed framework for insurance supervision](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0119) [1.20 European Commission urges Member States to ensure a strong role for independent directors](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0120) [1.21 European Commission sets out guidance on disclosure and shareholder control of directors’ pay](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0121) [1.22 Shareholder meetings: key legal issues](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0122)  **[2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm" \l "2)**  [2.1 Most companies making good progress towards International accounting standards](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#021) [2.2 ASIC releases policy on substantial holdings](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#022) [2.3 ASIC Annual Report 2003-04](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#023) [2.4 ASIC consults on delivery of superannuation product disclosure for investment strategy choice](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#024) [2.5 ASIC issues guidance on managing conflicts for research analysts](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#025)  **[3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm" \l "3)**  [3.1 Amendments to ASX Market Rule 7.10 (Managed Discretionary Accounts)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#031) [3.2 IAS/IFRS and continuous disclosure](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#032)  **[4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm" \l "4)**  [4.1 Takeovers Panel publishes revised guidance note 11: conflicts of interest](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#041) [4.2 Emperor Mines Ltd - Panel declines to make declaration of unacceptable circumstances following review application](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#042) [4.3 Panel releases consultation draft – lock-up devices (revised guidance 7)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#043) [4.4 Australian Leisure & Hospitality Group Limited 03: Panel concludes proceedings](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#044) [4.5 Panel makes declaration of unacceptable circumstances and order: Skywest limited 04](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#045)  **[5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm" \l "5)**  [5.1 Mutual claims involving an insolvent company must be set-off](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#051) [5.2 Use of members’ information obtained from company registers](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#052) [5.3 It's settled: Part 2F.1A applies to a company in liquidation](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#053)  [5.4 More fun with litigation funding](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#054) [5.5 Use of the "no reasonable suspicion of insolvency" defence to a preference claim](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#055) [5.6 Contracting prior to registration](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#056) [5.7 The appointment of a liquidator on just and equitable grounds](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#057) [5.8 No abuse of process where criminal proceedings brought following civil prosecution](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#058) [5.9 Court's refusal to order the convening of a members meeting because of the invalidity of the initial request made to directors](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#059) [5.10 The privilege against self-incrimination in the context of interrogatories](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0510) [5.11 Directors’ belief about insolvency when resolving to appoint an administrator](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2087.htm#0511) |
| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Study: CEO tenure**  Although the rate of CEO turnover in Australia declined in the past year, local CEOs are more likely to leave their jobs because of poor performance than their global counterparts, according to a study by international management consulting firm Booz Allen Hamilton and the Business Council of Australia published on 23 November 2004.  The study also found that overall CEO turnover in Australia – for reasons of performance, merger activity or normal transition – is still significantly higher than the global average in 2003. In 2003, 14.2% of Australian ASX 200 companies recorded a turnover event, compared to 9.5% for the global average.  The study also found average CEO tenure in Australia remains lower than the global average, while the trend for Boards to appoint replacement CEOs from outside the company is accelerating. ‘Outsiders’ last year made up 57% of new CEO appointments in Australia compared to 40% in 2002.  Booz Allen Hamilton conducted the Australian study – which examined Australia’s top 200 ASX-listed companies – jointly with the Business Council of Australia (BCA), as part of the annual global Booz Allen Hamilton CEO turnover study.  Among key findings of the study:           14.2% of Australian companies replaced their CEOs in 2003, compared to 16.8% the previous year. Globally, overall CEO turnover was 9.5% in 2003 and 10.7% in 2002.          Average tenure of Australian CEOs increased in 2003 to 5.6 years, up from 4.4 years in 2002 but still significantly below the 2003 global average of 7.6 years.          In Australia, outsider CEOs outperformed insider CEOs, as measured by shareholder returns delivered over their full tenure (16.4% returns for outsiders versus 10.0% for insiders).          Utilities were the ‘safest’ sector for Australian CEOs, with no performance-related departures in 2003; other safe sectors were financial services (24% of departures performance-related), materials (25%) and energy (29%). Health care was the riskiest sector for CEOs, with half of all departures related to performance.  To view a copy of the study visit the [BCA website](http://www.bca.com.au/" \t "_new).  **1.2 NASD Mutual Fund Task Force report on soft dollars and portfolio transaction costs**  On 17 November 2004 the United States National Association of Securities Dealers (NASD), submitted the first set of recommendations by its recently appointed Mutual Fund Task Force to the US Securities and Exchange Commission.  The Report of the Mutual Fund Task Force on Soft Dollars and Portfolio Transaction Costs represents the conclusion of the first phase of the task force’s work. Among its recommendations are:           Narrowing the types of research services that may be obtained with soft dollars;           Expanding the disclosure in fund prospectuses about soft dollar practices and portfolio transaction costs;           Providing more explicit guidance about the types of information that fund boards should receive about soft dollar practices and portfolio transaction costs; and            Considering soft dollar issues raised by other managed advisory accounts, such as hedge funds.  The second phase of the task force’s assignment, which will focus on mutual fund distribution arrangements, is expected to take several months to complete.   The report is available at the [NASD website](http://www.nasd.com/" \t "_new).  **1.3 Corporate governance rating agencies need to lift their game**  Seventy-seven per cent of corporate governance professionals in Australia’s listed public companies believe that corporate governance rating agencies’ assessments of companies are not accurate and that the methodologies they use lack rigour and transparency.  According to a Chartered Secretaries Australia (CSA) survey published on 16 November 2004, there is a tremendous amount of concern about how the governance rating agencies collect and assess data. As a result, reports are being prepared and published on limited information, incorrect assumptions and with little or no verification from the companies which were being assessed.  In fact, only 26 per cent of respondents said that they were consulted on the facts of the report prior to it being published, and then only briefly (75 per cent of that 26 per cent).  According to CSA’s National President, Ms Sue Crook, there is no doubt that stakeholders do value rating agencies’ assessments of how a company is performing in terms of corporate governance. “However, these reports would be far more valuable if they accurately reflected a company’s corporate governance practices and procedures”. “At the moment we have arbitrary standards, little opportunity for comment and virtually no opportunity to access a report unless you are a subscriber”. “Rating agencies should be encouraged to develop and adopt consistent and robust methodologies to capture data accurately and consistently as well as put appropriate consultative processes in place to verify data and rectify any errors or inaccuracies,” Ms Crook says.  One hundred per cent of respondents would like to be consulted before the release of any report. Respondents claim that they should have an opportunity to rectify any misinterpretations before information is made public as it is almost impossible to correct any misconceptions once a report has been published.  The survey also found that 65 per cent of respondents have taken steps to correct any inaccuracies or misunderstandings, with most advising the agency of their company’s views on errors and inaccuracies either by letter, telephone or face to face.  Yet, despite the inaccuracies, 64 per cent of those surveyed believe that the reports provide useful information to subscribers, while 36 per cent think they are just a box-ticking exercise.  **1.4 Survey: fraud in Australia and New Zealand  (a) Overview**  Organisations in Australia and New Zealand lost in excess of $456 million to fraud during the period April 2002 to March 2004 according to KPMG’s 2004 Fraud Survey released on 8 November 2004.  A total of 27,657 incidents of fraud were reported by 221 organisations.  Despite organisations experiencing at least one fraud losing an average of $2.07 million, only seven percent of the 491 respondents believe that fraud is a major problem for their organisation. This is down from the 17 percent who felt that fraud was a major problem for their own organisation in the 2002 survey.  Of the seven incidents of financial statement fraud reported, three were nominated by the respondents as the largest single fraud incident in the survey period. The amount of the financial statement fraud across the seven cases reported varied from $1,500 to $10 million per incident.  While the typical fraudster was motivated by greed in 38 percent of cases, followed by gambling (21 percent), perpetrators of financial statement fraud were driven by other factors such as the desire to retain employment, qualify for bonuses linked to performance, cover up information that would show the business in a bad light or meet market expectations.  The major factor allowing fraud to occur was the overriding of internal control or poor internal controls generally. These two factors combined represent the most important pre-condition for fraud to occur being cited in 43 percent of the major cases.  **(b) Survey highlights**           78 percent of the major fraud cases reported accounting for 71 percent of the total value of loss was instigated by people within the organisation.          In 75 percent of the internal major cases reported, the perpetrator acted alone.          Corrupt conduct involving the payment of kickbacks in connection with the procurement process accounted for the highest average loss of $2.2 million within the major cases reported.          The most common type of major fraud reported was a misappropriation of funds with 39 individual cases of this type reported for a total loss of $15.4 million (an average loss of $395,000 per incident).           The incidence of fraud rises proportionately with the size of the organisation. Only 15 percent of organisations with less 100 employees experienced fraud compared to 48 percent of organisations with 501 to 1,000 employees, 66 percent of organisations with 1,001 to 10,000 people and 100 percent of organisations over 10,000 employees.          In one third of the reported major cases early warning signs were either ignored or not acted upon quickly enough. In some cases where early warning signs were ignored, the frauds continued for up to ten years.          In 44 percent of the major frauds, there was no recovery of the amount stolen. In the cases where funds were recovered, 33 percent of the loss was recovered from insurance.          Only 63 percent of major frauds discovered during the survey period were reported to the police.          An overwhelming 84 percent of respondents agreed or strongly agreed with the proposition that fraud control is a governance issue.          33 percent of organisations experienced unethical behaviour (specifically excluding fraud that was reported elsewhere in the survey) during the survey period. Some of the unethical behaviours reported included: unauthorised use of corporate equipment (16.5 percent), false claims for sick leave (14 percent), disclosure of confidential information (11.8 percent), sexual harassment (11 percent) and operating a business during work hours (9.4 percent).           22 percent of respondents believed that unethical behaviour was driven by a lack of senior management commitment to ethical conduct.  **(c) Profile of the typical fraudster (for the survey period)**           Male aged 31 years acting alone;          Non-management employee of the victim organisation with no known prior dishonesty with a previous employer;          Six years with the organisation and held his current position for four years at the time of detection;           Misappropriated funds to an average value of $337,734 and was motivated by greed;          Detected by a workplace colleague 13 months after the commencement of the fraud; and          The organisation recovered only 21 percent of the proceeds of the fraud.  **(d) About the survey** The findings of the Fraud Survey 2004 were derived from 491 responses received to a survey questionnaire sent in June 2004 to 2164 of Australia and New Zealand largest organisations across public and private sectors. The questionnaire, consisting of 54 questions, sought information about fraud incidents within the respondent’s business operations during the period April 2002 to March 2004.  **1.5 Study: Australia’s socially responsible companies**  On 8 November 2004 RepuTex announced Australia’s and New Zealand’s most socially responsible companies.  As part of its public research program, RepuTex has rated Australia’s Top 100 companies and New Zealand’s Top 20 companies, examining their activities and policies in four areas: Corporate Governance, Environmental Impact, Social Impact and Workplace Practices. Each company received a rating of either AAA (outstanding), AA (high), A (satisfactory), B (low) C (very low) or D (inadequate). The main results are:  **(a) Australia**  Top 10 companies: AAA: Westpac (the only company to receive AAA); AA: (in alphabetical order) Australian Postal Corp, BHP Billiton, Energex, Hewlett-Packard Australia, IBM Australia, Insurance Australia Group, National Australia Bank, Queensland Rail, Visy Industries.           Just over half the companies (51) were satisfactory or better (ie. A, AA or AAA), 42 were rated low or very low (ie. B or C) (7 companies were not rated due to insufficient information available and given I/A)           Corporate Governance: 76 companies satisfactory or better, 19 low (5 received I/A)           Environmental Impact: 21 companies satisfactory or better, 78 low, very low or inadequate (1 received I/A)           Workplace Practices: 29 companies satisfactory or better, 57 low, very low or inadequate (14 received I/A)           Social Impact: 54 companies satisfactory or better, 37 low or very low (9 received I/A)  **(b) New Zealand**  Top 5 companies: AA - The Warehouse Group; A+ (in alphabetical order) Carter Holt Harvey, Telecom Corporation of NZ; A (in alphabetical order) ACC NZ, New Zealand Post.           7 companies were satisfactory or better (ie. A, AA or AAA), 12 were low or very low (ie. B or C) (1 company was not rated due to insufficient information available and given I/A);           Environmental Impact: 7 companies satisfactory or better, 13 low, very low or inadequate;           Corporate Governance: 12 companies satisfactory or better, 8 low;           Workplace Practices: 7 companies satisfactory or better, 9 low, very low or inadequate (4 received I/A); and           Social Impact: 7 companies satisfactory or better, 8 low or very low (5 received I/A).  **1.6 US financial regulation: industry changes prompt need to reconsider regulatory structure**  On 8 November 2004, the US Government Accountability Office (GAO) released a report titled “Financial Regulation: Industry Changes Prompt Need to Reconsider US Regulatory Structure”.  In light of the passage of the 1999 Gramm-Leach-Bliley Act and increased competition within the financial services industry at home and abroad, GAO was asked to report on the current state of the U.S. financial services regulatory structure. This report describes the changes to the financial services industry, focusing on banking, securities, futures, and insurance; the structure of the U.S. and other regulatory systems; changes in regulatory and supervisory approaches; efforts to foster communication and cooperation among U.S. and other regulators; and the strengths and weaknesses of the current regulatory structure.  The financial services industry has changed significantly over the last several decades. Firms are now generally fewer and larger, provide more and varied services, offer similar products, and operate in increasingly global markets. These developments have both benefits and risks, both for individual institutions and for the regulatory system as a whole. Actions that are being taken to harmonize regulations across countries, especially the Basel Accords and European Union Financial Services Action Plan, are also affecting U.S. firms and regulators.  While the financial services industry and the international regulatory framework have changed, the regulatory structure for overseeing the U.S. financial services industry has not. Specialized regulators still oversee separate functions--banking, securities, futures, and insurance--and while some regulators do oversee complex institutions at the holding company level, they generally rely on functional regulators for information about the activities of subsidiaries. In addition, no one agency or mechanism looks at risks that cross markets or industry segments or at the system and its risks as a whole.  Although a number of proposals for changing the U.S. regulatory system have been put forth, the United States has chosen not to consolidate its regulatory structure. At the same time, some industrial countries--notably the United Kingdom--have consolidated their financial regulatory structures, partly in response to industry changes. Absent fundamental change in the overall regulatory structure, U.S. regulators have initiated some changes in their regulatory approaches. For example, starting with large, complex institutions, bank regulators, in the 1990s, sought to make their supervision more efficient and effective by focusing on the areas of highest risk. And partly in response to changes in European Union requirements, SEC has issued rules to provide consolidated supervision of certain internationally active securities firms on a voluntary basis.  Regulators are also making efforts to communicate in national and multinational forums, but efforts to cooperate have not fully addressed the need to monitor risks across markets, industry segments, and national borders. And from time to time regulators engage in jurisdictional disputes that can distract them from focusing on their primary missions.  GAO found that the U.S. regulatory structure worked well on some levels but not on others. The strength and vitality of the U.S. financial services industry demonstrate that the regulatory structure has not failed. But some have questioned whether a fragmented regulatory system is appropriate in today's environment, particularly with large, complex firms managing their risks on a consolidated basis. While the structure of the agencies alone cannot ensure that regulators achieve their goals--agencies also need the right people, tools, and policies and procedures--it can hinder or facilitate their efforts to provide consistent, comprehensive regulation that protects consumers and enhances the delivery of financial services.  The report is available at: [http://www.gao.gov/new.items/d0561.pdf](http://www.gao.gov/new.items/d0561.pdf" \t "_new)  **1.7 Adoption of IFRS – prudential implications**  The Australian Prudential Regulation Authority (APRA) released on 8 November 2004 an overview paper on the ‘Adoption of International Financial Reporting Standards - prudential implications’ that will assist APRA-regulated institutions in their preparations for IFRS, which come into effect from the first reporting period on or after 1 January 2005. The paper is available at: [http://www.apra.gov.au/.](http://www.apra.gov.au/" \t "_new)  APRA’s Chairman, Dr John Laker, said the paper would aid key decision-makers in APRA-regulated institutions to identify and assess the prudential impact and any associated risks for their entity as a result of implementing IFRS. It will be followed by a series of more detailed discussion papers dealing with key issues.  The paper also provides a qualitative overview of APRA’s approach to IFRS; interim prudential and statistical reporting arrangements; key issues arising from adoption of IFRS and accounting and prudential implications for each key issue; and industry-specific concerns arising from IFRS.  From 1 January 2005, authorised deposit-taking institutions should apply Australian accounting standards current as at 31 December 2004 to the clean sale requirements of Prudential Standard APS 120 and Guidance Note AGN 120.3 in relation to securitisation transactions. This approach will apply until further notice from APRA and also pertain to any extension of these requirements to general insurers as envisaged in APRA’s discussion paper ‘Prudential Supervision of General Insurance - Stage 2 Reforms (November 2003)’.  The treatment of Tier 1 capital covered in APRA’s letter of 5 April 2004, ‘Treatment of Tier 1 Capital Instruments’, is applicable until further notice.  In addition, APRA will use Australian accounting standards current as at 31 December 2004 for assessing Tier 1 instruments until further notice. TheAustralianPrudential Regulation Authority (APRA) is the prudential regulator of the financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry. APRA is funded largely by the industries that it supervises. It was established on 1 July 1998. APRA currently supervises institutions holding approximately $2 trillion in assets for 20 million Australian depositors, policyholders and superannuation fund members.  **1.8 Australian corporate regulation - extension of the referral of corporations power**  On 5 November 2004 the Honourable Chris Pearce MP, Parliamentary Secretary to the Treasurer and Chairman of the Ministerial Council, announced that at a meeting of the Ministerial Council for Corporations held on 5 November, Ministers unanimously endorsed a five year extension to the current references of corporations and related power from the States to the Commonwealth.  The current arrangements commenced in 2001, and were due to expire in 2006. The new agreement extends these arrangements until 2011.  The purpose of addressing this issue now is to ensure a constitutional foundation for regulating Australia’s 1.3 million companies.  Meanwhile, the Standing Committee of Attorneys General is continuing its consideration of possible amendments to the Constitution as an alternative basis for such legislative schemes. The aim of such an amendment would be to provide a sound constitutional basis for ‘co-operative’ schemes, such as the scheme for the regulation of corporations and related matters which existed in the 1990s. Such schemes rely directly on both State and Commonwealth power, and do not involve a referral of power.  The meeting was attended by Ministers representing the Commonwealth, all the States, and the Northern Territory.  **1.9 New guide on rebates and commissions for financial products**  On 4 November 2004 the Financial Planning Association of Australia (FPA) and the Investment and Financial Services Association (IFSA), jointly released a finance industry guide on rebates and related payments.  The Guide forms part of a broader initiative by the two bodies to improve payment and remuneration practices in the financial services industry in Australia. It sets out standard definitions and summarises all of the rebate practices and disclosure requirements at different stages of the advisory and sales process.   The key principles underlying the Guide are:           Consumers should know what discounts they are receiving when paying for advice and/or investments, and which service they relate to. The Guide specifies that only discounts that are passed through to the consumer should be called ‘rebates’; and          Consumers need to be made aware of the revenue received by their adviser and the licensee when the adviser recommends a platform or product. The Guide says that any payment received from a platform or fund manager which is not passed straight through to the consumer should be disclosed as ‘commissions’.  Similar provisions apply to fees paid by a fund manager to a platform / licensee and fees paid by the platform provider to a licensee.  The FPA is engaged in a three phase process to improve the clarity and transparency of payment and remuneration practices in financial planning and to improve client understanding. Phase 1 was completed on 1 August 2004 with release of the Code of Practice on Alternative Remuneration in the Wealth Management Industry. Phase 2 is complete with the adoption of the industry Guide on rebates & related payments and work is well developed on phase 3, the establishment of principles to help members manage areas where potential or perceived conflicts of interest may exist.  The FPA Position Paper on improving payment and remuneration practices in financial planning is available on the [FPA website](http://www.fpa.asn.au/" \t "_new), with the full text of the industry guide on rebates and related payments.  **1.10 Investigation of malpractices in the European investment fund industry**  On 4 November 2004 the Committee of European Securities Regulators (CESR) published a report which sets out the findings of CESR members following their investigations into the possibility of malpractices such as late trading or market timing practices in the European investment fund industry.  CESR members conducted extensive investigations to assess whether malpractices were prevalent in Europe’s investment fund industry, following the US regulatory authorities’ findings in autumn 2003, in which they found evidence of abusive practices in the US mutual fund market. The main conclusion is that there is little evidence of these practices occurring in Europe. However, a key finding of the investigation was that internal processes of the management companies should be improved as this may be a source of potential weakness in the future which could lead to cases of malpractices developing.  In particular, CESR members have taken action to develop supervisory programmes and tools to increase their monitoring of potential cases of malpractice, such as developing programmes geared to identifying samples of transactions to review, which may indicate potential signs of late trading and market timing. Secondly, CESR members have initiated regulatory changes or, in some cases where appropriate, amended processes to reform the functioning of the collective investment management activity to avoid the possibilities of malpractice. Such changes include requirements concerning the internal control mechanisms of fund management companies, and the way in which forward pricing and fair value approaches are used in the valuation of assets of investment funds. A summary of the actions taken by each CESR member following the findings of the investigation are included in the annex of the report.  For further information please go to the [CESR website](http://www.cesr-eu.org/" \t "_new).  **1.11 Organisations failing to report on people issues to key stakeholders**  More than 40 per cent of organisations do not see human capital measurement as a priority for their business and a fifth of large firms never expect to report on it within their annual reports, according to UK research released on 2 November 2004 by Deloitte.  The research, carried out in conjunction with Personnel Today, finds that one year after Denise Kingsmill published the recommendations of the Accounting for People Taskforce, a significant percentage of companies are still not undertaking any measurement of their human capital.  They survey found just 12% of organisations expect to report on human capital in their Operating and Financial Reviews (OFRs).  On a positive note, the overall picture is more encouraging than the previous survey, with more organisations measuring the contribution employees make to the overall organisational performance than two years ago. In addition, the survey shows that the benefits organisations are obtaining from their measurement approaches have generally increased.  Many organisations have made changes that enable them to collate human capital data, including collecting quantitative information and specific activities such as exit interviews and employee surveys.  As with the 2002 survey, there are differing views about the best tool to measure human capital. Deloitte questioned respondents about the five most common techniques and found the most popular approach,  HR benchmarking, is used by 47 per cent of respondents - but owing to limitations associated with each technique, more than a quarter of organisations are using more than one approach.  The study is on the [Deloitte website](http://www.deloitte.com/" \t "_new).  **1.12 New UK corporate governance laws**  On 29 October 2004 the Companies (Audit, Investigations and Community Enterprise) Act received Royal Assent. The Act implements safeguards recommended by post-Enron/WorldCom reviews and creates a new form of company for social enterprise. In particular it strengthens the independent regulation of the UK audit profession and the enforcement of company accounting requirements, both concerns highlighted by the Enron and WorldCom scandals. It gives auditors greater powers to get the information they need to do a proper job, and increases company investigators' powers to uncover misconduct.  The Act aims to improve the reliability of financial reporting and the independence of auditors and auditor regulation in the UK by:           requiring directors to make a statement in the directors' report about the disclosure of relevant information to their auditors;          giving the Government the power to require large and quoted companies to publish details of non-audit services provided by their auditors;          requiring the professional accountancy bodies that supervise auditors to sign up to independent auditing standards, monitoring and disciplinary procedures;          strengthening the role of the Financial Reporting Review Panel (FRRP) in enforcing good accounting and reporting, by giving it new powers to require documents and broadening its scope; and          allowing the Inland Revenue to pass information about suspect accounts to the FRRP.  The Act also strengthens company investigations by:           improving investigators' access to relevant information;           reducing the possibility of delay or obstruction by companies under investigation;          removing a possible deterrent to individuals volunteering information when complaints are vetted for possible investigation; and          introducing more effective sanctions.  The Act also relaxes the current prohibition on companies indemnifying directors against liability and permits companies to pay directors' defence costs as they are incurred. The Act requires disclosure in the directors' report by companies that indemnify directors. Shareholders will also have the right to inspect any indemnification agreement. Companies that do not indemnify directors will not have to make any disclosure.  In addition the Act will create community interest companies (CICs), a new type of company for social enterprises, or businesses that use their profits for the benefit of the local community or the wider public.  CICs will offer the certainty and flexibility of the standard company form, but with a new feature - a legal "lock" to ensure that assets and profits will be used for the community interest, not private gain. CICs will face fewer legal restrictions than charities and will not get charity-style tax breaks. They will be commercial enterprises, competing with other businesses, but for a social aim.  CICs will be:           easy to set up, but subject to an objective and transparent eligibility test;          able to issue shares to raise investment, but the dividends paid on those shares would be capped, to protect the "asset lock";          required to produce annual reports (which will be made publicly available) on how they have pursued their social or community objectives and how they have worked with their stakeholders; and          allowed to transfer assets to other suitable organisations, such as other CICs or charities.  Organisations and individuals will be able to set up CICs from July 2005 onwards.  **1.13 European Commission proposes to simplify the formation, maintenance and alteration of companies’ capital**   On 29 October 2004 the European Commission presented a proposal for a Directive to make it easier for public limited liability companies to take certain measures affecting the size, structure and ownership of their capital. The proposal would amend the parts of the 1976 Second Company Law Directive covering the formation, maintenance and alteration of capital. This proposal is part of the Commission’s Action Plan on Company Law and Corporate Governance, announced in May 2003 and will be submitted for adoption under the 'co-decision' procedure to the EU's Council of Ministers and the European Parliament.  Stakeholders find some aspects of the current legal capital regime under the Second Company Law Directive too inflexible and costly. To remedy this, the new proposal would enable Member States, under certain conditions, to eliminate specific financial reporting requirements and to facilitate specific changes in share ownership. It would also bring into line across the EU the basic elements of legal procedures for creditors when capital is reduced.  Among the changes would be:           limiting the need for an expert valuation of contributions in kind when a company is established or increases capital;           relaxing current rules on the limitation or withdrawal of pre-emption rights, to make the procedure of issuing new shares less burdensome while maintaining shareholders’ protection from dilution of their shareholdings;           partially relaxing the prohibition on companies providing financial assistance for acquisition of their shares by third parties;           introducing “squeeze out”- and “sell out”-rights (i.e. the right of the majority shareholder, under certain conditions, to buy out minority shareholders at a fair price and the complementary right of minority shareholders to compel the majority shareholder to buy their shares); and           introducing a right for the company to acquire its own shares up to the limits of distributable reserves.  These modifications should enable companies to react more promptly and efficiently to market developments. Provision for protecting shareholders’ interests is made inthe proposed amendments.  The full text of the proposal and a working document with further detailed information are available at: [http://europa.eu.int](http://europa.eu.int" \t "_new)  **1.14 European Commission proposes collective board responsibility and more disclosure on transactions, off-balance sheet vehicles and corporate governance**  On 28 October 2004 the European Commission proposed four key revisions of the Accounting Directives to enhance confidence in financial reporting by companies. First, establishing that board members are collectively responsible for financial statements and key non-financial information. Second, making unlisted companies transactions with related parties more transparent. Third, ensuring that all companies provide full information about off-balance sheet arrangements, including Special Purpose Vehicles which may be located offshore. Fourth, making listed companies issue an annual corporate governance statement. The proposals are part of the Commission Company Law Action Plan, published in May 2003.  **(a) Responsibility of board members**  The proposal would confirm that board members of limited liability companies are collectively responsible to the company for the financial and other key information that they publish and that Member States must have appropriate sanctions and liability rules where board members do not comply with accounting rules. This is in line with what currently exists in all Member States. In some, there is debate on going further, so the Commission considers this proposal may be a first step at EU-level.  **(b) Related party transactions**  For listed companies, disclosure requirements on transactions with all related parties such as family members and company managers already exist under International Accounting Standards (IAS). The proposed amendments would extend these to unlisted companies, though the amendments would apply only to significant transactions with related parties not carried out under normal commercial conditions. Member States would be able to exempt small unlisted companies.  **(c) Off-balance sheet arrangements**  Certain financial instruments can involve Special Purpose Entities located offshore that are not captured in the balance sheet. The Commission proposes that all companies - listed or not - should disclose all off-balance sheet arrangements, including their financial impact, in notes to the annual and consolidated accounts.  **(d) Corporate governance statement**  Companies that perform well tend to be well-governed. Investors need transparency on corporate governance to make informed investment decisions. The Commission is proposing that all listed EU companies should provide a corporate governance statement in their annual report. That statement would cover key issues such as whether the company complies with a corporate governance code, information about shareholders meetings and the composition and operation of the board and its committees.  The proposed amendments to the Accounting Directives follow consultations earlier this year. The proposed amendments are available at:  [http://www.europa.eu.int/comm/internal\_market/accounting/board/index\_en.htm](http://www.europa.eu.int/comm/internal_market/accounting/board/index_en.htm" \t "_new)  **1.15 SEC proposes securities offering reform, requires registration of hedge fund investment advisers**  On 26 October 2004 the United States Securities and Exchange Commission took the following actions:  **(a) Proposals regarding securities offering reform**  The Commission voted to propose modifications to the registration, communications, and offering processes under the Securities Act of 1933. The proposals would address communications related to registered securities offerings, delivery of information to investors, and registration and other procedures in the offering and capital formation process.  **(i) Categories of issuers**  In many cases, the amount of flexibility granted to issuers under the proposed revisions to the registration, communications, and offering processes would be contingent on the characteristics of the issuer, including the type of issuer, the issuer's reporting history, and the issuer's equity market capitalization or historical debt issuance. The proposals divide issuers into four categories:           A non-reporting issuer would be an issuer that is not required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act;             An unseasoned issuer would be an issuer that is required to file reports pursuant to Sections 13 or 15(d) of the Exchange Act, but does not satisfy the requirements of Form S-3 or Form F-3 for a primary offering of its securities;            A seasoned issuer would be an issuer that is eligible to use Form S-3 or Form F-3 to register a primary offering of securities; and            A well-known seasoned issuer would be a new class of issuer that is eligible to register a primary offering of its securities on Form S-3 or Form F-3 and has either $700 million of public common equity float or, for limited purposes, has issued $1 billion of registered debt in the preceding three years.  The most significant revisions to the Commission's communications rules and registration processes would apply to well-known seasoned issuers.  **(ii) Liberalising communications around the time of registered offerings**  The proposals would update and liberalise permitted offering activity and communications to allow more information to reach investors by revising the "gun-jumping" provisions under the Securities Act of 1933. The cumulative effect of the proposals under the gun-jumping provisions would be the following:           Well-known seasoned issuers would be permitted to engage at any time in oral and written communications, including use at any time of a new type of written communication called a "free writing prospectus, "subject to enumerated conditions (including, in some cases, filing with the Commission);            All reporting issuers would, at any time, be permitted to continue to publish regularly released factual business information and forward-looking information;            Non-reporting issuers would, at any time, be permitted to continue to publish factual business information that is regularly released to persons other than in their capacity as investors or potential investors;            Communications by issuers more than 30 days before filing a registration statement would not be considered prohibited offers so long as they did not reference a securities offering;            All issuers and other offering participants would be permitted to use a free writing prospectus after the filing of the registration statement, subject to enumerated conditions (including, in some cases, filing with the Commission);            A broader category of routine communications regarding issuers, offerings, and procedural matters, such as communications about the schedule for an offering or about account-opening procedures, would be excluded from the definition of "prospectus";  and          The exemptions for research reports would be expanded.  A number of these new proposals would include conditions of eligibility. Most of the proposals, for example, would not be available to blank check companies, penny stock issuers, or shell companies.  The proposals would address the treatment under the Securities Act of electronic communications, including electronic road shows and information located on or hyperlinked to an issuer's website.  Comments on the proposals should be submitted to the Commission within 75 days following publication in the Federal Register.  The full text of the detailed release concerning these proposals is posted on the [SEC website](http://www.sec.gov/" \t "_new).  **(b) Registration under the Advisers Act of certain hedge fund advisers**  The Commission voted to adopt new Rule 203(b)(3)-2 that will require hedge fund advisers to register with the Commission under the Investment Advisers Act of 1940 by 1 February 2006. The Commission also adopted related rule amendments.  The rule is the culmination of an initiative to study hedge funds and their advisers that commenced over two years ago. Registration under the new rule will permit the Commission to:           collect important information about the operations of hedge fund advisers, which represent a significant and growing component of the U.S. financial system;            conduct examinations of hedge fund advisers. Examinations permit the SEC to identify compliance problems at an early stage, identify practices that may be harmful to investors and provide a deterrent to unlawful conduct;            require all hedge fund advisers to adopt basic compliance controls to prevent violation of the federal securities laws;            improve disclosures made to prospective and current hedge fund investors; and            prevent felons or individuals with other serious disciplinary records from managing hedge funds.  The new rule will eliminate the ability of hedge fund advisers to rely on an exemption from adviser registration designed for advisers providing advice only to a small number of clients.  The new rule contains special provisions for advisers located outside the United States designed to limit the extraterritorial application of the Advisers Act to offshore advisers to offshore funds that have U.S. investors.  The compliance date for the new rule will be 1 February 2006.  The full text of the detailed release concerning this rule is available on the [SEC website](http://www.sec.gov/" \t "_new).  **1.16 Report on crimes against business**  On 21 October 2004, the Australian Institute of Criminology (AIC) released a report titled “Crimes Against Business: A Review of Victimisation, Predictors and Prevention”. The following is an extract from the executive summary.  The impact of crime on the business community can be substantial, with offences ranging from traditional business crimes such as burglary and shoplifting, through to internally perpetrated crimes such as employee fraud and theft. However, despite the vast extent of crime and its considerable costs, there has not always been a strong research focus on business crimes. This report attempts to address this issue by reviewing the literature pertaining to the scale of the problem, possible causal explanations, and strategies for prevention.  The review of literature examines studies conducted both in Australia and overseas. First, findings are presented on the nature and extent of business crime, with data relating to victimisation, reporting, and costs. This section includes findings for different types of business crime, as well as an overview of important findings from the AIC study of crimes against small business in Australia conducted in 1999. The report then goes on to consider possible predictors for business crime, from individual and situational perspectives. Finally, there is a focus on the preventative aspect of business crime, first presenting findings from various studies which have reported on business owners' own efforts to fight crime. The paper then details case studies of successful crime prevention strategies, along with guidelines for business.  In the conclusion, the literature review is summarised and a number of relevant recommendations are proposed. It is suggested that:           further research should be conducted to investigate in greater depth the nature and extent of crime against particular types of businesses;           there should be an increased focus in research on repeat victimisation;           recording of crime should be improved and consistently administered;           police should provide an improved response for business complainants and simplify reporting procedures to encourage increased reporting; and           businesses should be encouraged to implement crime prevention measures.  The report is available on the [AIC website](http://www.aic.gov.au/" \t "_new).  **1.17 SEC sanctions KPMG and four auditors for improper professional conduct**  On 20 October 2004, the United States Securities and Exchange Commission (SEC) announced that it had sanctioned KPMG LLP, the national accounting firm based in New York City, two former KPMG partners, and a current partner and senior manager for engaging in improper professional conduct as auditors for Gemstar-TV Guide International, Inc. KPMG and the auditors agreed to settle the action without admitting or denying the SEC's findings. As part of the settlement, KPMG was censured and agreed to pay $10 million to harmed Gemstar shareholders. This represents the largest payment ever made by an accounting firm in an SEC action. The auditors, all of whom are certified public accountants, agreed to suspensions from practicing before the SEC.  The SEC's administrative order finds that from September 1999 through March 2002, the respondents' conduct resulted in repeated audit failures in connection with KPMG's audits of Gemstar's financial statements. The order also finds that the respondents reasonably should have known that Gemstar improperly recognized and reported in its public filings material amounts of licensing and advertising revenue. Gemstar, based in Hollywood, Calif., publishes TV Guide magazine and licenses and sells advertising on an interactive program guide (IPG) for television that enables consumers to navigate through and select television programs.  More information is available on the [SEC website](http://www.sec.gov/" \t "_new).  **1.18 SEC proposes IPO allocation reforms**  On 13 October 2004 the United States Securities and Exchange Commission proposed amendments to Regulation M that would prohibit certain market activities that undermine the integrity and fairness of the offering process, particularly with respect to the allocation of Initial Public Offerings (IPOs). The amendments would also enhance the transparency of underwriters’ aftermarket activities.  Adopted in 1996, Regulation M governs the activities of underwriters, issuers, selling security holders, and others in connection with offerings of securities. Regulation M is designed to prohibit activities that could artificially influence the market for the offered security, including for example, supporting the IPO price by creating the perception of scarcity of IPO stock or creating the perception of aftermarket demand.  The proposed amendments would:           Lengthen the “restricted period” for IPOs beyond the current 5-day period. The restricted period is the time period during which distribution participants must refrain from activity that could stimulate the market for the security in distribution. Under the proposal, the restricted period for an IPO generally would begin when the issuer reaches an understanding with an underwriter to proceed with a distribution;            Require syndicate covering bids, indicating that the underwriter is buying shares to cover its short position, to be publicly disclosed to the market, similar to what is required for stabilizing bids under the current rule;            Prohibit the use of penalty bids, which also can function as an undisclosed form of stabilization. Penalty bids occur when an underwriter reclaims a selling concession from a syndicate member if the offering security is immediately sold by the initial purchaser;            Adopt a new rule under Regulation M that would expressly prohibit certain IPO abuses that occurred in the late 1990’s and in other “hot issue” periods, including conditioning or “tying” an allocation of shares on an agreement by the customer to buy shares in another less desirable (“cold”) offering, or to pay excessive trading commissions on unrelated securities transactions;            Require recordkeeping in connection with the rule’s “de minimis exception,” which excepts inadvertent bids and purchases during the restricted period that total less than 2% of the distributed security’s average daily trading volume (“ADTV”). Frequent reliance on the exception could indicate that a firm’s compliance policies and procedures are inadequate to achieve compliance with Regulation M; and            Update the ADTV value and public float value thresholds (which are used to determine a security’s restricted period and the availability of the exception for actively-traded securities) to reflect the increase in market value since Regulation M’s adoption in 1996.  The comment period for the proposals will end 60 days from the date of publication of the proposed rules in the Federal Register. The full text of the detailed release concerning this proposal is available on the [SEC website](http://www.sec.gov/" \t "_new).  **1.19 Proposed framework for insurance supervision**  The International Association of Insurance Supervisors (IAIS) has released its new framework for insurance supervision, and invited public consultation. The framework underpins the IAIS’s past and future standard-setting activities on insurance supervision and proposes the development of cornerstones for the assessment of insurer solvency, which takes a central position in the framework.  The IAIS paper outlines the proposed IAIS Framework for Insurance Supervision and shows where the financial components of insurance supervision (which include the assessment of insurer solvency) fit within this Framework. A significant current focus for the IAIS is the development, as part of the Framework, of the key elements or ‘‘cornerstones’’ of a common structure and common standards for the assessment of insurer solvency.  A common structure and common standards for the assessment of insurer solvency will address the IAIS’s first objective of improving supervision of the insurance industry for the benefit and protection of policyholders by:  • assisting both industry and the insurance supervisory community in the determination and assessment of the risk and solvency position of insurers, reinsurers and financial groups; • serving to enhance the transparency and comparability of insurers worldwide, to the benefit of consumers, the industry, investors and other interested parties; • supporting a level playing field; • offering further opportunities for international cooperation; • reducing opportunities for unwanted regulatory arbitrage; • increasing public confidence in the insurance sector; • reducing reporting and compliance costs; and • enabling a more effective use of resources by industry and the supervisory community.  The remainder of the paper presents the structure of the IAIS Framework for Insurance Supervision and the proposed future development of the ‘cornerstones’ of a common structure and common standards for the assessment of insurer solvency.  The paper is available on the [IAIS website](http://www.iaisweb.org/" \t "_new).  **1.20 European Commission urges Member States to ensure a strong role for independent directors**  The European Commission has formally invited Member States, through a Commission Recommendation, to reinforce the presence and role of independent non-executive directors on listed companies boards. Protecting shareholders, employees and the public against potential conflicts of interest, by an independent check on management decisions, is particularly important to restore confidence in financial markets after recent scandals.  The non-binding Recommendation concentrates on the role of non-executive or supervisory directors in key areas where executive or managing directors may have conflicts of interest. It includes minimum standards for the qualifications, commitment and independence of non-executive or supervisory directors.  The main principles in the Recommendation are:           The administrative, managerial and supervisory bodies should include overall an appropriate balance of executive/managing and non-executive/supervisory directors so that no individual or small group can dominate decision-making;           Boards should be organised so that a sufficient number of independent non-executive or supervisory directors play an effective role in defining and dealing with potential conflicts of interest. To this end, nomination, remuneration and audit committees should normally be created within the (supervisory) board. The Recommendation defines minimum standards for the creation, composition and role of those committees;           A director is considered independent when free from any business, family or other relationship - with the company, its controlling shareholder or the management - which might jeopardise his or her judgement;           The (supervisory) board should be composed of members who, taken together, have the diversity of knowledge, judgment and experience to properly complete their tasks; and          All directors should devote to their duties the necessary time and attention. When the appointment of a director is proposed, his or her other significant professional commitments should be disclosed.  The Recommendation is addressed to Member States. Since differing approaches to corporate governance are deeply rooted in national traditions, particular care has been taken to provide for maximum flexibility in the ways Member States can apply the principles in the Recommendation. The Recommendation takes account of efforts already made in Member States and aims by identifying best practices to foster convergence on these issues in the EU.  The Commission will closely monitor the application of this Recommendation to identify whether additional measures may be desirable in the medium term.  The full recommendation is at: [http://www.europa.eu.int/comm/internal\_market/company/independence/index\_en.htm](http://www.europa.eu.int/comm/internal_market/company/independence/index_en.htm" \t "_new)  **1.21** **European Commission sets out guidance on disclosure and shareholder control of directors’ pay**  The European Commission has adopted a Recommendation on directors’ remuneration. It recommends that Member States should ensure listed companies disclose their policy on directors’ remuneration and tell shareholders how much individual directors are earning and in what form, and ensure shareholders are given adequate control over these matters and over share-based remuneration schemes.  The non-binding Recommendation invites Member States to adopt measures in four areas:           Remuneration policy: all listed companies should release a statement of their policy on directors’ remuneration for the following year. It should include information on the breakdown of fixed and variable remuneration, on performance criteria and on the parameters for annual bonus schemes or non-cash benefits. It should also explain the company’s contract policy. The company should not have to disclose commercially-sensitive information.           Shareholders meeting: remuneration policy for directors should be on the agenda of the shareholders general meeting. To increase accountability, it should be submitted to a vote which may be either binding or advisory. An advisory vote would require neither directors’ contractual entitlement or remuneration policy to be amended.           Disclosure of the remuneration of individual directors: this should include detailed information about: the remuneration and/or emoluments of individual directors; the shares or rights to share options granted to them; their contribution to supplementary pension schemes; and any loans, advances or guarantees to each director.           Approval of share and share option schemes: variable remuneration schemes under which directors are paid in shares, share options or any other right to acquire shares should be subject to prior approval of the Annual General Meeting of Shareholders. The approval relates to the system of remuneration and the rules applied to establish individual remuneration under the scheme. It would not relate to the individual remuneration of directors.  The recommendation takes due account of efforts already made by several Member States and aims to foster these developments by identifying best practices to ensure greater convergence in the EU. The Commission will closely monitor the application of the Recommendation to identify whether additional measures may be desirable in the medium term.  The full text of the Recommendation is at:  [http://www.europa.eu.int/comm/internal\_market/company/directors-remun/index\_en.htm](http://www.europa.eu.int/comm/internal_market/company/directors-remun/index_en.htm" \t "_new)  **1.22 Shareholder meetings: key legal issues** A new research paper dealing with shareholder meetings is available on the Centre for Corporate Law and Securities Regulation website. The author is John McCombe, Partner, Corrs Chambers Westgarth.   Over recent years shareholder activism has become an increasingly common feature of the corporate landscape.  This paper outlines the principal legislative provisions regulating the calling of general meetings by members and others and associated legislative tools available to shareholders.  It focuses on some related practical issues, including:           the grounds for mounting a legal challenge to proposed resolutions;           applications for extension of the statutory timetable to call and hold meetings under section 249D of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default);          the available avenues to terminate the calling and holding of meetings following the receipt of a section 249D request; and          a possible approach to overcome the ease of reliance on the 100 member rule.  The paper is available at:[http://cclsr.law.unimelb.edu.au/research-papers/index.html](http://cclsr.law.unimelb.edu.au/research-papers/index.html" \t "_new) |
| **2. Recent ASIC Developments** |
| **2.1 Most companies making good progress towards International accounting standards**  On 22 November 2004 the Australian Securities and Investments Commission (ASIC) released the findings of ASIC's review of financial report disclosures explaining progress by listed entities towards the adoption of 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 narrative note disclosures made in the published financial reports of more than 1100 listed entities with 30 June 2004 balance dates.  The review found that while the nature and extent of the disclosures varied, 99 per cent of the entities provided disclosure under AASB 1047 'Disclosing the Impacts of Adopting Australian equivalents to International Financial Reporting Standards'.  The review found that:           95 per cent of the listed entities reviewed disclosed the key differences in accounting policies that arise from the transition or positively stated that they didn't expected any major differences;           in areas selected by ASIC from those where key differences in accounting policy are likely to exist, most entities disclosed these common key differences were relevant to them. These differences included: use of discounted rather than undiscounted cashflows for asset impairment testing; expensing amounts relating to share-based payments; accounting for corporate sponsored defined benefit superannuation plans and reversing past revaluations or capitalised expenses in relation to certain intangible assets; and           almost 10 per cent of entities voluntarily quantified the financial effect of some or all key differences in accounting policy that they had identified and disclosed. Quantification is not required until the 30 June 2005 year-end financial reports.  ASIC has written to the 11 entities that failed to make the necessary disclosure, requiring them to disclose the required information to the Australian Stock Exchange immediately.   While the overall result was positive, ASIC notes that in some areas disclosures could have been more comprehensive, including that:           many entities could have described the management of their specific transition processes in more detail;           many entities could have provided more detail as to the impact of the key differences in accounting policy, eg. that the expected change would lead to an expense, asset etc;           recognising that the transition process involves managing more than just accounting policy impacts, more disclosure on any real business impacts could be given such as on taxation, lending covenants, profit incentive arrangements, future dividend policy, Australian financial service licence financial requirements, prudential capital requirements etc; and           many entities didn't describe the impact on their parent entity financial statements.  June year-end entities will be required to make updated AASB 1047 disclosures in their December half-year reports. ASIC expects more detail on these issues and on progress toward implementation in those reports.  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 IFRS is being managed and a narrative explanation of the key differences in accounting policies that are expected to arise from adoption of AIFRS.  **2.2 ASIC releases policy on substantial holdings**  On 18 November 2004, the Australian Securities and Investments Commission (ASIC) released its revised policy on substantial holdings.   The revised policy reflects legislative amendments to the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) arising from the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) (CLERP 9).  It also incorporates additional explanation of s671B of the Corporations Act 2001 using recent case law. The substantial holdings policy has been added to Policy Statement 159 Takeovers, compulsory acquisitions and substantial holdings [PS 159].   Under s671B of the substantial holding provisions, a person who becomes a five per cent holder, or changes their substantial holding by at least one per cent in a listed company or listed managed investment scheme, is required to lodge a notice disclosing details of the holding with ASIC, usually within two business days.   Failure to comply with these obligations is an offence and may ultimately lead to the securities being vested in ASIC.  This revised policy addresses issues including:           full, rather than minimal or technical disclosure;           net movements in substantial holdings;           time for giving a notice;           documents to accompany a notice; and           joint notices.  The revised policy also discusses Class Order [CO 04/1413], which gives relief to bidders from s671B(4) (Information to be in prescribed form and accompanied by certain documents). The effect of this relief is that substantial holding notices during the offer period do not need to be accompanied by a bidder's statement, offer document and acceptance forms. This relief is consistent with ASIC's position under former National Companies and Securities Commission Policy Statement 110 Substantial Shareholding Notices.  The revised policy replaces Interim Policy Statement 109 Substantial Shareholder Notices, Practice Note 26 Takeovers: Offerors and Substantial Shareholders and NCSC PS 110.  A copy of PS 159 can be obtained from the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.3 ASIC Annual Report 2003-04**  On 17 November 2004 the Australian Securities and Investments Commission (ASIC) Annual Report for 2003-04 was tabled in Federal Parliament.  Highlights of ASIC's report include:           A record $4.1 billion in capital raisings required additional disclosure, court orders or enforceable undertakings were obtained for recoveries, compensation and fines of $101 million, and assets worth $11 million were frozen for investors and creditors.           Financial and corporate laws were kept credible and respected. This saw 28 criminals jailed, 60 illegal schemes shut down and insolvent trading deterred.           Higher and more consistent standards were promoted in the financial services industry under 3,853 new Australian financial services licences.           Business costs were reduced and innovative products assisted through 2,007 ASIC approvals.           Public use of ASIC's services increased with consumer website visits up 37 per cent, database searches up 23 per cent and reports of misconduct up 7 per cent.  Copies of the report may be downloaded from the [ASIC website](http://www.asic.gov.au/" \t "_new).  **2.4 ASIC consults on delivery of superannuation product disclosure for investment strategy choice**  On 11 November 2004 the Australian Securities and Investments Commission (ASIC) invited public comment on its policy proposals about how trustees of superannuation entities deliver product disclosure information about available investment strategies to members.  The proposals will be relevant to all superannuation entities that allow members to choose between different investment strategies, including funds that are commonly known as superannuation master trusts.  The proposals do not relate to the implementation of the [Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78495" \t "default). They deal with product disclosure about investment strategy choice within a superannuation fund, rather than product disclosure about choice of a superannuation fund.  The proposals allow the trustee to deliver the required information in two ways, by either:  a) preparing the information themselves, whether through a PDS or in a supplementary PDS; or b) supplementing their own modified PDS with a PDS prepared by the issuer of the particular product that can be accessed via a specific investment strategy.  The proposed relief relates to both the s1012IA disclosure obligation and to the general disclosure obligations in s1013D and s1013E of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). Until now the superannuation industry has had an extended deadline until 31 December 2004 to comply with their s1012IA obligation under Class Order [CO 03/1097] Deferral of s1012IA. ASIC has extended that deadline until 30 June 2005 to complete the policy development process and to allow time for the superannuation industry to transition. ASIC has selected a new deadline of 30 June 2005 to coincide with the commencement of choice of superannuation fund legislation on 1 July 2005.  However ASIC recognises that change may occur in the superannuation industry during this period. For this reason ASIC is seeking comments about whether the proposed transition timetable is likely to cause significant difficulties.  The policy proposal paper, entitled 'Superannuation: Delivery of product disclosure and investment choice' and the amended Class Order [CO 03/1097] are available from the [ASIC website](http://www.asic.gov.au/" \t "_new) or by calling the ASIC Infoline on 1300 300 630.  **2.5 ASIC issues guidance on managing conflicts for research analysts**  On 3 November 2004 the Australian Securities and Investments Commission (ASIC) published guidance to help research report providers, including research analysts, manage conflicts of interest. This is set out in “[Managing conflicts of interest: An ASIC guide for research report providers](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=managing_conflicts_interest_guide_pdf) (the Guide*)”.*  The Guide supplements Policy Statement 181 Licensing: Managing conflicts of interest [PS181], and is directed at traditional providers of investment product research, often known as research analysts, securities analysts or research houses.  The Guide takes into account other international regulatory developments including the Statement of Principles for Addressing Sell-side Securities Analyst Conflicts of Interest published by the International Organization of Securities Commission (IOSCO).   Copies of the Guide and PS 181 are available from the [ASIC website](http://www.asic.gov.au/" \t "_new) or by calling the ASIC Infoline on 1300 300 630. |
| **3. Recent ASX Developments** |
| **3.1 Amendments to ASX Market Rule 7.10 (Managed Discretionary Accounts)**  ASX Market Rule 7.10 (Managed Discretionary Accounts) was amended on 5 October 2004 to take into account, and avoid unnecessary duplication with, the obligations imposed upon Market Participants under ASIC Class Order 04/194 (the “Class Order”) and ASIC Policy Statement 179 (“PS 179”).  PS 179 and the Class Order provide that, after a transitional period ending on 10 December 2004 (“transitional period”), financial services licensees that provide MDA services must transition (by complying with the conditions and requirements set out in the Class Order) or comply fully with such of the requirements of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) regarding managed investments that apply to such MDA services. During the transitional period, no action relief is extended to licensees who have not transitioned.  The amended Rule 7.10 releases, during the transition period, those Market Participants who have transitioned from compliance with those of the obligations in Rule 7.10 that substantially duplicate requirements of the Class Order. After the transition period, all Market Participants are relieved from those obligations. Participants relieved from those obligations are required, however, to provide ASX with copies of reports they provide to ASIC under the Class Order.  **3.2 IAS/IFRS and continuous disclosure** ASX has published a Companies Update (issued October 2004) that provides guidance for listed entities on their continuous disclosure obligations on the adoption of Australian equivalents to International Financial Reporting Standards (AIFRS). It is a revised edition of a Companies Update issued in January 2004. The Update will be important reading for CFOs and other staff of listed entities involved in financial reporting as well as any person with a role or an interest in continuous disclosure issues or in financial reporting, such as legal and accounting advisers and auditors. A copy of the update is available at the following link:  [http://www.asx.com.au/about/pdf/AIFRSCompaniesUpdateOctober2004.pdf](http://www.asx.com.au/about/pdf/AIFRSCompaniesUpdateOctober2004.pdf" \t "_new) |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Takeovers Panel publishes revised guidance note 11: conflicts of interest**  The Takeovers Panel announced on 5 November 2004 that it has published a revised version of its Guidance Note 11 on Conflicts of Interest. Guidance Note 11 sets out the principles that the Panel and its members apply when assessing potential conflicts of interest which might arise for Panel members when the President of the Panel selects Panel members to sit on proceedings before the Panel, or during those proceedings. The Guidance Note is designed to explain the process the Panel undertakes to ensure that conflicts of interest are appropriately dealt with, that parties are afforded procedural fairness and that the Panel complies with its obligations under the [ASIC Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default).  The Panel took care to point out that each decision before it is decided on the circumstances of each particular case, and that although the Panel’s Guidance Notes are very good guidance, the unpredictability of future issues means that Guidance Notes cannot be relied upon to provide absolute answers for 100% of future cases.  The Panel advised that like some other minor reviews of Guidance Notes, it has not published Guidance Note 11 in a draft form for comment as it considers that the changes that it has made are not substantive and involve no change of policy. Rather the changes are part of the Panel’s planned process of reviewing the currency and consistency of its Guidance Notes. The types of changes which the Panel has made include adding recent matters as examples of the policy issues discussed. The Panel noted that it had reissued Guidance Notes 2 to 6 and 8 to 10 in July this year and Guidance Note 01 on Unacceptable Circumstances in September of this year. Similarly, the Panel considered that those Guidance Notes had received merely updating rather than substantive change and did not publish them as drafts for comment.  While it has not published the document as a draft, the Panel advised that it would, as always, be interested to receive comments on the revised version of Guidance Note 11.  A copy of the revised Guidance Note 11 is available on the [Panel's website](http://www.takeovers.gov.au/" \t "_new).  **4.2 Emperor Mines Ltd - Panel declines to make declaration of unacceptable circumstances following review application**  The Panel announced on 31 October 2004 that it has declined to declare that unacceptable circumstances exist in relation to the affairs of Emperor Mines Limited (Emperor). The decision was made in response to an application by Durban Roodeport Deep, Limited (DRD) for review of the decision made by the Initial Panel made in response to an application by Power Treasure Limited, Phoenix Gold Fund Limited or Floreat Fund Limited (the Original Applicants in the initial Emperor Mines 01 proceedings).  The Panel considering the review application (Review Panel) advised that it had come to a different conclusion from that of the sitting Panel in the Emperor Mines 01 proceeding (Initial Panel). In reaching this conclusion, the Review Panel took into account additional information received in the Emperor Mines 01 Review proceedings.  The initial application related to a 4-for-10 pro-rata, non-renounceable rights issue (Rights Issue) by Emperor and an associated shortfall facility (Shortfall Facility) and underwriting arrangements (Underwriting).  The decision in Emperor Mines 01 was announced on 18 October 2004 by Panel media release TP04/94. A copy of that media release is available from the [Panel's website](http://www.takeovers.gov.au" \t "_new).  **(a) Review application**  DRD requested that the Review Panel change the declaration of unacceptable circumstances made by the Initial Panel and, failing that, undertake a fresh consideration of the orders that might need to be made. However, DRD did not seek to challenge the Initial Panel’s order modifying the shortfall facility. That order is discussed in the Media Release referred to above.  **(b) Additional information**  The Review Panel commenced its proceedings with the body of information which had been submitted to the Initial Panel. However, Panel review proceedings are a fresh hearing of an application i.e. the original application in the Emperor Mines 01 proceedings by the Original Applicants, rather than an appeal from the previous decision. Therefore, a review Panel takes into account all of the circumstances which were before the first Panel and any subsequent changes or new information.  The Review Panel considered the information before it and sought additional submissions on a number of issues in light of the submissions made to the Initial Panel. The Review Panel received submissions primarily on two additional areas. They were:  1. Emperor’s actual financial position (the Initial Panel having accepted Emperor’s submissions as to its financial need); and 2. Developments since the Initial Panel’s proceedings and decision.  **(c) Emperor’s financial position**  The submissions received supported Emperor’s initial submissions that Emperor is currently in need of a significant cash inflow due, amongst other things, to lower ore grades, higher fuel costs, funding requirements for its Phase 2 expansion and repayment of short term facilities. The Review Panel considered that this supported the Initial Panel’s decision to proceed on the basis of that Emperor’s original submissions as to its current need for funds were true.  **(d) Developments**  In their submissions to the Review Panel, the Original Applicants advised that they were each now considering whether or not to take up their rights in respect of the Rights Issue in light of the orders made by the Initial Panel and, in the case of one of the Original Applicants, whether it might participate in any shortfall. The Original Applicants then went on to explain part of their reasons being that if Emperor was not likely to become a 60% subsidiary of DRD trading in its shares would be likely to be more liquid. In the Emperor Mines 01 proceedings, the Original Applicants had advised the Initial Panel that neither Phoenix Fund nor Floreat Fund would be able to take up their entitlement without exceeding the investment restrictions in the rules of the Phoenix Fund and the Floreat Fund respectively.  After the initial submissions to it, the Review Panel wrote back to the Original Applicants asking what their positions might be if the Review Panel did not make any or all of the orders of the Initial Panel. The Original Applicants responded that none of them had made a final decision, nor intended to do so until a later time. They said that the key factors in any reconsideration would be the level of shareholding and control of DRD, the voting freeze, the sell-down, and the terms of the Rights Issue including renounce ability.  **(e) Consideration of the issues**  The Review Panel considered that the fact of the Original Applicants being prepared to reconsider their participation in the Rights Issue meant that one aspect of a lack of equality of opportunity which may have constituted unacceptable circumstances had been removed. If the Original Applicants advised that they were no longer prevented from participating in the Rights Issue because of their investment mandates, as they had advised the Initial Panel, then the case for a lack of equality of opportunity was reduced.  The Review Panel also considered that undertakings offered by Emperor and DRD in the Emperor Mines 01 proceedings relating to the Shortfall Facility, when combined with the new position of the Original Applicants as to subscription for their rights, meant that the Original Applicants now had it within their power to manage the level of control which DRD would have after the Rights Issue. This was especially so given the submission that one of the Original Applicants would reconsider its position on participating in the Shortfall Facility.  In the Initial Panel proceedings, Emperor had offered to undertake to change the Shortfall Facility so that DRD would not participate in the Shortfall Facility until all other Emperor shareholders who wished to participate in the Shortfall Facility had had their subscriptions filled in full. Emperor and DRD renewed that offer in the Review Panel proceedings. The Review Panel considered that it would be possible, if the Original Applicants wished to invest in Emperor to the necessary level, for them to subscribe for sufficient shares in Emperor to keep DRD below 50% of the voting power in Emperor. Indeed, between them, they might keep DRD to its current voting power of 45.3%.  **(f) Investor Info decision**  Both the Initial Panel and the Review Panel considered the list of factors relating to the acceptability or otherwise of rights issues set out in the Investor Info decision. In Investor Info the Panel considered a range of factors which might be relevant to a decision by the Panel in considering whether or not the circumstances surrounding a rights issue constituted unacceptable circumstances. The Panel in Investor Info said that:  “None of these factors is decisive on its own; a decision whether any particular rights issue complies with the policy underlying the Rights Issue Exception and each of the Underwriting Exceptions as they relate to rights issues will depend on assessing each of these factors, as relevant in the particular circumstances, and any other factor which bears on a consideration of whether participation in that rights issue has been made genuinely accessible to shareholders in general, within the limits of the particular company’s position and the constraints set by Chapter 6D. That is, the list is not exhaustive, and the importance of the different factors will alter from rights issue to rights issue (even for the same issuer). “  Both the Initial Panel and the Review Panel looked at the facts before them, applied the factors set out in Investor Info, and any other relevant factors, to those facts and came to their decisions consistent with the Panel’s principles, which are discussed in the Investor Info decision. The facts before the Review Panel were different to those before the Initial Panel and, applying the same principles, the Review Panel has now come to a different decision.  Further information about this decision is available in the Panel’s media release on Emperor Mines at the [Panel's website](http://www.takeovers.gov.au/" \t "_new).  **4.3 Panel releases consultation draft on revised guidance note 7: lock-up devices**  The Takeovers Panel announced on 27 October 2004 that it has published a consultation draft of revised Guidance Note 7 on Lock-up Devices (GN7).  To assist in its review, the Panel invited interested parties to provide feedback in relation to their observations of GN7’s operations and application so far and what aspects (if any) should be modified.  The Panel sought to address the following issues in preparing the revised version of GN7:           The Panel has affirmed its view that lock-up devices are not prima facie unacceptable;          The “1% guideline” in relation to break fees has been retained, with additional guidance as to how concerns regarding competitive neutrality or non-coercion may override the application of the guideline;          There is new focus on the two underlying principles, competitive neutrality and non-coercion, that the Panel applies in considering whether a lock-up device prevents a control transaction from taking place in an efficient, competitive and informed market;          The Panel’s view that the payment of a break fee is not, of itself, unacceptable in circumstances where, for example, shareholders reject the takeover bid or other relevant transaction is re-stated;          There is less focus on costs incurred by parties as a determinative factor in assessing whether a lock-up device is unacceptable – although costs may still be taken into account (for example, when deciding whether it is appropriate to apply the 1% guideline);          A distinction is made between the Panel’s approach to no-talk agreements on the one hand and no-shop agreements on the other; and          The guidance provided in relation to the disclosure obligations of parties to a lock-up device has been revised.  The Panel’s review has been conducted in large part by a sub-committee, and the Panel wishes to thank the sub-committee members: Panel members Simon McKeon, Simon Mordant, Peter Cameron, Peter Scott and Professor Ian Ramsay.  The Panel is also grateful for the input and assistance received from external sub-committee member, David Williamson (Blake Dawson Waldron, Melbourne).  The Panel now seeks input on the revised version of GN7 from interested practitioners and market participants. A copy of the revised version of GN7 is available on the [Panel's website](http://www.takeovers.gov.au/" \t "_new).  **4.4 Australian Leisure & Hospitality Group Limited 03: Panel concludes proceedings**  On 22 October 2004, the Panel announced that it has concluded proceedings in response to an application from CMM Hotel and Retail Investments Pty Ltd (CMM) under section 657C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)in relation to the affairs of Australian Leisure & Hospitality Group Limited (ALH) and the takeover offer by Bruandwo Pty Ltd (Bruandwo) for ALH.  **(a) Summary**  The Panel has advised the parties to the proceedings that it proposes to decline to make a declaration of unacceptable circumstances in relation to Bruandwo’s announcement on the afternoon of Monday 18 October concerning a “conditional increase” to its offer for ALH shares. This is subject to the Panel receiving a number of undertakings in a suitable form which have been offered by Bruandwo. The Panel considered that it is not in the public interest to make such a declaration given that:           ALH shareholders now have adequate time to consider the conditional increase announced by Bruandwo;           Bruandwo has offered an undertaking to give a right of withdrawal to ALH shareholders which had accepted the revised Bruandwo conditional increase bid on the afternoon of Monday 18 October;           Bruandwo has offered an undertaking to make appropriate disclosures in relation to any acceptance facility it establishes; and           Bruandwo has advised that it will clarify certain issues raised by parties and the Panel in these proceedings.  **(b) Background**  On 2 July, Bruandwo acquired a stake of approximately 16% of the ordinary shares in ALH.  On 8 July, Bruandwo announced a conditional takeover bid for all of the ordinary shares in ALH at $2.75 per share.  On 28 September, ALH and Newbridge Capital announced a recommended proposal under which Newbridge Capital would acquire all of the ordinary shares in ALH at $3.05 per share pursuant to a scheme of arrangement. The recommendation was subject to the announcement of a superior offer.  On 30 September, Bruandwo announced an increase in the consideration under its bid to $3.15 per share and the waiver of all conditions to Bruandwo’s bid. ALH’s board announced that it recommended acceptance of Bruandwo’s increased bid (in the absence of a higher offer). The increased offer was scheduled to close at 7.00 p.m.on 18 October.  On 13 October, ALH and CMM announced a recommended proposal under which CMM would acquire all of the ordinary shares in ALH at $3.35 per share pursuant to a scheme of arrangement.  On 15 October, Bruandwo announced that it intended to vote against any scheme of arrangement put to shareholders to give effect to the proposed ALH and CMM merger.  At 2.13 p.m. on 18 October, an announcement by Bruandwo was released to Australian Stock Exchange Ltd. (ASX) (the 18 October Announcement). So far as relevant, the 18 October Announcement stated that:           Bruandwo would let its bid for ALH lapse at 7.00 p.m. on 18 October if Bruandwo did not achieve a relevant interest in ALH in excess of 20% by 6.00 p.m. that day;          Bruandwo would increase its cash offer to $3.40 per ALH share if Bruandwo’s relevant interest in ALH was in excess of 20% by 6.00 p.m. on 18 October;           Bruandwo would increase its cash offer to $3.50 per ALH share if Bruandwo’s relevant interest in ALH was in excess of 20% by 6.00 p.m. on 18 October and if it was in excess of 50% by the closing time for its offer;           the 18 October Announcement did not disclose the automatic extensions to Bruandwo’s bid which would result from either of the above price increases; and           for present purposes, Bruandwo did not expressly reserve its rights to act otherwise than in accordance with any of the above statements in the 18 October announcement.  At approximately 4.00 p.m. on 18 October, the Panel announced that it had received an application alleging unacceptable circumstances in relation to the 18 October announcement.  At approximately 5.30 p.m. on 18 October, the Panel made the interim orders referred to below under the heading ‘Interim Orders’.  On 18 October, CMM made an announcement welcoming the Panel’s interim orders. In that announcement, CMM said that ‘CMM is currently considering its position in relation to the revised Bruandwo offer. It proposes to announce its position before the close of the Bruandwo bid. In the meantime, CMM encourages all ALH shareholders not to accept the Bruandwo bid’.  At approximately 9.30 a.m. on 19 October, Bruandwo released a further announcement to ASX (the 19 October Announcement). So far as relevant, the 19 October Announcement stated that:           Bruandwo would increase its cash offer to $3.40 per ALH share if Bruandwo has received or is satisfied that it will receive sufficient acceptances to increase its relevant interest to in excess of 20% by 6.00 p.m. on 25 October; and           Bruandwo would increase its cash offer to $3.50 per ALH share if Bruandwo’s relevant interest in ALH was in excess of 20% by 6.00 p.m. on 25 October and it subsequently receives or is satisfied that it will receive in excess of 50% by the closing time for its offer.  The 19 October Announcement did not contain any statement as to Bruandwo’s intentions if the ‘20% condition’ in that announcement was not satisfied. In particular, it did not contain a statement that Bruandwo would let its offer lapse.  **(c) Interim orders**  The Panel issued interim orders on 18 October extending Bruandwo’s takeover bid to the later of 7.00 p.m. on 25 October and a time permitted by the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) which is determined by Bruandwo.  The Panel considered that the timing and content of the 18 October Announcement constituted unacceptable circumstances in that the 18 October Announcement was an apparent attempt to ‘stampede’ shareholders into accepting Bruandwo’s bid by providing them with an unreasonably short period of time in which to consider material developments in its bid, and an inadequate explanation of the consequences of accepting the Bruandwo bid. The Panel considered it highly relevant that the circumstances were entirely of Bruandwo’s making.  Although the Panel recognises that a significant number of ALH’s largest shareholders are institutional investors, it is conscious that ALH also has a large number of retail shareholders. Retail shareholders, in particular, would not have had a reasonable opportunity to be aware of the 18 October Announcement, let alone consider how to respond to it, before 6.00 p.m. on 18 October. Accordingly, the Panel was not merely concerned at the ‘stampeding’ aspect of Bruandwo’s behaviour, but also the prospect that both retail and institutional shareholders might not have been aware of the material development in Bruandwo’s offer and denied the opportunity to accept it by reason of the offer lapsing.  The Panel concluded that, prima facie, the timing and content of the 18 October announcement were inconsistent with the principle in section 602(b)(ii) that the holders of shares in a company should have a reasonable time to consider proposals to acquire a substantial interest in the company.  The Panel also had regard to other principles in section 602 and was conscious that parliament had introduced section 624(2) with the specific policy objective that shareholders should not be stampeded into accepting a revised takeover bid.  The President of the Panel appointed Jennifer Seabrook, Professor Ian Ramsay and Elizabeth Alexander AM to constitute the sitting Panel to consider the application.  Further details of the decision are available on the [Panel's website](http://www.takeovers.gov.au/" \t "_new).  **4.5 Panel makes declaration of unacceptable circumstances and order: Skywest limited 04**  On 27 October 2004 the Panel announced that it has made a declaration of unacceptable circumstances and final orders in relation to the off-market takeover bid (the Bid) by CaptiveVision Capital Limited (CaptiveVision) for all of the issued shares in Skywest Limited (Skywest). The proceeding related to an application (the Application) made by Skywest dated 11 October in relation to the Bid.  In the Application, Skywest alleged that unacceptable circumstances had arisen in relation to offers by CaptiveVision to acquire Skywest options over unissued shares in Skywest made to certain Skywest shareholders. Skywest alleged that these offers were made by CaptiveVision for consideration in excess of the “fair value” of the options, and that those offers constituted an inducement to those Skywest shareholder to accept the Bid, which inducement was not offered to all Skywest shareholders.  Skywest sought a declaration of unacceptable circumstances and interim orders requiring CaptiveVision to revoke any unaccepted offers for Skywest options and preventing CaptiveVision from processing any outstanding acceptances of such offers for Skywest options or any outstanding acceptances of the Bid from any Skywest shareholder who received an offer in respect of their options.  Skywest also sought the following final orders:           that the consideration payable by CaptiveVision under the Bid be increased to reflect the maximum excess in value offered over the “fair value” of the Skywest options to certain Skywest shareholders; or          in the alternative, all contracts for the acquisition by CaptiveVision of Skywest options for a value in excess of “fair value” be cancelled and reversed, with each vendor of such options to be given a right to withdraw any acceptance of the Bid.  The declaration and orders sought under the Application did not differentiate between 2005 Options and 2006 Options. However, the supporting material provided by Skywest with the Applications and in its subsequent submissions to the Panel focused largely on transactions and valuation issues relating to the 2005 Options. After consideration of the materials provided to the Panel by the parties, the Panel decided that circumstances relating to the affairs of Skywest were unacceptable and that it was in the public interest to make a declaration of unacceptable circumstances.  The Panel considered that the offers made by CaptiveVision to the 2005 Option Offerees constituted benefits which were not offered to all Skywest shareholders and which were likely to induce the 2005 Option Offerees or their associates to accept CaptiveVision’s offer under the Bid. The Panel considered that these offers by CaptiveVision were unacceptable because they:           were inconsistent with the policy of subsection 602(c) of the Act, which requires that as far as practicable, target shareholders all have a reasonable and equal opportunity to participate in any benefits accruing to target shareholders through a takeover proposal; and          constituted a breach of section 623 of the Act, both of which are matters that the Panel considers to be extremely serious.  The unacceptable circumstances resulting from those offers were not remedied by CaptiveVision’s subsequent actions in seeking to revoke the relevant offers. There remained on foot potential transactions tainted by the activity undertaken in breach of the Act (specifically, acceptances of the Bid by 2005 Option Offerees or their associates).  Further details are available in the Panel’s media release about this matter on the [Panel's website](http://www.takeovers.gov.au/" \t "_new). |
| **5. Recent Corporate Law Decisions** |
| **5.1 Mutual claims involving an insolvent company must be set-off**  (By Natalie Day, Corrs Chambers Westgarth)  Barton v Atlantic 3 Financial (Aust) Pty Ltd [2004] QSC 376, Supreme Court of Queensland, Moynihan J, 3 November 2004  The full text of the judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/november/2004qsc376.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/november/2004qsc376.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Relevant law**  In the recent case of Barton v Atlantic 3 Financial (Aust) Pty Ltd [2004] QSC 376 (“Barton”), the Supreme Court of Queensland considered the meaning of section 553C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), which provides that mutual debts, mutual credits and other mutual dealings between an insolvent company that is being wound up and a person wanting the credit or debt admitted against that company, must be set-off and only the balance is admissible to proof, or is payable by the company, as the case may be.  The court held that if a claim made by an insolvent company being wound up is met with a counter-claim against the insolvent company, the amounts the subject of those claims must be set-off and, for the purposes of the insolvent company assigning its chose of action (namely, its right to bring an action or recover a debt), the insolvent company may only assign that right in respect of the balance of those claims.  **(b) Facts**  Following orders that Atlantic 3 Financial (Aust) Pty Ltd (“Insolvent Company”) be wound up, the Insolvent Company sought to assign to a third party its right to recover an amount of $420,000 (“Claim”) from the Plaintiff in this case (“Barton”).  However, at the time of this purported assignment, Barton had a cross-claim on foot against the Insolvent Company (“Cross-Claim”).  Concerned that the Insolvent Company may be left with insufficient funds to pay the Cross-Claim amount, Barton sought orders from the Queensland Supreme Court that the Claim and Cross-Claim amounts be set-off under section 553C of the Corporations Act and that the Insolvent Company be permitted to assign only the balance of those claims and not the whole Claim amount.  **(c) Issue and other decisions**  The issue which the court had to consider was whether section 553C of the Corporations Act required mutual claims to be set-off automatically (namely, prior to determinations being made by the court) or whether the set-off applied only to those claims that had been determined or otherwise resolved.  The court considered the decision of the High Court in Gyre v MacIntyre (1991) 171 CLR 609, in which it was unanimously held that a provision in the [Bankruptcy Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default) equivalent to section 553C of the Corporations Act, was a “statutory derivative…which operates as at the time bankruptcy takes effect. It produces a balance upon the basis of which the Bankruptcy administration can proceed….The section is self executing in the sense that its operation is automatic and not dependent upon ‘the option of either party’” (at 622).  This reasoning was applied by the House of Lords in Stein v Blake [1996] 1 AC 243 (Stein), in which the plaintiff claimed breach of contract against a defendant who counterclaimed for damages for misrepresentation. The plaintiff was bankrupt prior to the trial and his trustee purported to assign the plaintiff’s chose in action against the defendant to a third party. The House of Lords held that the purpose of the set-off provision was to prevent assignment of choses in action such as that represented by the cross claim and only the balance was capable of assignment.  Like other recent Australian cases that have followed the Stein decision, the court granted the orders sought, being that the Claim amount and the Cross-Claim amount (plus any amounts payable by the Insolvent Company to the Plaintiff in these proceedings) be set-off and the Insolvent Company be permitted to assign only its chose in action against the Plaintiff in respect of the balance of those amounts.  **5.2 Use of members’ information obtained from company registers**  (By Jeremy McCarthy and Lisa Struthers, Corrs Chambers Westgarth)  IMF (Australia) Ltd v Sons of Gwalia Ltd (Administrator Appointed) ACN 008 994 287, [2004] FCA 1390, Federal Court of Australia, French J, 1 November 2004  The full text of the judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1390.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1390.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case considers the restriction imposed by section 177 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act) on the use of information obtained from company registers. The Court held that the scope of the exemption contained in section 177(1A)(a) of the Corporations Act should be narrowly construed in order to protect the privacy of shareholders.  **(b) Facts**  Sons of Gwalia is a listed Australian mining company. Following a strategic review, the company discovered shortfalls in its gold reserves which negatively impacted on certain financial arrangements, including hedging contracts. The company subsequently entered into voluntary administration on 29 August 2004.  IMF (Australia) Limited is a commercial litigation funder. A number of disgruntled shareholders of Sons of Gwalia approached IMF after the company entered into administration, alleging that Sons of Gwalia had acted in breach of its continuous disclosure obligations under section 674 of the Corporations Act. IMF took the view that certain Sons of Gwalia shareholders could have a potential claim against the company if it could be shown that the company had failed to keep the market informed in respect of its gold reserves and the status of its hedging contracts.  IMF obtained a copy of the share register from the administrators of Sons of Gwalia. IMF wished to use the shareholders’ names and addresses for the purpose of approaching and inviting past and present shareholders to participate in a collective shareholders’ claim against the company.  At the time of providing the company register, the administrators notified IMF that the use of information from company registers is restricted under section 177 of the Corporations Act. Section 177(1) prohibits a person from:           using information obtained from a register to contact or send material to a person on the register; or           disclose such information where the information is likely to be used to contact or send material to a person on the register.  An example provided in the legislation of a prohibited use includes placing a person’s name and address on a mailing list for advertising material. This prohibition, however, will not apply where it is permitted by the company, or where the use or disclosure is relevant to the holding of the interests recorded in the register, or the exercise of rights attaching to them: section 177(1A).  The administrators refused to give IMF their consent in respect of the proposed use of the information. IMF sought a declaration from the Court that the proposed use of information was permissible under section 177.  **(c) Decision**  Prior to considering this issue, French J was asked to determine whether the Court had jurisdiction to hear the matter and make the relevant declaration. The Court found that it had jurisdiction pursuant to section 21 of the [Federal Court of Australia Act 1976 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default), section 1337B of the Corporations Act and section 39B of the [Judiciary Act 1903 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "default). Having determined that the Court had jurisdiction, French J considered whether IMF’s proposed course of conduct was permitted under section 177 of the Corporations Act.  His Honour found that contacting past and present shareholders in the manner proposed by IMF would constitute a use of company register information as set out in section 177(1). Therefore, in light of the administrator’s lack of consent, IMF would be prohibited from taking such action unless the use of information was relevant to the holding of the interests on the register or the exercise of rights attaching to those interests. Was IMF’s proposed course of conduct within the scope of this exemption?  The court held that the scope of the exemption should be narrowly construed. The purpose of the legislation is to protect the privacy of shareholders. A broad interpretation would defeat this purpose by allowing any use of information which could be connected to a person’s status as a shareholder of the company. In contrast, a narrow interpretation would maintain shareholder privacy by requiring a “narrow legal connection to the actual ownership of the shares and the enjoyment of rights conferred by that ownership”.  His Honour considered IMF’s proposed use of register information as equivalent to a third party seeking to sell services to Sons of Gwalia shareholders simply on the basis that they were shareholders. Allowing such unsolicited approaches was outside the scope of the exemption, and would be contrary to the legislative purpose behind the prohibition.  Accordingly, the Court held that IMF’s proposed use of the information was not permitted under section 177. The application was dismissed.  **5.3 It's settled: Part 2F.1A applies to a company in liquidation**  (By Tom Evans, Phillips Fox)  Carpenter v Pioneer Park Pty Ltd [2004] NSWSC 1007, New South Wales Supreme Court, Barrett J, 29 October 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc1007.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc1007.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The plaintiff ('Mr Carpenter') sought leave under section 237 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act') to bring proceedings on behalf of the defendant ('the Company'). In the alternative, Mr Carpenter sought leave to bring proceedings on behalf of the Company under the inherent jurisdiction of the Court.  His Honour Justice Barrett of the New South Wales Supreme Court granted leave both under Part 2F.1A of the Corporations Act and in exercise of the Court's inherent jurisdiction. Leave was granted on condition that:           Mr Carpenter be liable for and indemnify the Company against, the expenses involved in bringing the proceedings on behalf of the Company; and          the proceedings not be discontinued, compromised or settled without the leave of the Court.  **(b) Facts**  Section 236 of the Act allows a person within any of several categories to bring proceedings on behalf of a company, if the person is acting with leave granted under section 237.  Section 237(2) relevantly provides that to grant leave, the Court must be satisfied that:  (a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; (b) the applicant is acting in good faith; (c) it is in the best interests of the company that the applicant be granted leave; (d) if the applicant is applying for leave to bring proceedings there is a serious question to be tried; and (e) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying.  Mr Carpenter was an officer and a member of the Company, both relevant categories for the purposes of section 236. He applied for leave under section 237 of the Act to bring proceedings under section 236.  The Company had passed into the form of creditors voluntary winding up that follows from the appointment of administrators under Part 5.3A of the Act. The proceedings to be brought by Mr Carpenter in the name of the Company alleged that the ANZ:           offered to provide finance facilities to the Company, for which the Company provided security over its assets, as well as a guarantee and security of Mr Carpenter and his wife;          terminated the finance facilities;          called up all indebtedness, appointed an administrator and exercised a power of sale; and          in terminating the finance facilities, calling up all indebtedness, appointing an administrator and exercising the power of sale, breached the relevant contract and made statements that were misleading or deceptive, as a result of which the Company suffered loss.  A 'detailed and meticulous' opinion of Queens Counsel was tendered by Mr Carpenter in support of the proposed proceedings.  **(c) Decision**  **(i) Application of Part 2F.1A to a company in liquidation**  On the threshold issue of whether or not Part 2F.1A of the Act applied to a company in liquidation, his Honour Justice Barrett found that it did and concluded that this question should now be regarded as settled. His Honour referred to the seven authorities that had considered the issue and noted that all but one were in accordance with his view.  Barrett J cited a passage of his judgment from Charlton v Baber (2003) 47 ACSR 31 to the effect that subsection 237(3) which refers to decision making by directors does not by implication exclude circumstances where decisions are not made by directors. Instead, subsection 237(3) does no more than cause a rebuttable presumption to arise for the purpose of subsection 237(2), in circumstances where decisions are made by directors.  **(ii) Statutory criteria**  Barrett J considered each of the criterion stipulated by subsection 237(2) and concluded that leave should be granted to Mr Carpenter to commence proceedings under section 236.  First, in relation to the probability that the Company would not itself bring proceedings, Barrett J noted that the Company was in liquidation and the evidence of the liquidator was that the Company had no means to pursue any proceedings.  Second, in considering whether or not Mr Carpenter was acting in good faith, Barrett J applied the opinion expressed by Palmer J in Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR 313 ('Swansson'), that there are generally two question that are relevant: first, whether the applicant honestly believes that a good cause of action exists; and, second, whether the applicant is seeking to bring the derivative action for such a collateral purpose as would amount to an abuse of process.  While acknowledging that Mr Carpenter was 'locked in extensive litigious combat' with the ANZ, Barrett J considered that: the potential benefit to the company flowing from the proposed proceedings; the benefit that would flow to Mr Carpenter's family members; and the sense of responsibility of a former officer to creditors who had suffered losses; satisfied him that Mr Carpenter was acting in good faith.  Third, with respect to the proposed proceedings being in the best interests of the company, Barrett J held that as a liquidator had been appointed, no presumption could arise under subsection 237(3) to the effect that proceedings against a third party were not in the best interests of the Company.  Citing Plamer J in Swansson, Barrett J considered that in the context of a liquidation where the liquidator has no funds, the relevant concern is whether or not the pursuit of the proceedings on behalf of the Company presents genuine prospects of benefits to creditors and of enhancement to their welfare. In the circumstances, Barrett J considered that the proceedings were in the best interest of the Company: Unsecured creditors stood to receive nothing prior to the institution of proceedings; a cost order against the Company could not in any case be satisfied; and Mr Carpenter would finance the pursuit of the proceedings.  Fourth, in considering whether or not the proposed proceedings raised a serious question to be tried, Barrett J again referred to Palmer J in Swansson (above) to the effect that 'the court will not normally enter into the merits of the proposed derivative action to any great degree'. Barrett J was satisfied that, in the circumstances, there was a serious question to be tried.  Fifth, the requisite notice to the Company had been given.  **(iii) Inherent power of the Court**  Barrett J held that the inherent power of the Court to permit proceedings to be brought in the company's name where a company is in liquidation continued to exist despite the enactment of Part 2F.1A. His Honour's view is in accordance with the view expressed by Einstein J in BL & GY International Co Ltd v Hypec Electronics Pty Ltd (2001) 164 FLR 268 and by Austin J in Brightwell v RFB Holdings Pty Ltd (2003) 171 FLR 268.  In the circumstances, presumably in large part because the Company had no assets, Barrett J concluded that the criteria applicable in deciding whether or not Mr Carpenter should be allowed to sue in the name of a company in accordance with the inherent jurisdiction of the Court, were not more onerous than those stipulated by Part 2F.1A.  **5.4 More fun with litigation funding**  (By Ron Schaffer and Alastair Young, Clayton Utz)  Barr v Narui Gold Coast Pty Limited [2004] NSWSC 986, New South Wales Supreme Court, Palmer J, 25 October 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc986.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc986.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Introduction**  Is it an abuse of the Court's process to allow your case to be funded and run by a third party who has a commercial interest in the outcome? Recent cases confirm, and it must be right, that the answer to that question depends entirely on the nature of that commercial interest. If the interest is a proprietary interest in the subject matter of the litigation acquired prior to the commencement of the litigation then, at least according to this case, the third party's involvement would not be an abuse of the Court's process. However, if that third party's involvement was more like that of a commercial litigation funder, with no prior interest in the litigation, and who is only funding and running the litigation for a cut of any damages awarded, then it is far more likely that that involvement would constitute intermeddling and be an abuse of the Court's process (Clairs Keeley v Treacy [2003] WASCA 299).  This case involved a motion brought by the Defendant to have proceedings commenced against it stayed or dismissed on the grounds that they were being prosecuted by the Plaintiff pursuant to a litigation funding agreement that was champertous or savoured of maintenance and were accordingly inimical to public policy and an abuse of the Court's process. The motion was dismissed.  The decision considers the well-known case of Trendtex Trading Corporation v Credit Suisse [1981] 3 All ER 520 and, in particular, whether a litigation funder must have a commercial interest in litigation before agreeing to fund it.  **(b) Facts**  The Defendant, Narui Gold Coast Pty Ltd (“Narui”) leased land to Tim Barr Pty Ltd (“TBPL”) under a lease which contained an option to purchase. Narui later terminated the lease (for alleged breach by TBPL) before TBPL could exercise the option to purchase. TBPL commenced proceedings for a declaration that Narui’s termination of the lease was invalid.  Some ten months after proceedings were commenced Austcorp Group Ltd (“Austcorp”) entered into an agreement with TBPL whereby TBPL agreed to do everything necessary to enforce its option to purchase Narui’s land and granted Austcorp an option to purchase the land if TBPL succeeded in enforcing its option against Narui. As part of the consideration for this agreement Austcorp agreed to pay all of TBPL’s costs occasioned by the proceedings to enforce the option against Narui.  Shortly afterwards, TBPL and Austcorp entered into a further agreement whereby Austcorp became entitled to, and did, take control of and manage the proceedings. By the time the motion was heard Austcorp had spent more than $900,000 in legal costs.  **(c) Maintenance and champerty**  Maintenance was defined by Palmer J, at [32], as "the assistance or encouragement, usually by funding, of a party to an action in which the maintainer has no interest". Champerty was defined as "a species of maintenance in which the maintainer, in consideration for funding the proceedings, shares in their fruits if they are successful".  At common law maintenance and champerty are both crimes and torts. However, in NSW at least, those crimes and torts have been abolished by the [Maintenance, Champerty and Barratry Abolition Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10780" \t "default). However, the Defendant in this case sought relief not on criminal or tortious grounds, but on the basis that litigation funding in this context was an abuse of the Court's process. In the Clairs Keeley case (supra) that argument was successful, albeit in quite different circumstances.  **(d) The litigation funding agreement**  Defending the litigation funding arrangement, TBPL relied on Trendtex to argue that it arose out of a prior interest that Austcorp had in the land. It submitted that the litigation funding was ancillary to Austcorp's equitable interest in the land. That is, it was an interest ancillary to an assignment of a chose in action and not an assignment of a bare cause of action. It relied on Trendtex.  Narui argued that the funding agreement was not ancillary to Austcorp's interest in the land. It said that Austcorp acquired its interest in the land at the same time it agreed to fund the litigation. It submitted that Trendtex could only assist TBPL if Austcorp's interest in the land preceded the funding arrangement.  Narui argued that vesting exclusive control of the proceedings in the hands of Austcorp rendered the continuation of the proceedings an abuse of process. This is because, although not a party to the proceedings, and while not amenable to the orders and sanctions of the Court, Austcorp had effective control of TBPL's litigation.  **(e) The decision in Trendtex**  In Trendtex, Lord Roskill said, at 531, in an often-quoted passage:  "The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee had a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance."  Narui argued that this persuasive passage stood for the proposition that, in order to be valid, Austcorp's interest in the subject matter of the litigation (ie the land) should have preceded the litigation funding arrangement (and its management of the proceedings). Narui submitted that this was not the case.  **(f) Decision**  Palmer J distinguished Trendtex, at [44], to the extent that Trendtex involved an assignment of a cause of action. Palmer J held that the present case was not one in which TBPL had assigned to Austcorp a bare right to litigate. In doing so, Palmer J also disposed of Narui's argument that Austcorp had effective control of the litigation.  The case of Clairs Keeley was only passingly referred to by Palmer J. However, in that case a litigation funding arrangement that placed effective control of the litigation in the hands of the funder was deemed to be a de facto assignment of a cause of action. The funder in Clairs Keeley had no commercial interest in the underlying subject matter of the litigation and was only in it for a share in the fruits of the litigation.  Palmer J found, at [53], that Trendtex does not establish a rigid requirement that in all cases a funder of litigation must be shown to have acquired some “commercial interest” in the litigation before the funding agreement is actually executed. In his Honour's opinion, all that Trendtex establishes is that the funder must have a "genuine reason for entering into the funding agreement which the law regards as justifiable".  Regardless of this analysis, Palmer J also found, at [48], that Austcorp had a genuine commercial interest in acquiring the land before the litigation funding arrangement was entered into. This finding was made notwithstanding that the litigation had been on foot for 10 months before Austcorp became involved. Rather, it was made on the basis that Austcorp genuinely wished to acquire the land and was not motivated to fund the litigation because it wanted a share of the fruits of successful litigation.  Accordingly, Palmer J found, at [51], that the funding arrangement did not savour of maintenance.  The consequence of this finding was that the arrangement could not be champertous. Champerty is a species of maintenance and cannot exist in the absence of maintenance. Further, the essence of champerty is the sharing of the spoils of victory between the plaintiff and the maintainer. In this case, the option agreement did not give Austcorp a share of the proceeds of the proceedings: it gave Austcorp the right to acquire the whole of the subject matter of the proceedings (at [51]).  Finally, Palmer J held, at [62], that this case did not amount to "litigation trafficking” which in itself may constitute an abuse of process. Just because Austcorp was not directly a party to the proceedings did not mean that it was not amenable to the court’s orders. Austcorp’s role in the proceedings was also sufficiently transparent for all to see.  **(g) Conclusion**  Palmer J's decision that the funding agreement did not constitute an abuse of the court's process by being champertous or savouring of maintenance is important for two key reasons.  First, it shows that the Trendtex decision does not stand for the proposition that a litigation funder must have an interest in the proceedings before entering into the funding arrangement. All that is required is that the funder has a genuine and justifiable reason to fund the litigation.  Second, this decision shows that a proprietary interest in the subject matter of the litigation (in this case the land) is a sufficiently genuine reason to justify litigation funding.  **5.5 Use of the "no reasonable suspicion of insolvency" defence to a preference claim**  (By Michael John Makridakis, Clayton Utz)  Neil Robert Cussen as Liquidator of Akai Pty Ltd (in liquidation) v Commissioner of Taxation [2004] NSWCA 383, New South Wales Court of Appeal, Spigelman CJ Handley JA Tobias JA, 22 October 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswca383.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswca383.htm" \t "_new)  or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The words “a reasonable person in the person’s circumstances” in section 588FG(2)(b)(ii) require an objective “reasonable business person” test to be applied and do not require the court to take into account the acumen, perspicacity and resources of the particular creditor.  On the facts of this case there were no factors which, either alone or cumulatively, constituted reasonable grounds for suspicion of insolvency.  The information deemed to be available to “a reasonable person in the person's circumstances” under section 588FG(2)(b)(ii) is the information that was actually known by the creditor at the time of the alleged preference payment. It does not include information that the creditor would have known if the creditor had made reasonable inquiries. Where reasonable inquiries have not been made a “reasonable person in the person’s circumstances” would know that inquiries that could or should have been made have not been made, but would not know the hypothetical result of such hypothetical inquiries  **(b) Facts**  Akai approached the ATO in August 1998 seeking an extension of time to make sales tax payments, citing a temporary liquidity problem. The ATO granted Akai an extension. Akai continued to make such requests for a period of just over a year. Akai and the ATO negotiated a timetable for deferred payments, which was substantially complied with by Akai. By 3 September 1999 Akai had paid all its arrears of sales tax in full together with interest and imposed penalties.  The relation back period commenced on 22 September 1999. Eight payments of sales tax were made after that date. Of the eight payments, five were made on the due dates without any request for an extension of time, two were paid on the agreed extension date and the third was paid a day late.  **(c) Decision**  Akai's liquidator made 3 alternative submissions as to why the ATO had not discharged the onus of establishing a defence under section 588FG(2).  **(i) section 588FG(2)(B)(ii) –“a reasonable person in the person’s circumstances”**  The liquidator submitted that the differentiation between section 588FG(2)(b)(i) and section 588FG(2)(b)(ii) lay in the words “in the person’s circumstances” in the latter. The liquidator advanced the following propositions in this regard:           Subparagraphs (b)(i) and (b)(ii) of section 588FG(2) answer the question, "Are there reasonable grounds for suspecting insolvency?" from different perspectives: section 588FG(2)(b)(i) at a general level, section 588FG(2)(b)(ii) at a level commensurate with the particular “circumstances” of the creditor.          Section 588FB(2)(b)(ii), by expressly drawing attention to the particular creditor’s “circumstances”, is a “tailored objective test” and accordingly the “average business person” test is not applicable.          With respect to section 588FG(2)(b)(ii) the particular acumen, perspicacity, investigative resources, and ability to ‘read the signs’ of the particular creditor is part of that creditor’s circumstances.           The perspective is the point of view of a hypothetical creditor endowed with the full range of relevant characteristics of the particular creditor, not that of the “average business person”.  The court rejected these arguments on the following basis:           The word “circumstances” can, but does not usually, refer to a characteristic of a person. It refers to an external factor of some kind. The primary meaning in the Macquarie Dictionary is: “a condition, with respect to time, place, manner, agent etc, which accompanies, determines or modifies a fact or event”.          In Kitto J’s references in Queensland Bacon v Reesto “reasonable person in the position” of a creditor, the word “position” has a similar connotation of external factors. Kitto J’s references to “position” were references to the objective circumstances of the creditor rather than to its particular perspicacity, financial acumen, etc.  Accordingly, the court held that the “reasonable business person” test is the correct test in respect of section 588FG(2)(b)(ii).  **(ii) section 588FG(2)(b)(i) - reasonable grounds to suspect insolvency**  The liquidator submitted that given the information known to the ATO, and in the context of Akai’s history of late payment, the ATO had reasonable grounds to suspect insolvency at the time of the alleged preference payments. Relevantly, none of the ATO officers dealing with Akai’s sales tax payments actually became aware of the contents of Akai’s relevant tax returns.  The court noted that whether the ATO should be taken to have “grounds for suspecting” on the basis of information available to, but not accessed in the normal course, by one of its particular sub-units raises some difficult issues. It was not, however, necessary for the court to resolve that issue in this case, because, even if the contents of the relevant tax returns were taken to have been within the actual knowledge of the officers of the ATO, they would not, in the circumstances of the case, have constituted grounds for suspecting insolvency.  **(iii) section 588FG(2)(b)(ii) - the information available to "a reasonable person in the person's circumstances"**  The court, having found that the ATO was not in possession of information which constituted grounds for suspicion of insolvency, next considered whether the section 588FG(2)(b)(ii) test can be applied so that information which a “reasonable person” would have sought, but the particular creditor did not seek, can be included in the matters to which regard is had to determine whether such a person would have had “reasonable grounds for suspecting” insolvency. Such material encompassed the tax returns available to the ATO and additional financial information such as cash flow forecasts.  The issue turned on the meaning of the words “would have had” in section 588FG(2)(b)(ii) and whether those words:           refer to a past course of conduct in which a “reasonable person”, in the creditor’s “circumstances”, would have engaged; or          are limited to what such a “reasonable person” would have concluded on the basis of the information in fact available to the particular creditor.  The court held that the words “would have had” in section 588FG(2)(b)(ii) should be construed as the “reasonable person’s” assessment of information in fact in the possession of the creditor and into whose “circumstances” the reasonable business person is theoretically placed. Thus, "a reasonable person in the [creditor's] circumstances" is taken to know the facts actually available. As regards additional inquiries, the only relevant fact that a “reasonable person” is taken to know is that inquiries that could or should have been made, had not been made.  The court opined that if section 588FG(2)(b)(ii) obliged a creditor to make inquiries and, therefore, a “reasonable person” in its circumstances is taken to have done so, an honest response by the debtor would usually, perhaps always, contain grounds for suspicion, if not proof, of insolvency. The court found that it is most unlikely that Parliament intended the defence to be virtually unavailable.  (It should be noted that the court's consideration of this issue was on the presumption that there was no deemed actual knowledge of such information, although, as discussed in paragraph (b)(ii) of this case note, the court did not need to decide that issue. In the more recent case of Dean-Wilcocks v Commissioner of Taxation [2004] NSWSC 1058 the court was called to decide the issue and held that ATO is deemed to have knowledge of all information that has been conveyed to its various officers and sections.)  Finally, the court observed that a failure to make inquiries may, in some cases, be of considerable significance when determining the good faith element of the defence under section 588FG(2)(a), but that was not so in the circumstances of this case.  **5.6 Contracting prior to registration** (By Kate Griffiths, Blake Dawson Waldron)  Aztech Science Pty Ltd v Atlanta Aerospace (Woy Woy) Pty Limited [2004] NSWSC 967, New South Wales Supreme Court, Barrett J, 19 October 2004  The full text of this judgement is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc967.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc967.htm" \o "http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc967.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case concerns a pre registration agreement made between the plaintiff (Aztech) and the first and second defendants, Atlanta Aerospace (Woy Woy) Pty Ltd and Dr Daevys, respectively. The plaintiff alleged the defendant was in breach of a contract entered into prior to the registration of the plaintiff. The plaintiff sought a declaration and orders directed towards performance of the contract by Atlanta and Dr Daevys. Dr Daevys was the only director of Atlanta and one of two shareholders. There was no appearance by, or on behalf of, the defendants and therefore the case was determined by reference to the evidence adduced by the plaintiff only.  The Court ruled that the parties entered into a contract recorded in a formal document on 19 December 2002. The parties acted with regard for the provisions of section 131 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and agreed a time limit for registration and ratification. That time limit expired on 17 February 2003. The time limit was found not to be varied by any further agreement. Therefore the contract did not operate to cause the plaintiff to become bound by and to obtain the benefit of the contract.  **(b) Facts**  The pre registration contact had three parties named:           Mr Azzi (the Promoter);          Atlanta (the Contractor); and          Dr Daevys (the Nominee).  The contract provided that the Contractor provide services to the Principal, as well as providing the services of the Nominee to the Principal. The contract also stated that the Promoter and Contractor wished to enter into the Agreement, prior to the incorporation of the Principal, which was to be known as Aztech Sciences Pty Ltd. The contract also relevantly provided that in the event that the Principal was not registered or failed to ratify the Agreement within 60 days from the "date hereof", the Agreement was to be at an end. The contract further provided that if there was a failure to register or ratify within the time period, notwithstanding section 131 of the Corporations Act, neither party was to have any further rights against the other.  The formal document listed the date of 11 November 2002 in two places, at the beginning and again just before the signatures. The date of 19 December 2002 also appeared under the signature of Dr Daevys, where he had purported to sign for Atlanta as its secretary and director.  **(c) Issues for determination**  The court was required to determine the following issues:           Did Aztech ever become bound by, or entitled to, the benefit of the alleged contract upon which it sued?          The effect and operation of section 131(1) of the Corporations Act;          What was the "date hereof"?          Was there a variation of the section 131(1) of the Corporations Act date?  **(e) Decision**  The court identified section 131(1) of the Corporations Act as causing contractual rights and obligations to arise in circumstances where the general law of contract would not recognise them. In this case, Mr Azzi had purported to enter into a contract on behalf of a company which was not then registered. Section 131 would have operated to cause Aztech to become bound by the contract and be entitled to the benefit of the contract if two things occurred:           Aztech was registered within the relevant time frame; and          Aztech ratified the contract.  The time agreed to by the parties for registration referred to the time agreed to for registration of the company as well as ratification of the contract. Further, this agreement must be between parties to the contract. Such agreement, therefore, cannot refer to a company which was not in existence at the time the contract was executed. Where parties have not agreed a time frame, section 131(1) of the Corporations Act imposes a requirement that the events occur within a reasonable time frame.  Clause 2 of the contract provided that the agreement shall be at an end if either of the specified events did not happen within 60 days of the “date hereof”.  The two dates specified in the contract caused some argument about what was the "date hereof". The defence suggested the date hereof was 11 November 2002. Two reasons were given by the plaintiff to suggest that Dr Daevys had expressly declined to have the contract executed by Atlanta on 11 November 2002. Firstly that Dr Daevys had forgotten to bring the company's common seal and secondly that he was proposing to change the shareholdings and directors in Atlanta.  According to the plaintiff, these facts supported the inference that the parties intended that none be bound until the third had executed. The Court considered that the structure of the transaction and the contractual roles of the parties were such that there could have been no intention of the immediate parties that any contractual relationship could be sourced in the formal document before all of those immediate parties had executed it as provided for in the document. The court ruled that the "date hereof" referred to 19 December 2002 with the result that the period of 60 days was the period that ended on 17 February 2003.  Aztech was registered on 20 February 2003. Accordingly, neither of the things that were required took place within the time frame of 60 days. The plaintiff argued that there had been an extension of the time period agreed. On 14 February 2003 a conversation discussing the extension took place between Dr Daevys and Mr Somosi, who Mr Azzi described as an employee of my company. Mr Somosi was described as an employee of a company which was not yet in existence at the time of the conversation, not of Mr Azzi, the Promoter. The court ruled that the evidence did not show that Mr Somosi was acting with the actual or implied authority of Mr Azzi and therefore his actions could not be regarded as amounting to contractual conduct on the part of Mr Azzi.  **5.7 The appointment of a liquidator on just and equitable grounds**  (By Corey Johnson, Blake Dawson Waldron)  ASIC v Global SDR Technologies Pty Ltd [2004] VSC 402 Supreme Court of Victoria, Mandie J,18 October 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/October/2004vsc402.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/October/2004vsc402.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The Supreme Court of Victoria held that a provisional liquidator should be appointed for Global DR Technologies Pty Ltd ("Global") based on the just and equitable ground contained in s 461(1)(k) of the Act. Justice Mandie stated that relevant factors to consider in appointing a provisional liquidator include the conduct of the controllers and managers of the company, the interests of the company and its members, the interest of creditors, and the public interest.  **(b) Facts**  This case involved the Australian Securities and Investment Commission ("ASIC") applying for an order to wind up Global on the grounds of insolvency, or on just and equitable grounds. From two applications before the Court, ASIC sought the appointment of a provisional liquidator to Global, and also the delivery up from the second and third defendants (Roger and Jason May) of the books and records of two companies, SDR Communications Technologies Pty Ltd ("SDRCT") and SDR Technologies Pty Ltd ("SDRT"), to their respective liquidators.  ASIC tendered and relied on an affidavit of Richard Daniel Vandeloo, a Senior Investigator for ASIC. The basis for his affidavit was that Global was being mismanaged, failed to keep proper books and records, and was insolvent. Mr Vandeloo also claimed that the Mays were in contravention of s 182 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act") in that they had used their positions as directors of SDRT for the advantage of Global without having proper regards to the interests of the employees of SDRT and SDRCT.  Current and former employees of SDRT complained to ASIC, and ASIC's National Insolvency and Co-ordination Unit ("NICU") commenced inquiries. Amongst the complaints were claims that their wages had not been paid by SDRT, following the voluntary liquidation of another company to which the Mays are directors, Advanced Communication Technologies ("ACTA"), and then in turn, SDRCT.  Following the appointment of an administrator to ACTA, SDRCT entered into written employment contracts with ACTA's employees. Some of the wages were not paid, and then SDRCT went into liquidation, and its employees were told that they were now employed by SDRT without any written contracts entered into. From May 2004, they were unable to pay the staff's wages, and from July, a number of the staff refused to work.  In September 2003 ASIC prosecuted the Mays for failing to prepare a report on the affairs of SDRCT pursuant to the Act. There was evidence of outstanding liabilities to employees totalling $690,445, whilst the only assets of the company were related party loans.  MCT, which had become the marketing and distribution arm for Global, issued a press release in September 2004 stating that it had finalised an agreement to acquire the majority of the assets of Global. In his affidavit, Mr Vandeloo stated that any such transfer of assets would frustrate claims from the liquidators of SDRCT and SDRT in relation to the assets of these companies and also the intellectual property ("IP").  The liquidator of SDRCT, Mr Kenneth Lamb, estimated that the company had unpaid wages of between $400,000 and $800,000. The liquidator of SDRT, Mr Malcolm Orders, was not provided with adequate records and books from the Mays, but the records that he did have access to stated that payroll liabilities approximated $1.7 at September 2004, whereas generated revenue over the past 9 months totalled only $9,000. He also noted a discrepancy in the total asset value between the numbers provided by ASIC, and those provided by the Mays.  There were also affidavits from a number of employees of SDRCT detailing the extent of their outstanding wages.  **(i) The intellectual property of Global**  In May 2004, Rita Coorey, Senior Accountant with ASIC, was informed by Jason May that Global was a non-trading holding company and therefore had no bank account or accounting records. Ms Coorey was told by Mr May that the original business, ACTA, upon going into voluntary administration, passed on all IP rights to Global, subject to royalty payments. SDRT continued the development of this IP. Ms Coorey was told that Global had an option to buy the IP at a price determined by an independent valuation, which is inconsistent with the deed of assignment from ACTA. In June and July 2004, Ms Coorey wrote to Jason May expressing ASIC's concerns that Global might be trading whilst insolvent. There was no response.  Mandie J queried how, in light of the deed of assignment, any part of the IP is held by ACTA when it has been assigned to Global. The Mays asserted that ACTA, rather than Global, is the true owner of the IP in question. Mandie J noted however that if this were the case, the Mays would then be in a position that they had a conflict of interest as they are both directors and controllers of Global and ACTA.  **(ii) ASIC's submissions and standing**  In a written outline of submissions, ASIC put forward the following bases for the appointment of a provisional liquidator:           the threatened purchase by MCT of Global's IP assets;          the insolvency of Global by virtue of the event of defaults under the loan agreement with GIF;          the potential liability of Global as a holding company pursuant to s 588W of the Act;          that Global should not be allowed to continue under the control and management of the Mays who have proven their deficiencies in such roles; and          the absence of any books or records of Global to refute the allegations.  ASIC was held to have sufficient standing to apply for a winding up order against Global based on the just and equitable ground contained in s 461(1)(k) of the Act, by virtue of s 462(2)(e) and s 464 of the Act, in that ASIC is investigating Global and its affairs under Division 1 of Part 3 of the [Australian Securities and Investments Commission Act (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default).  **(iii) Jason May's submissions**  Jason May stated that there was a capital raising transaction in its final stages and that if a provisional liquidator were appointed to Global, this would jeopardise the transaction. There was no evidence to support this however, and Mandie J queried how it could be the case that investors would advance the said amount of $42M to MCT, a company with virtually no assets and liabilities nearing $1m. Mandie J stated that the protection of these investors was a relevant factor in deciding whether or not to appoint a provisional liquidator.  **(iv) Provisions of the Act**  In a further affidavit, the liquidator of SDRT deposed that he suspected that Global had contravened s 588V of the Act, and that the creditors of SDRT might have a claim against the assets of Global pursuant to s 588W of the Act. These sections of the Act establish a contravention by a holding company of a company which incurs debts while insolvent, when there are reasonable grounds for suspecting insolvency, and the holding company, or its directors knew or ought to have been aware of this.  Mandie J stated that on the evidence before the Court, there would be a reasonable case by the liquidator of SDRT against Global pursuant to these provisions. Global, through the Mays, had control of SDRT, and the evidence presented to the Court indicated that the Mays ought to have been aware of the insolvency of SDRT. On the evidence, it appears that the Mays permitted both SDRCT and SDRT to continue incurring debts to their respective employees and to the ATO and the State Revenue Office while suspecting that the companies could not meet their financial obligations.  **(c) Issues for determination**           Whether the balance of convenience was in favour of appointing a provisional liquidator to Global; and          whether the application by ASIC for orders that the Mays produce to the respective liquidators the books and records of SDRCT and SDRT should be granted.  **(d) Decision**  **(i) Appointing a provisional liquidator**  An applicant must establish the need for the appointment and generally persuade the Court that the balance of convenience favours the appointment. Factors to be taken into account are the interests of the company and its members, the interests of creditors, and in appropriate cases, the public interest.  Mandie J decided in favour of ASIC in appointing a provisional liquidator to Global. He cited the following reasons for this decision:           There is a prima facie case that Global should be wound up on the just and equitable ground;          The conduct of the Mays in incurring debts to employees and revenue authorities when they ought to have suspected insolvency;          The "serial failure" by the Mays to prevent companies incurring debts which they are unable to pay;          The lack of willingness to provide records or accounts; and          The public interest in protecting potential employees, investors and others who might be induced to become employed by or to invest money in Global.  As a further note, Mandie J stressed that the question of ownership of the IP (whether it is the property of Global or ACTA) needs to be urgently investigated.  **(ii) Delivery up of books and records**  This issue was deferred to the hearing of the originating process.  **5.8 No abuse of process where criminal proceedings brought following civil prosecution**  (By Carolyn Pugsley, Freehills)  Adler v Director of Public Prosecutions [2004] NSWCCA 352 New South Wales Court of Criminal Appeal, Mason P Grove and Barr JJ, 15 October 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswcca352.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswcca352.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  The case involved an application by the appellant for a permanent stay of criminal proceedings brought against him by the Crown, on the grounds that the proceedings were an abuse of process because of exposure to double jeopardy. The appellant’s submissions centred around the argument that, because he had already been prosecuted by Australian Securities and Investments Commission (“ASIC”) under the civil penalty provisions of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“Act”), he had already been punished for the conduct which formed the basis of the criminal charges brought by the Crown.  The appellant’s application was refused by James J at first instance. His Honour held that because of the important differences between both the elements and purposes of the civil causes of action and the criminal offences, the criminal proceedings did not constitute an abuse of process and no issue of double jeopardy arose.  The appellant sought leave to appeal Justice James’ decision, on the basis that he had erred in his reasoning by:           applying the wrong test in relation to the issue of double jeopardy;           taking into account an irrelevant consideration, being the differing purposes of the civil and criminal proceedings; and          failing to consider the issue of whether the criminal proceedings put at risk the finality of the final decision in the civil proceedings.  The Court of Criminal Appeal granted leave to appeal, but upheld the decision of James J in finding that there was no abuse of process involved in launching the criminal proceedings.  This decision at first instance also involved consideration of the scope and constitutionality of section 1317P of the Act, which permits criminal proceedings to be commenced against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision. Although arguments were raised in regard to this issue by both parties during the appeal hearing, the Court held it was unnecessary to resolve these issues.  **(b) Facts**  **(i) The civil proceedings**  ASIC brought civil proceedings against the appellant, as well as two other former directors of HIH Insurance Limited (“HIH”), alleging various breaches of directors’ and officers’ duties under the Act and the Corporations Law. Charges were also brought against the appellant pursuant to the provisions of the Act relating to accessorial liability.  Santow J held that the appellant had contravened various sections of the Act, and made the appropriate declarations of contravention. The relief granted by Santow J included the following orders against the appellant:           that he be disqualified from managing corporations for 20 years;          that he pay compensation of $7,986,402; and           that a pecuniary penalty order for $450,000 be imposed.  **(ii) The criminal proceedings**  The criminal proceedings involved allegations that the appellant had committed the following offences:           two counts of stock market manipulation likely to have the effect of increasing the price of HIH shares;          one count of stock market manipulation likely to have the effect of maintaining or stabilising the price of HIH shares; and          two counts of disseminating false or misleading information in relation to HIH shares.  The appellant accepted that no plea in bar was available, because in no case were the elements of any criminal offence charged the same as the elements of the civil causes of action which had already been brought. However, the appellant, relying on the decision in The Queen v Carroll (2002) 213 CLR 635 (“Carroll”) submitted that he should not be exposed to punitive proceedings twice in respect of the same conduct, and that the Court should grant a permanent stay of proceedings to prevent an abuse of process occurring.  The Crown submitted that the criminal proceedings did not constitute an abuse of process, as the criminal offences and civil causes of action comprised different elements and had different purposes. The Crown relied on the decision of the High Court in Pearce v The Queen (1998) 194 CLR 610 (“Pearce”), in which it was found that it was not an abuse of process to charge two separate counts in an indictment where the offences were different in important respects.  **(c) Decision**  The court noted that, as part of the civil proceedings, findings of fact had been made which, if proved to a criminal standard, would satisfy the core elements of all five criminal offences. However, the Court found that because these findings were made based on the civil standard of proof, it would not be inconsistent with the prior orders of Santow J if the appellant were acquitted (having regard to the different standards of proof).  The court upheld Justice James’ conclusion that there was no abuse of process involved in launching the proceedings. It cited with approval the following passage from the High Court’s judgment in Pearce:  ‘The short answer to the contention that the charging of both counts was an abuse of process is that because the offences are different (and different in important respects) the laying of both charges could not be said to be vexatious or oppressive or for some improper or ulterior purpose.’  The court held that this principle was not confined to cases in which two or more offences are charged in the same indictment. Applying the Pearce test, the Court found that because the criminal offences were different in important respects from all the causes of action in the civil proceedings, the criminal proceedings did not constitute an abuse of process.  The court distinguished the decision in Carroll on the basis that the present case did not involve an attempt to challenge a prior acquittal. Accordingly, the Court held that the issue of double jeopardy was not relevant, as the criminal charges were in no way inconsistent with the outcome of the civil proceedings.  The appeal was consequently dismissed.  **5.9 Court's refusal to order the convening of a members meeting because of the invalidity of the initial request made to directors**  (By Naomi Gingold, Phillips Fox)  Maxwell Gratton v Carlton Football Club [2004] VSC 379, Supreme Court of Victoria, Mandie J, 6 October 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/october/2004vsc379.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/october/2004vsc379.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  Maxwell Gratton, a member of the Carlton Football Club, sought an order from the court requiring the Directors of the Carlton Football Club to convene a meeting of members on the basis that it was impractical to call a meeting in any other way (section 249G(1)). Mandie J dismissed Gratton's application because Gratton failed  to comply with the requirements for a request to call a meeting under section 249D.  He further held that a court order was not the only practical way for convening a meeting and that the calling of such a meeting was futile.  **(b) Facts**  On 16 August 2004, Gratton delivered a letter to the Carlton Football Club with an attached petition. The petition included 33 separate pieces of paper, fastened together by a bulldog clip. On 23 of the pieces of paper, there was a table of members' signatures, their addresses and membership details as well as printed text. The text contained a request for a general meeting and a notice of resolutions in relation to the number of games played at Optus Oval. However, on the other 10 pieces of paper provided to the Carlton Football Club, there was only a table of names, addresses, signatures and membership details without the printed text.  **(c) Decision**  By advancing evidence about a petition signed by members, the plaintiff was seeking to establish that the directors failed to call a meeting in accordance with the members' request under section 249D. The plaintiff alleged that, pursuant to section 249G, it was therefore impractical to convene a meeting in any way other than by a court order.  His Honour Justice Mandie held that the directors had not failed to call a meeting pursuant to section 249D. Section 249D(1) dictates that directors of a company must call and arrange to hold a general meeting on the request of at least 100 members who are entitled to vote at a general meeting. The request must be made in writing, state any proposed resolutions and be signed by the members (section 249D(2)). The signatures can be contained in a series of documents as long as the wording of the request is identical on each page (section 249D(3)).  Mandie J held that the 10 sheets which did not contain the printed text failed to comply with the statutory requirements and dismissed Gratton's evidence of the circumstances in which the documents were signed. He also noted that the 10 pieces of paper could not be considered to be part of the documents containing the written request as they were not securely fastened together. In excluding 10 pages which contained members' signatures, Mandie J concluded that there were not the required 100 signatures of members.  Mandie J held that there were other practical ways for convening a members' meeting. Indeed, section 249E of the Act provides that, if the directors fail to call a meeting within 21 days of a request being made, members with more than 50% of the votes of all members who make a request under section 249D can call a meeting. There appeared to be no obstacle to the members calling a meeting under this provision. Moreover, considering the nature of the resolutions, such a meeting would have been futile as there was a contractual arrangement between Carlton Football Club and the Australian Football League in relation to venues for home games. Mandie J held that even if the request had been valid, these reasons prevented the court from ordering a meeting either pursuant to section 249G or pursuant to his injunctive power under section 1324 of the Act.  Finally Mandie J addressed arguments advanced by the defendants that the proposed resolutions could not have been lawfully passed by the members in the context of the Carlton Football Club's constitution. While he described these arguments as strong, he held that it was not necessary to make a finding in relation to them.  Mandie J dismissed originating motion with costs.  **5.10 The privilege against self-incrimination in the context of interrogatories**  (By Niti Gupta, Blake Dawson Waldron)  Pathways Employment Services v West [2004] NSWSC 903, New South Wales Supreme Court, Campbell J, 1 October 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc903.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc903.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Summary**  This case concerns an application by the plaintiffs, Pathways Employment Services Pty Ltd and Pathways Labour Hire Pty Ltd, for an order that the first defendant, Andrew David West ("West") "attend the Court on a date to be fixed to give evidence as to his assets and related matters". The plaintiffs are related companies, for which West once performed accounting and other financial work. The plaintiffs have alleged that West misappropriated funds from them. West had already claimed a privilege against self-incrimination in respect of certain documents required to be disclosed under an Anton Piller order and was also the subject of Mareva orders.  The court firstly examined its jurisdiction to make Mareva orders and require a person to attend court to give an oral examination as to his/her assets. It concluded that, whilst this was within the power of the Court, it had to be weighed against the privilege of self-incrimination, a fundamental right within the law, which cannot be abrogated other than by statute. While the UK has enacted laws specifically addressing the public interest in requiring a person in possession of property to give information about their dealings with that property, the same has not been done in NSW. The only statutory abrogation of the privilege derives from the [Evidence Act 1995 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4459" \t "default), which gives witnesses protection from self-incrimination in certain scenarios. This protection is not absolute.  Campbell J held that the orders sought, requiring West to attend an oral examination, were inappropriate, as the application would involve making the defendant a witness solely so as to compromise his privilege against self-incrimination. He would not be in the position of a witness at all if the order was not made. In addition, if an examination was permitted, its purpose should be to assist in ensuring that the court's processes for enforcement of a judgment were not frustrated by assets being divested before eventual enforcement. However, the examination sought by the plaintiffs would focus on what had become of the assets which the plaintiffs claim are missing, a subject on which the plaintiffs would seek to call evidence at trial. If the examination was to occur in aid of a Mareva order, it would be an abuse of process for information derived from it to be used to make out a substantive case at a hearing. The orders were thus not granted.  **(b) Facts**  On 24 June 2004, West was charged by the police with 7 offences of obtaining money by deception from one of the plaintiffs between 2000 and 2004. The plaintiffs then commenced proceedings against West on 19 August 2004, alleging that West had misappropriated approximately $1.1m from them. On the same day, Barrett J made Mareva orders, and an Anton Piller order, against West. The plaintiffs filed evidence which, if accepted, would show that more than $1.1m was misappropriated from them, and transferred to various bank and building society accounts, all of which now have negligible balances.  Pursuant to the Anton Piller order, certain documents and a Notebook computer were surrendered by West. West made a claim for privilege against self-incrimination, with respect to certain of those documents. On 1 September 2004, McDougall J decided to extend the Mareva orders against West, stating that the evidence shows not only a strong prima facie case that West has misappropriated money, but also an arguable case that he will dissipate the money, because he does not have the funds to repay what he has taken.  **(c) Legal principles**  **(i) Court's jurisdiction to make Mareva Orders**  The court first examined the court's jurisdiction to make Mareva orders. Campbell J cited a number of legal precedents as supporting the judicial power to make interlocutory orders in the nature of a Mareva injunction in order to prevent the frustration of a court's process. Section 23 of the [Supreme Court Act 1970 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3748" \t "default) was also cited as a possible basis for the court's jurisdiction.  The court went on to say that it is a recognised part of the power to grant Mareva orders that the Court can require the person against whom such an order is made to attend court for oral examination as to his/her assets. In the past, this oral examination has taken the form of a cross-examination on an affidavit of assets which has already been sworn. However, the fact that West has not sworn any such affidavit in this case is not a reason for concluding that an order requiring West to attend court for an oral examination is beyond power.  **(ii) Privilege against self-incrimination and its statutory abrogation**  The privilege against self-incrimination is a well-established common law right and rule of evidence, in respect of which it has been held that there is no scope for an exception, other than by statute.  This has resulted in the general rule that discovery and interrogatories will not be permitted by the courts where a privilege against self-incrimination has been claimed. In the UK, the legislature has intervened to create an exception to this rule to prevent privilege being used as a way of avoiding discovery and interrogatories in proceedings brought by an owner of property (which the owner has lost through someone's dishonesty) to recover that property or its value. The NSW [Crimes Act 1900](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3907" \t "default) explicitly creates an exception from the privilege in respect of certain crimes, however "obtaining money by deception" is not one of them.  The court then went on to discuss the possibility of substituting alternate protection in place of the privilege, so as to prevent the use of relevant disclosed information obtained in civil proceedings, in courts vested with criminal jurisdiction. Campbell J held that this would not serve the effective administration of justice as the privilege is a fundamental and important right within the law. The only legitimate way to modify or abrogate the privilege would be through statute.  **(iii) Section 128 of the Evidence Act and abrogation of the privilege**  The statute which abrogates the privilege and is relevant to this application is the Evidence Act. Section 128 applies if a witness objects to giving particular evidence on the grounds that the evidence might incriminate the person. If the court finds that there are reasonable grounds for the objection, it cannot require the witness to give that evidence and is to inform the witness of this fact, together with the fact that if he/she does give the evidence, he/she will be given a certificate. A certificate will also be given if:           the objection is overruled, and after the evidence is given, the court determines that there were reasonable grounds for the objection; or          despite the validity of the objection, the court requires the witness to give possibly self-incriminatory evidence in the interests of justice.  Any evidence in respect of which a certificate has been given or information obtained as a direct / indirect consequence of the person having given evidence, cannot be used against a person in any proceedings in a NSW court (except a criminal proceedings with respect to the falsity of the evidence). This is designed to protect against the use of information which would ordinarily be the subject of privilege, but is either required to be disclosed or voluntarily disclosed under section 128.  **(d) Decision**  Campbell J held that the orders which the plaintiffs sought should not be made. While section 128 contemplates application to reluctant witnesses or people who have been ordered to become witnesses by the court, this case involves making the defendant a witness so as to compromise his privilege against self-incrimination. It is only the active involvement of the court in setting a time and place for a special hearing that would not otherwise occur, that would make West a witness. This cannot have been intended by Parliament when enacting section 128 of the Evidence Act.  There are also other significant problems with making the orders requested. The purpose for which examination would have been permitted would have been to assist in ensuring that the court's processes for enforcement of a judgment were not frustrated by assets being divested before eventual enforcement. However, the examination would focus on what has become of the assets which the plaintiffs have found to be missing, a subject on which the plaintiffs would seek to call evidence at trial. If the examination was to occur in aid of a Mareva order, it might be an abuse of process for information derived from it to be used to make out a substantive case at a hearing.  Campbell J then went on to discuss the need to reform the law to allow for a better interaction between the privilege against self-incrimination and the law concerning compulsory disclosure of information for the purposes of civil proceedings.  **5.11 Directors’ belief about insolvency when resolving to appoint an administrator**  (By Kathryn Evans, Mallesons Stephen Jaques)  Downey v Crawford [2004] FCA 1264, Federal Court of Australia, Weinberg J, 30 September 2004  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fca1264.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fca1264.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/" \t "_new)  **(a) Parties**  First plaintiff: Mr James Downey was the liquidator of ACN 075 004 643 Pty Ltd, a company involved in reviewing financial advice prepared by others. Second plaintiff: ACN 075 004 643 Pty Ltd (In Liquidation) (“the Company”). First defendant: Mr Andrew Crawford was the managing director of the Company and the owner of the business name “Quantum Analytical Services”. Second defendant: Mr Gilbert Crawford (the father of the first defendant) was a non-executive director of the Company.  **(b) Claims against the defendants**  The plaintiffs claimed that:           the defendants had breached their statutory and fiduciary duties to the Company by placing it into voluntary administration when they did not believe that it was insolvent, or likely to become insolvent in the future;          the defendants had prepared a false report concerning the affairs of the Company, which: (i) exaggerated the amounts claimed to be owed to the defendants as unsecured creditors of the Company; (ii) failed to disclose the Company’s BT Funds Cash Management Account credited to $22,000; (iii) failed to disclose that there was an unpaid amount of $72,500 on shares in the Company held by the first defendant; and          immediately prior to the liquidation, the first defendant had requested BT Funds Management to release all of the Company’s funds in its BT Funds Cash Management Account to “Quantum Analytical Services” (that is, to him).  As a result of these acts and omissions by the defendants, the plaintiffs claimed that the Company had suffered unnecessary losses in the order of approximately $192,000.  **(c) Relevant law**  In this case, the key section of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) was section 436A(1) which provides that:  “A company may, by writing, appoint an administrator of the company if the board has resolved to the effect that:  (a) in the opinion of the directors voting for the resolution, the company is insolvent, or is likely to become insolvent at some future time; and (b) an administrator of the company should be appointed.”  The plaintiffs sought damages under section 598 which states that:  “…where, on application by an eligible applicant, the court is satisfied that:  (a)  a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a corporation; and (b)  the corporation has suffered, or is likely to suffer, loss or damage as a result of the fraud, negligence, default, breach of trust or breach of duty;  the court may make such order or orders as it thinks appropriate against or in relation to the person…”  **(d) An objective standard**  The principal legal issue in this case was whether the defendants had placed the Company into voluntary administration when they did not believe that the Company was insolvent or likely to become insolvent in the future. Justice Weinberg stated that in resolving this issue, it was not relevant to establish whether the Company was in fact insolvent, or likely to become insolvent in the future. Rather, the court was concerned with the opinion of the directors about the solvency of the Company when they resolved to place it into administration.  The question to be answered was “whether [the directors] genuinely believed, on reasonable grounds, that the company was insolvent or likely to become so in the future…the reasonableness of any such belief in turn depends, at least in part, upon the adequacy of the steps that they took to satisfy themselves that the preconditions for the appointment of an administrator had been met” (at 189).  As with cases involving an alleged breach of the directors’ duty to prevent insolvent trading, in establishing the reasonable belief of directors, the court had to consider “the objective standard [of care] of a director of ordinary competence.” That standard would vary “according to the size and nature of each particular company, as well as the particular experience that the directors held himself or herself out as having upon appointment to that office” (at 190).  **(e) The decision**  Justice Weinberg held that the plaintiffs had not discharged their onus of proving that the defendants had placed the Company into voluntary administration without “genuinely believing on reasonable grounds” (at 189) that the Company was insolvent or likely to become insolvent in the future.  In ascertaining the defendants’ belief as to the Company’s solvency, it was necessary to consider the other aspects of the plaintiffs’ claims, those being, the amounts owed to the defendants as unsecured creditors of the Company, the balance of the Company’s BT Funds Management Account and the amount owing on the unpaid shares.  The problem, identified by Justice Weinberg, facing the plaintiffs in this case, was the “uncertain”, “informal” and “incomplete” (at 187 and 207) records of the Company’s assets and liabilities. There was insufficient evidence to suggest that the debts claimed by the defendants were false. Similarly, the evidence relating to the unpaid shares was “too tenuous” (at 205) to support the plaintiffs’ claim that money was owed to the Company. Accordingly, the plaintiffs could not prove that the defendants lacked a genuine and reasonable belief that the Company was insolvent, or likely to become insolvent in the future.  The case against the second defendant was slightly different. Justice Weinberg held that as a non-executive director, who did not understand the financial aspects of the Company and who was overseas at the time the decision was made to place the Company into voluntary administration, the second defendant was entitled to rely on his son’s (the first defendant’s) claim about the insolvency of the Company.  The plaintiffs did succeed in proving that the first defendant was not authorised to withdraw all of the funds from the Company’s BT Funds Management Account.  Those funds were owned by the Company, not the first defendant, and had derived from the settlement of a dispute in favour of the Company. The first defendant was required to repay those funds, plus interest. |
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