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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Legal professional privilege seminar (Sydney and Melbourne) – recent developments in legal professional privilege and their implications for companies and advisers**  The Centre for Corporate Law and Securities Regulation is hosting two seminars titled 'Legal professional privilege – recent developments and their implications for companies and advisers' in Sydney and Melbourne.  The dates of the seminars are 24 August (Sydney) and 30 August (Melbourne). The time of each seminar is 5.30pm – 7.00pm.  Legal professional privilege is a major issue for in-house lawyers, regulators and professional advisors to companies. There have been many important recent developments in the area of legal professional privilege which have implications for companies and their advisers. The scope and reach of legal professional privilege has been under attack through legislative changes and recent court judgments, posing challenges to the legal profession and in-house counsel in particular when advising on complex issues.  This seminar brings together key speakers (from the ATO, a major company and law firm) to address:   * the essential requirements of legal professional privilege as they apply to in-house lawyers; * key trends and likely future developments; * how to manage legal professional privilege from an in-house counsel's perspective; and * tax office practices and policies relating to legal professional privilege.   **Speakers**  Emilios Kyrou - Mallesons Stephen Jaques Kirsten Gray - BHP Billiton Stephanie Martin - Australian Taxation Office  **Topics**  **Emilios Kyrou:** will outline the key requirements of legal professional privilege as they apply to in-house lawyers, and discuss key trends and likely future developments. Following a spate of cases in the last few years in which claims for privilege were rejected because of findings of lack of independence of in-house lawyers, 2006 has seen less negative sentiment against in-house lawyers in the case law. Nevertheless, claims for privilege continue to be rejected by courts for a variety of reasons and this trend is likely to continue.  **Kirsten Gray:** will present an in-house perspective on legal professional privilege.   **Stephanie Martin:** will describe Tax Office practices and policies relevant to legal professional privilege where there have been recent decisions and/or the law is still vague or ambiguous. The most notable issues are severance, electronically stored information, third parties, copies and improper purpose. All of these can create major difficulties for regulatory authorities unless clear and reasonable processes are in place for dealing with disagreements about the extent of the privilege versus the extent of the access and information-gathering powers. Stephanie will describe the Tax Office's various approaches to the many conflicts that can arise in the course of audits or field work.  Further information and the registration form are available on the [Centre for Corporate Law and Securities Regulation website](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new).  **1.2 CEO/CFO sign-off disclosure**  The number of Australian companies disclosing CEO and CFO sign-offs in annual reports rose by 25 per cent to 69 per cent in total over the last year, according to research published on 19 July 2006.  The KPMG study, 'Another year on', assessed companies' responses to Recommendation 7.2 of the ASX Corporate Governance Guidelines which requires CEO/CFO assertion that their sign-off on financial statements is founded on a sound system of risk management and internal control compliance. It models a similar survey that followed the nature and quality of disclosure in the 2004/2005 financial year.  There is an increased number of companies providing investors with significant insights into their risk profile and risk management strategies.  Ninety-five per cent of companies provided a description of their risk management system and 50 per cent disclosed their risk profile. Within this group, there is a smaller group of companies providing very descriptive summaries of their risk profile and risk management systems.  The study also found the majority of CEOs and CFOs are signing off on non-financial controls (60 per cent), which reflect the growing interest in non-financial risk amongst investors as demonstrated in several supporting submissions to the recent Parliamentary Joint Committee on Corporate Social Responsibility.  Further information is available on the [KPMG website](http://www.kpmg.com.au/Default.aspx?TabID=214&KPMGArticleItemID=2104" \t "_new).  **1.3 Australian capital markets survey: 2005-2006**  The Australian capital markets reaped a record amount of equity, raising $42.5 billion in financial year 2005-2006, an increase of 22 percent on the previous year, according to KPMG's Capital Markets Survey 2005-2006 published on 17 July 2006.  **(a) Highlights of the survey**  For the second year running initial public offerings (IPOs) were the number one fundraising vehicle for 2005-06 responsible for $11.9 billion or 28 percent of total equity raised, followed by placements ($11.6 billion), dividend reinvestment plans ($7.3 billion) and rights and entitlements issues ($6.0 billion).  **Top 5 equity raisings: 2005-2006:**   |  |  |  | | --- | --- | --- | | **Company name** | **Raising type** | **Equity raised ($m)** | | Goodman Fielder | IPO | 2,649 | | SP AusNet | IPO | 1,415 | | Spark Infrastructure Group | IPO | 1,145 | | Dyno Nobel | IPO | 1,075 | | Westpac TPS Trust | Rights issue/ hybrid | 763 |   **(b) IPOs**  The 2005-2006 financial year set records for IPOs with $11.9 billion raised in 164 transactions. Excluding the earlier Telstra T1 and T2 issues, 2005-06 saw the highest aggregate dollar raised by IPOs in a decade.  While the main feature of 2004-05 was the sheer volume of IPOs, the latest year witnessed the return of the "super floats". Thus the year saw four IPOs exceeding the $1 billion level compared with none in the previous year.  The average value of IPOs increased from $53 million to $72.5 million per float. However, the number of IPOs declined from 185 to 164. There was also a decline from 62 to 50 in "micro floats" (those below $5 million). This decline ran counter to experience, as strong market conditions traditionally produce a rush of small company floats.  The weighted average cost of listing as a percentage of the capital sought has been on an upward trend for several years. It has grown to 6.88 percent in 2005-06. As seen in previous years, there was an inverse relationship between the size of a capital raising and the cost of listing as a percentage of the amount sought.  **(c) Hybrid securities**  Hybrid securities remained popular in 2005-2006, making up $13.2 billion of the $42.5 billion raised during the year.  **(d) Debt markets**  2005-2006 was a record year for the debt markets. Bank loan volume was driven to a new high of around $77 billion, largely as a consequence of increased corporate refinancing together with mergers and acquisitions and leveraged buy-out activity. Acquisition-related loans were 49 percent higher than in 2004-05.  Companies with ratings below investment grade raising finance in March 2006 had debt of 5.73 times EBITDA. This is the highest figure since the leveraged loan market started to be tracked in the late 1990s. However, despite this significant increase in leveraged finance deals, debt refinancing remained the main driver of corporate borrowing, accounting for 42 percent of all corporate debt raising in 2005-2006.  **(e) Industry highlights**  The top three industries for equity raisings for 2005-2006 were real estate ($7.6 billion raised), materials ($6.8 billion) and diversified financials ($4.1 billion). Banks took the greatest dip this year dropping from the number one rank in 2004 with $6.0 billion to number seven in 2005-06 raising only $2.2 billion.  Utilities enjoyed a boost in raisings from $1.2 billion in 2004-2005 to $3.8 billion in 2005-2006, while the food, beverage and tobacco sector saw the strongest growth jumping from $352 million to $3.1 billion during the year primarily as a result of the Goodman Fielder float.  **1.4 SEC proposes Sarbanes-Oxley section 404 improvements**  On 11 July 2006, the US Securities and Exchange Commission published a Concept Release as a prelude to its forthcoming guidance for management in assessing a company's internal controls for financial reporting.  Following its 10 May 2006 Roundtable devoted to Sarbanes-Oxley section 404 implementation issues, the Commission issued a roadmap for improvements entitled "Next Steps for Sarbanes-Oxley Implementation" (SEC Press Release 2006-75, 17 May 2006). Issuance of the Concept Release is one of the milestones on that roadmap, and it brings the SEC one step closer to issuing guidance for management that has been lacking since the law was enacted in 2002.  At the Roundtable, the Commission learned from participants that while section 404 has produced benefits, its implementation has been unduly costly. The Commission also received specific feedback about issues that remain to be addressed, and actions that the SEC and the Public Company Accounting Oversight Board could take to make the internal control assessment and auditing more efficient and more effective. A separate Advisory Committee on Smaller Public Companies reported, following a year-long study, that companies which have not yet undertaken the process have special concerns with both costs and procedures. The planned guidance for management, which is the subject of the Concept Release, is intended to assist in dealing with all of these issues and concerns.  The Commission anticipates that the forthcoming guidance for management will cover at least these areas:   * Identifying risks to financial statement account and disclosure accuracy and the related internal controls that address the risks, including how management might use company-level controls to address the risks. * Objectives of the evaluation procedures and methods or approaches available to management to gather evidence to support its assessment. * Factors management should consider to determine the nature, timing, and extent of its evaluation procedures. * Documentation requirements, including overall objectives of the documentation and factors that might influence documentation requirements.   The Concept Release seeks feedback on each of these topics and on whether guidance should be provided in other areas as well.  Further information is available on the [SEC website](http://www.sec.gov/news/press/2006/2006-112.htm" \t "_new).  **1.5 European Commission calls upon member states to sign Hague Securities Convention**  On 5 July 2006, the European Commission issued its legal assessment of the Hague Securities Convention, an international treaty providing a uniform legal formula for determining the ownership of securities held in electronic form. This is in response to a request from the EU's Council of Ministers for clarification of four specific legal issues (see below for details). The assessment finds that three of the issues pose no major difficulty, while on the fourth issue it cautions that the use of more than one Convention law within securities settlement systems would endanger financial stability. The Commission therefore recommends that the European Community and Member States now sign the Convention, and that the Settlement Finality Directive be amended so that securities settlement systems are governed by one Convention law only.  On 15 December 2003, the Commission submitted to the Council a proposal for a Council Decision concerning the signing of the 2002 Hague Securities Convention (see IP/03/1725). The Convention establishes a conflicts-of-law regime, under which the law applicable to holdings of securities is the one named in the account agreement with the relevant intermediary. This differs from the regime which is currently applied in the European Community, under which the law applicable to holdings of securities is determined by the location of the account.  It is this switch from one formula to another that has prompted a wide-ranging debate about the merits of adopting the Convention. On 23 June 2005, the Council asked the Commission to assess four legal issues, namely: (1) scope of application, (2) extent of third-party rights, (3) consequences for substantive and public law and (4) impact of the diversity of laws on settlement systems and prudential regimes.  The Commission's legal assessment, issued in the form of a staff working paper, concludes that the first three issues would not pose major difficulties, but that the application of the Convention may affect the financial stability of securities settlement systems, if participants in such a system decided to apply more than one Convention law.  The Commission therefore suggests that, apart from changing three Directives, in which the 'location of the account' formula appears, an additional eligibility criterion be introduced in Article 2 of the Settlement Finality Directive to ensure that, within systems, one and only one Convention law should be expressly chosen by all participants. These amendments would have to be introduced after the signing of the Convention and before its ratification.  The Commission's legal assessment is available on the [European Commission website](http://ec.europa.eu/internal_market/financial-markets/hague/index_en.htm" \t "_new).  **1.6 New standard on auditor competence**  On 5 July 2006, the International Accounting Education Standards Board (IAESB), an independent standard-setting board within the International Federation of Accountants (IFAC), released a new standard outlining the skills, training, professional values and attitudes necessary for auditors to perform competently. International Education Standard (IES) 8, Competence Requirements for Audit Professionals, applies to all audit professionals, not just the audit engagement partner. It also prescribes specific competence requirements for audit professionals involved in translational audits.  Effective 1 July 2008, IFAC member bodies will be expected to modify their policies and procedures to ensure that audit professionals meet the requirements of IES 8. These requirements include having advanced level knowledge of audit and financial reporting; relevant information technology knowledge; and the professional skills and professional values, ethics and attitudes expected from audit professionals.  IES 8 will also impact upon the education of new audit professionals. Education and development programs for new audit professionals will need to comply with the new standard's requirements and may need immediate revision to ensure that they are operational well before the effective date of 1 July 2008. The standard requires professional accountants taking on the role of audit professional to undertake a period of practical experience in audit and to undergo an assessment of capabilities and competence before they assume such a role.  IES 8 is available on the [IFAC website](http://www.ifac.org/store/" \t "_new).  **1.7 Managed funds research**  Research published on 5 July 2006 by AFG Global Funds Management Index shows that on a per capita basis, Australians have $44,911 invested in managed funds – nearly 15% more than the second ranking country, the USA.  The AFG Global Funds Management Index is based on the most recent international data available for the final quarter of 2005. It shows that while inflows to managed funds in Australia have grown by 97.5% since 2000, during the last six months of 2005 growth was a relatively modest 5.9%. This compares with growth rates for the USA of 8.0%, Canada – 10.3% and UK – 10.2% during the same six month period.  AFG Global Funds Management Index does not include direct share ownership, nor ownership of other asset classes such as property. Figures include all countries except tax havens such as Luxembourg and British Virgin Islands.  After Australia's 97.5% growth rate during the past five years, the next highest were France with 86.5%, Spain with 82.9% and South Korea with 77.4%.  **1.8 Trading transparency in bond markets**  On 5 July 2006, the UK Financial Services Authority (FSA) published its feedback statement FS06/4 Trading Transparency in the UK Secondary Bond Markets – feedback on DP05/5.  The discussion paper was primarily aimed at informing the FSA's position on the European Commission's review of whether the MiFID transparency requirements for markets in shares should be extended to other asset classes, including bonds.  The FSA believes that prior to any new regulations being introduced it should be established whether there are any market failures in bond markets being caused by insufficient transparency. Based on the analysis set out in the feedback statement, the FSA does not see any evidence of significant market failures related to transparency in the UK's wholesale bond markets.  The feedback statement combines the responses to the discussion paper, the outcome of ongoing discussions with a range of stakeholders, further analysis of existing empirical research and the FSA's own data analysis. It reaches a number of conclusions:   * No evidence has been found of widespread market failure related to transparency that would warrant regulation. The FSA agrees with the view of the majority of respondents that a combination of competition, market-driven transparency, interaction between the cash and credit derivatives markets and regulation is sufficient to deliver efficient pricing and fair executions. * Extreme caution needs to be exercised in mandating greater transparency in the UK and Europe, as greater pre-trade transparency is likely to impact on existing complex market structures in unknown, but potentially significant ways. These markets are still relatively dynamic and continue to evolve. * Changes to post-trade transparency may have less impact on market structure. Further analysis is needed of the trade-off between transparency levels and liquidity provision, particularly for less liquid bonds. * Some participants may find existing transparency deficient but it is not clear whether differences in the availability of trading information to different types of institution is a market failure per se or a reflection of the fact that in any market there will be those with better access to information. The FSA will look to the market to generate appropriate solutions in the first instance. * There are very few direct UK retail participants in the secondary bond markets, due to a number of structural features that are unlikely to change in the short term. Concerns raised about retail participation in bond markets relate primarily to matters other than market transparency. * The introduction through MiFID of a new pan – European Union best-execution regime should, if implemented effectively, address a key concern for retail investors in relation to bond markets. DP06/3 aims to open up debate on how best to implement the MiFID best execution requirements across a range of financial instruments, and the role that transparency information might play.   Further information is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Communication/PR/2006/066.shtml" \t "_new).  **1.9 Reports recommend improvements to EU investment fund framework**  On 4 July 2006, the European Commission published three industry reports that analyse the main challenges facing different segments of the EU investment fund industry, focusing respectively on retail investment funds (UCITS), hedge funds and private equity. The reports were prepared by the expert groups on investment fund market efficiency and alternative investments (see IP/06/96), and are a follow-up action to the Green Paper on the enhancement of the EU framework for investment funds and long-term savings vehicles (see IP/05/927). While they do not necessarily represent the views of the Commission, the reports and stakeholders' reactions to them will contribute significantly to the policy debate on improving the operating environment for Europe's asset management industry. In particular, they constitute an important input to the forthcoming White Paper on strengthening the single market framework for investment funds, scheduled for publication in November 2006.  The report on investment fund market efficiency provides ideas and operational suggestions on how efficiency improvements can be delivered. Several of these would require carefully targeted amendments to the UCITS Directive. The report calls on the EU to deliver these improvements within three years.  The report on hedge funds identifies a number of alternative approaches - which do not call for new EU legislation - to make hedge funds available to different categories of investor. It stresses the need to remove barriers the investment in hedge funds by institutional investors and the cross-border provision of essential support services to hedge fund managers.  The report on private equity funds describes the unique role of private equity in nurturing new enterprises and re-energising existing companies. Member States control most of the tax and regulatory levers needed to provide a private-equity friendly environment, and the report urges them to make effective use of these powers. The report highlights a number of EU initiatives that have had unintended consequences for the private equity industry and identifies useful EU-level improvements that could facilitate cross-border investment and capital-raising by private equity funds.  The reports are available on the [Europa website](http://ec.europa.eu/internal_market/securities/ucits/index_en.htm" \t "_new).  **1.10 Report on trade-based money laundering**  A report published on 3 July 2006 by the Financial Action Task Force (FATF) examines the ways in which the international trade system can be misused for laundering the proceeds of crime. Noting a number of money laundering case studies, "red flag" indicators of illegal activity and issues for further consideration, the report identifies how import and export operations are exploited as a cover for the movement of illicit funds.  Using information from public sources, case studies, and national experience furnished by governments, the report will assist policy makers, law enforcement officials and financial service providers as they attempt to prevent money-laundering loop-holes in the international trade system.  This report is one in a series of thematic studies carried out by the FATF to provide an in-depth look at money laundering.  A full text of the report is available on the [FATF website](http://www.fatf-gafi.org/document/18/0,2340,en_32250379_32237217_37038354_1_1_1_1,00.html" \t "_new).  **1.11 Australian CEO share ownership and corporate performance**  On 3 July 2006 Guerdon Associates, a remuneration consultancy firm, published information on Australian CEO share ownership and corporate performance.  The research finds there is a positive relationship between CEO share ownership and shareholder returns but there are differences between industries, size of companies and extent of shareholdings. Guerdon Associates states that it is problematic to infer that the share ownership is causing improved shareholder returns. Most CEOs in the sample would receive some form of share-based remuneration. These grants are increasingly being tied to company performance, particularly relative total shareholder returns. As a consequence of this, it is to be expected that CEOs in the highest performing companies will receive more share value than other CEOs. It is also to be expected that well performing company shares, or shares in a company about to realise long term potential, are less likely to be sold than under performing shares, or a company with limited potential. It may be that the performance is causing the share ownership, not the other way around.  The sample for the study was the ASX top 300 companies. Companies with a market capitalisation of less then $100 million were excluded, as were executives who had only served part of the reporting year. Share holdings were valued in the following three ways:   * the dollar value of the holding (multiplying the holding by the share price as at 15 May 2006); * the value as a percentage of Total Fixed Remuneration (TFR); and * the value as a percentage of market capitalisation (as at 15 May 2006).   In all, 230 CEOs were identified of whom 185 (80%) held shares in the company they manage.  **(a) How much do CEOs own?**  CEOs in the sample own a significant amount of the companies they manage. Only 20% of CEOs do not own any of the company they are employed to manage. But a significant 66% have $500,000 or more of their wealth tied up in company shares. 13% percent own more than $50 million in shares of the company they manage. The median share ownership is $5.789 million.  **(b) Value of shareholding and company size**  Overall, there is no correlation between the value of the CEO's shareholding and the market capitalisation of the associated listed company. That is, the CEO of a small company would be just as likely to have a million dollars tied up in company shares as the CEO of a larger company. The same held true when Guerdon Associates looked at how much of a CEO's wealth was tied up in the company as a percentage of his/her pay. That is, the CEOs who held at least one year of their fixed pay in company shares were just as likely in the smaller company as the larger company.  However, there was a negative relationship between the shareholding as a percentage of market capitalisation and market capitalisation. That is, larger company CEOs owned less of the company than smaller company CEOs. This is not surprising since CEOs are more likely to own a greater proportion of the company if it is small than if it is large.  Overall there is a weak negative relationship between remuneration and the value of the share holding. The strongest relationship is between the value of the holding as a percentage of market capitalisation and CEO TFR. The correlation was -0.24. This suggests that the greater the proportion of the market capitalisation of the company that is held by the CEO, the lower his/her TFR is likely to be.  **(c) Ownership and performance**  There is a significant relationship between the size of the shareholding and long-term performance. The relationship between shareholding and long term company performance is stronger than the relationship between shareholding value and short-term performance. This suggests that sound long-term decisions are more likely if the CEO has a substantial holding in the company. The correlation between the dollar value of the stock held and ten-year TSR performance is 0.46. This contrasts with a weak correlation of 0.10 with one-year TSR performance.  **(d) Findings by industry**  When the data was broken down by industry the relationship between share holdings and company performance changed. The Health Care, Industrial and Material sectors have a clear relationship between share ownership and long-term (ten year) performance. The Financial sector relates most strongly with medium-term (five year) performance. This is a diverse group of companies including banks, insurance companies and property related companies. The Energy and Consumer Discretionary industries appear to relate most strongly to short-term (one year) performance.  Further information about the study is available on the [Guerdon Associates website](http://www.guerdonassociates.com/" \t "_new).  **1.12 Independent directors have key role in managing risk**  Nearly three quarters (72%) of independent directors believe risk levels have risen over the last two years, according to a survey published on 3 July 2006 by Ernst & Young, and compliance with standards and regulations has become a top priority for corporate boards.  The survey, "Board members on risk: leveraging frameworks for the future", is the third in a series of reports on risk produced by Ernst & Young, and follows similar reports on the views of investors and of executive management. It sought the views of around 150 independent non-executive board members, from companies ranging in size from half a billion dollars turnover.  According to the independent board members interviewed in the survey, compliance with standards and regulations is the board's main risk priority (32%), understandably a strongly held view among Audit Committee Members (ACMs) (41% v 14% for non-audit committee members). Non-ACMs perceive greater levels of business risk (21%).  The survey suggests boards can add most value through better collaboration and skills transfer, both between audit committee members and non-members, and between independent directors and executives. One in four (27%) of directors sees a framework for risk management as critical to success, but the challenge is to create a framework that goes beyond simply compliance.  However, this focus on risk mitigation raises potential tensions between board members and company senior management, whose growth and performance objectives mandate active risk-taking. A third of board members (32%) have pushed for executive changes on the basis of poor performance on risk management, with audit committee members significantly more likely to have pushed for change than non members (35% v 24%).  One in three independent board members believe some types of risk are not well managed by their companies, primarily business environment risks (17%) and to a lesser extent operational (12%), technology risk (11%) and competitive risks (10%), ie non compliance areas, suggesting room for improvement and an opportunity for the board to utilise their broader skills to create a positive risk framework.  Nevertheless, and perhaps not surprisingly with this focus on financial and regulatory compliance, board members generally believe risk is well managed (7.6 out of 10 score). Certainly more so than the senior managers who deal with it on a day to day basis (7.0 in the corresponding survey).  Other key findings include: Clear ownership of risk across the business is considered the single most important factor in successful risk management, but while the board see themselves as most likely to "own" risk (40%) with the CEO some distance behind (21%), in the earlier survey of executive management the CEO's were seen to own risk (30%) well ahead of the board (on just 20%). This implies a difference in understanding of what is meant by ownership, with the board focused on authority and management on accountability.  But boards now have greater accountability, a larger role and spend more time on risk with increased awareness of risk accentuating accountability. While board members generally agreed about their role in setting the strategy for risk (36%), non-audit committee members see their role as providing guidelines for implementation (41%), leaving execution to the executive management, whereas audit committee members (28%) are, understandably, more involved in detail and take an active role.  Risk priorities for the future include dealing with regulatory risk (15%), identifying emerging risks (14%), and improving systems for risk management (14%).  Further information is available on the [Ernst & Young website](http://www.ey.com/global/content.nsf/International/Media_-_Press_Release_-_Board_Members_on_Risk" \t "_new).  **1.13 CESR publishes its final guidelines on simplification of the cross-border notification procedure of UCITS**  On 29 June 2006, the Committee of European Securities Regulators (CESR) published its final guidelines (Ref CESR/06-120b), together with a feedback statement (Ref CESR/06-301) regarding the cross-border notification procedure of UCITS.  In order to simplify access by investors to mutual funds created under the UCITS directive in the EU single market, CESR has published guidelines to facilitate cross border notification of UCITS.  Within the boundaries of the existing legal framework of the *acquis communautaire* of the UCITS Directive, the guidelines address several of the requests for simplification of the cross border notification process proposed by markets participants.  The following key issues were raised during the second consultation and the improvements to the text of the guidelines made as a result and agreed by CESR are highlighted below:   * UCITS can submit the notification letter in a language common in the sphere of international finance to the Host competent Authority where this is not contrary to the domestic legislation or regulations. * Once a complete notification has been filed, the notification procedure should not exceed the two-month period and possibly be reduced to a shorter period. * As suggested by the respondents during the second consultation, in order to simplify the practices and reduce costs, competent Authorities will rely on self-certification of copies of original attestations by the notifying UCITS. * Regarding new sub-funds, which are added to the umbrella fund with the intention to be marketed in the Host Member State, where the marketing arrangements are already familiar to the Host country competent Authority, CESR has agreed that the necessary time for the Host Authority to check should be significantly less than the two-month period. To simplify the processing by the Host competent Authority of the notification of umbrella funds with a large numbers of sub-funds to be marketed, CESR recommends that umbrella funds with a large number of sub-funds should have one full prospectus.   Further information is available on the [CESR website](http://www.cesr.eu/" \t "_new).  **1.14 Disclosure of commissions to retail fund clients**  On 29 June 2006, the UK Financial Services Authority (FSA) published its policy statement PS06/5 Bundled Brokerage and Soft Commission Arrangements for Retail Investment Funds – feedback on CP05/13.  The FSA proposed that an "investors' representative" should receive and consider any commission-related disclosures about retail funds on investors' behalf and interact with the fund manager where necessary.  However, following feedback, the FSA has decided that it will not make rules in this area but will encourage and support an industry-led solution to dealing with this issue and will look to firms to demonstrate that they are treating retail consumers fairly.  The relevant trade associations – the IMA, DATA, the ABI and the AITC – agree that a disclosure-based approach can work for retail funds. The trade associations have agreed to consider further how standards of good practice can be established, and new ones developed where needed, to implement a consistent approach to the way commission disclosures are considered. This is expected to include more detail on:   * who is best suited to receive and consider disclosures for each type of fund; * how they should go about reviewing the information; * what kind of feedback they should be giving to fund managers; and * what information should be made available to fund investors.   As previously announced, the FSA will be carrying out a review in 2008 into the effectiveness of the new rules on soft commissions and bundled brokerage and the industry disclosure codes which support them on the wholesale side. The review will also look at how disclosure has benefited investors in retail funds.  The policy statement is available on the [FSA website](http://www.fsa.gov.uk/pages/library/policy/policy/2006/06_05.shtml" \t "_new).  **1.15 Studies into costs and benefits of financial regulation**  On 28 June 2006, the UK Financial Services Authority (FSA) published its Better Regulation Action Plan (BRAP) Progress Report, taking forward plans for reform of its rules first announced in December 2005.  This report is accompanied by three pieces of independent research into: the incremental costs of complying with individual FSA rules in three sectors; an estimation of the administrative costs to firms of providing information to the FSA; and a framework for identifying and measuring the benefits of financial regulation.  The BRAP reports on the progress made since last December and relates that work to the two studies on costs of regulation also published on 28 June 2006. In particular, it shows that rules which account for over three quarters of the administrative costs are already subject to review by the FSA. The FSA now intends to use the detailed rule by rule analysis of incremental costs set out in the Cost of Regulation study, as described below, to shape future regulatory reform.  The Cost of Regulation study, conducted for the FSA and the Practitioner Panel by Deloitte, examines the incremental costs of complying with individual FSA rules to firms in three sectors – corporate finance, institutional fund management and investment and pension advice. Incremental costs are costs which firms would not incur other than to comply with FSA rules. The results are indicative rather than statistically representative. While much of what regulation requires is, in fact, regarded by firms as good business practice, the estimated incremental costs differ markedly both between sectors and among firms within a sector. The results are specific to each sector, and no general conclusion about the total cost of regulation can be drawn from them.  The Estimation of FSA Administrative Burdens, conducted for the FSA by Real Assurance Risk Management, examines the costs financial sector firms and individuals incur in reporting to the FSA. Its results, which are also indicative rather than statistically representative, suggest that these costs are about £600 million, or about 0.5% of the industry's total costs of around £120 billion. The most significant costs arose in relation to anti-money laundering rules, where the FSA has recently streamlined its own requirements, and regular reporting rules.  The Benefits of Regulation – what to measure and how, study, conducted for the FSA by Oxera Consulting, sets out a framework for identifying and measuring the benefits of regulation. It establishes a best practice methodology for this, building on FSA's existing cost benefit analysis tools. This will enable a better analysis to be made of the benefits of individual rules or clusters of rules and support the comparison of such benefits with the incremental cost they impose.  The reports are available on the [FSA website](http://www.fsa.gov.uk/" \t "_new).  **1.16 Updated combined code on corporate governance**  On 27 June 2006, the UK Financial Reporting Council (FRC) published an updated version of the 'Combined Code on Corporate Governance'.  A small number of changes have been made to the previous version of the Combined Code, which was published in 2003. These will enable the company chairman to sit on the remuneration committee if considered independent on appointment; provide shareholders voting by proxy with the option of withholding their vote on a resolution; and encourage companies to publish the details of proxies lodged on resolutions where votes are taken on a show of hands. These amendments received strong support in a public consultation exercise held earlier this year.  The Listing Rules will not formally apply to the revised Combined Code until a separate consultation has been carried out by the Financial Services Authority (as the Listing Authority). This consultation is expected to start in September 2006. However, in view of the limited nature of the changes and the strong support that they have received, the FRC encourages listed companies and their investors to adopt the updated Code on a voluntary basis for reporting years beginning on or after 1 November 2006.  The changes made to the 2003 Combined Code will:   * amend the existing restriction on the company Chairman serving on the remuneration committee to enable him or her to do so where considered independent on appointment as Chairman (although it is recommended that he or she should not also chair the committee); * provide a 'vote withheld' option on proxy appointment forms to enable shareholders to indicate if they have reservations on a resolution but do not wish to vote against. Many listed companies already provide this option. A 'vote withheld' is not a vote in law and is not counted in the calculation of the proportion of the votes for and against the resolution; * recommend that companies publish on their website the details of proxies lodged at a general meeting where votes are taken on a show of hands. The UK Company Law Reform Bill currently with Parliament includes clauses that would require companies to publish details of votes taken on a poll. This amendment to the Combined Code means that details of all votes would be made available; and * enable companies to meet the requirement to make the terms of reference of board committees available by placing them on their website.   The updated Combined Code is available on the [FRC website](http://www.frc.org.uk/corporate/combinedcode.cfm" \t "_new).  **1.17 Surveys on supervisory rules on own funds and on recent market trends in new capital instrument**s  On 23 June 2006, the Committee of European Banking Supervisors (CEBS) published a survey of the national implementation of the current rules on own funds based on information provided by Member States. CEBS also published in parallel an analysis of recent market trends in, and the main characteristics of, new capital instruments. This analysis is based on replies from market participants to CEBS' online questionnaire in early 2006.  The survey on supervisory rules highlights the main commonalities and differences in national regimes across Europe. In general, CEBS found that member states share many commonalities with regard to the core objectives of own funds. Variations in own funds rules arise either from the flexibility granted by the CRD, or as a result of local market specificities, differences in national tax and company laws or in prudential approaches.  There is some variation in how competent authorities treat hybrid capital instruments that have similar characteristics to, but do not have the same quality as, core original own funds. This divergence is not addressed in the present EU legislation.  CEBS notes that working in parallel with the Basel Committee on Banking Supervision is crucial to ensure consistency and a level playing field at international level.  With regard to recent market trends, CEBS notes that the volume and diversity of hybrid instruments are developing quickly. This is mainly due to return-on-equity considerations, low interest rates and a widening of the investor base.  More information is available on the [CEBS website](http://www.c-ebs.org/Advice/advice.htm" \t "_new).  **1.18 M & A activity in the Asia Pacific region**  The growing affluence in the Asia Pacific region is causing an unprecedented boom in the private banking sector and driving record levels of merger and acquisition (M&A) activity globally, according to a survey released on 21 June 2006 by KPMG.  The survey: "Hungry for more: Acquisition appetite and strategy in the global private banking and wealth management industry", found that 45 percent of all deals last year took place in the Asia Pacific region and when respondents were asked to nominate countries where they were seeking to expand, China, followed by India, topped the poll.  258 deals were completed globally in 2005, up 80 percent on the previous year, which was in itself a record.  Almost 22 percent of respondents expect to spend more than US$1 billion on acquisitions over the next three years and one third between US$250 million and a billion. Australia ranked sixth in terms of most noteworthy target countries.  Domestic acquisitions continue to dominate the sector at 78 percent of all deals in 2005. The average deal size (ignoring the five largest deals) remained constant from the previous year at US$103 million.  The burst of activity in the M&A market also raises its own challenges. Vendor's price expectations is cited by half of the respondents as an obstacle to M&A activity and of the deals that failed to be consummated, four out of ten of these also faltered on the seller's price demands, the highest single cause of failure. Integration issues continue to be an issue for deals that were completed.  **Survey highlights**   * The number of deals is increasing: 258 deals were completed in 2005, up from 142 in 2004. Asia Pacific dominated this activity, with 45 percent of the deals taking place in the region. * 89 percent of respondents are actively seeking acquisition targets or would consider acquiring if the right opportunity arose. * 29 percent of survey respondents had acquired another private banking business in the past three years. Among those companies that had made an acquisition the mean number of transactions in the past three years was 2.7. * Small banks appear to be under pressure with 55 percent citing increased competition from larger, consolidated competitors as being the primary driver of structural change in the sector. * The average deal size in 2005 (removing the five largest deals) was US$103 million. * 52 percent of respondents said that price expectations were the most likely factor preventing more investment in M&A. * Two-thirds of respondents lost some proportion of the acquired company's client base within one year of completing their largest acquisition. 39 percent of private banks lost over 10 percent of the customer base. * 80 percent of respondents said their recent acquisitions had increased shareholder value.   The Hungry for More survey is now in its third year. This year's survey was based on interviews with 147 private banks around the world. The underlying survey was conducted by the Economist Intelligence Unit. Twenty-four percent of survey respondents were from the Asia Pacific region and 10 percent of all respondents were Australian.  The Survey is available on the [KPMG website](http://www.kpmg.com.au/Default.aspx?TabID=1342" \t "_new).  **1.19 Fund managers views on IFRS**  The majority of UK fund managers see the move to International Financial Reporting Standards (IFRS) as a broadly positive one, with nearly two thirds saying that the transparency of company reporting has improved, according to new research published on 20 June 2006.  The PricewaterhouseCoopers LLP survey "IFRS – The investors' view six months on" shows that respondents believe IFRS has helped companies be more transparent about their reporting. Although 18 per cent disagree (perhaps reflecting concerns about the volume of information now reported), the significant majority (64 per cent) believe IFRS has improved transparency.  Overall, the information provided by companies in their year-end reports, including any restatements, has been well received by investors. More than three quarters (76 per cent) found the information presented very or fairly clear and understandable and the majority (67 per cent) found annual reports useful in helping them to interpret the changes required under IFRS.  Compared to the findings of a PricewaterhouseCoopers survey into fund managers' views of IFRS six months ago, there was a shift towards respondents seeing a more positive impact in terms of the clarity of companies’ historic financial reporting under IFRS. However, fund managers did appear less positive about the impact of IFRS on the clarity of reporting of financial risk, with 52 per cent of respondents saying such risks are very or fairly clear under IFRS, compared to 77 per cent in the previous survey.  One in three respondents say that the information they focus on has changed as a result of the move to IFRS. Cashflow remains the most crucial piece of information, but in the second wave of results the balance sheet has replaced operating profit as the second most important information in a company's report. This may reflect the increased lack of comparability of how operating profit is derived.  In terms of how management has performed, fund managers' views have remained positive. The majority of them (79 per cent) believe that management has coped very or fairly effectively with the adoption of IFRS. This is consistent with the previous survey six months ago.  With regard to investors' knowledge, 52 per cent of respondents feel their understanding of IFRS is greater than six months ago, whilst 47 per cent feel it has remained the same. However, this increased understanding goes hand in hand with a dip in confidence – 68 per cent say they are very or fairly confident that they have a full understanding of the impact of IFRS on companies they are investing in, compared to a very high 84 per cent last time. This may simply indicate that, having now seen some full IFRS accounts and with months more experience, fund managers are more realistic about how much there is to absorb.  Likewise, perceptions of value continue to be altered. Over a third of respondents reported that the conversion to IFRS has influenced a decision to invest in or divest from a company, down from almost 50% six months ago but still higher than many people might expect. The impact on investment decisions in relation to sectors and countries is however much lower, reflecting as expected the difficulty in making generalisations.  When comparing IFRS to UK GAAP as a basis for reporting, the findings were revealing. Whilst half of fund managers believe that IFRS and UK GAAP are equally useful or their usefulness depends on the circumstances, where a preference was expressed, almost twice as many fund managers (29 per cent compared to 15 per cent) believed that information produced under IFRS is more useful than that issued under UK standards.  **1.20 Audit committees feel most exposed to litigation: survey**  Audit committee members feel they are more exposed to litigation and financial prosecution than any other members of the Board, according to research by KPMG's Audit Committee Institute published on 19 June 2006.  The research, which was conducted among 1,200 audit committee members in 17 countries, found that this sentiment of heightened exposure is especially marked in the US and Canada (85% and 89% of respondents respectively) but is generally high in all countries. Overall, around three quarters of those surveyed said they were somewhat or very concerned about their liability exposure.  Separate KPMG research recently found that, in the UK, remuneration for non-executives grew by on average 12% between 2004 and 2005. But audit committee members do not appear to be being remunerated significantly more than remuneration or nomination committee members.  Worries about liability came despite the fact that respondents rated the effectiveness of their committees highly. The highest satisfaction levels were in the US where 72% of respondents rated their committee as very effective, followed by Canada (64%) – interestingly, two of the countries most concerned about litigation. Satisfaction levels across the Atlantic were appreciably lower – 52% in the UK rated their committee as very effective, for example, and 48% in the Netherlands.  The US and Canada also spend more time on audit committee matters than other countries. Anecdotal evidence suggests that the Sarbanes-Oxley process has necessitated more meetings than was previously the case. Indeed, 22% of US respondents stated that they spend 101-150 hours a year in their role compared to UK (6%), France (5%), Netherlands (11%) and Australia (12%). This equates to around 14 to 21 days annually.  The difference in the number of meetings, between Europe on the one hand and the US and Canada on the other, is quite substantial. European respondents tend to have between 1 and 5 meetings a year with the UK (78%), France (76%) and the Netherlands (60%) indicating as such. Meanwhile in the US and Canada more respondents tend to have between 6 and 10 meetings a year (62% and 58% respectively). Indeed, 17% of US respondents attended between 11 and 15 meetings a year. It was probably not a coincidence that US respondents also sat on the least number of audit committees.  On average, most respondents to the survey said they served on 1 or 2 audit committees, which typically comprised of 3 or 4 members. Most of them had a background of having been a chairman, CEO, president or director in their previous working life. |
| **2. Recent ASIC Developments** |
| **2.1 Superannuation reporting practices**  On 17 July 2006, the Australian Securities and Investments Commission (ASIC) released new information for superannuation trustees to ensure they meet their legal obligations to members regarding the reporting of material changes and significant events.  An extension of ASIC's review of disclosure practices following the introduction of choice legislation last July, "QFS 163 I am a superannuation trustee. Do I need to notify members about member transfers without consent?" is aimed at improving the clarity and timeliness of significant event reporting.  Trustees should be aware that it may be necessary to provide members with comparative information that helps them understand the nature and effect of the decision. For example, where fees change (including fee rebates), or insurance cover or cost is affected, the trustee needs to explain the differences.  Trustees should also take care not to drip-feed information about particular changes or individual events without explaining the consequences of the changes or events as a whole.  Currently, member benefits can be transferred without their consent in a number of ways including into a successor fund, eligible rollover fund, or another category within the same fund. Different terms may be used to describe different categories within a fund such as plans, divisions, or sections. A common source of member transfers is when a person changes jobs and decides to stay with their former employer’s default fund. Unless their new employer is also an employer sponsor of the fund, the member is likely to be transferred into the personal division of the fund which may have quite different fees to their old division.  Further information is available on the [ASIC website](http://www.asic.gov.au/ASIC/asic.nsf/ASIC+FSR+FAQ+DisplayW?ReadForm&unid=644D56EE38A1EEE6CA2571A400002F84" \t "_new).  **2.2 Prosecution of company officers**  On 11 July 2006, the Australian Securities and Investments Commission (ASIC) published statistics for the latest quarter on prosecutions in relation to summary offences committed by company directors and other officers.  In the April to June 2006 quarter, ASIC prosecuted 161 defendants in relation to 300 contraventions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), with fines and costs totalling $333,790 imposed.  Summary prosecutions, an important part of ASIC's enforcement work, are aimed at improving the quality of information available to the public, shareholders and members or officers of Australian companies. The work undertaken is of particular assistance to directors and also to small businesses, which make up the greatest proportion of Australian companies.  For the year as a whole, ASIC successfully prosecuted 502 company officers for 920 contraventions of the Corporations Act, with fines and costs totalling more than $1 million imposed on company officers.  These results reflect an increase over the 2004/05 financial year when ASIC prosecuted 478 company officers for 905 contraventions.  ASIC's prosecution of company officers in 2005/06 related to a range of contraventions. These included company officers:   * failing to assist liquidators and administrators in the administration of their failed companies; * continuing to act as officers of a company following the appointment of a liquidator; and * failing to update ASIC registers with the addresses of their companies and company officers in an attempt to hide from creditors.   Other contraventions included people who continued to trade companies while deregistered, disqualified people continuing to be involved in the management of corporations, companies failing to hold Annual General Meetings, and officers and their companies lodging documents with ASIC that contained false or misleading information.  ASIC's prosecutions follow complaints received from the general public and business community.  These matters were prosecuted summarily before Local and Magistrates Courts across Australia and are not intended as an exhaustive list of all ASIC actions during the 2005/06 financial year.  Since 1 July 2002, ASIC has increased summary prosecutions of people and companies and in doing so has improved the quality of information available to the public, shareholders and members or officers of Australian companies. These actions have assisted external administrators to address ongoing misconduct by company officers and prevented disqualified directors from managing companies.  Further information on ASIC's enforcement outcomes are available on the [ASIC website](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/Media+and+information+releases+Home+Page?openDocument" \t "_new).  **2.3 Exit statement relief for winding up superannuation funds**  On 11 July 2006, the Australian Securities and Investments Commission (ASIC) announced relief in relation to the requirement for trustees of superannuation funds to provide certain additional information in exit statements given on or after 1 July 2006, in cases where members exit the fund on or before 30 June 2006 as part of the fund's winding up.  ASIC class order [CO 06/538] "Relief from enhanced disclosures in exit statements" relieves trustees from the requirement for the exit statements to those members to contain the enhanced fees and costs disclosure described in the [Corporations Amendment Regulations 2005 (No 1)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83651" \t "Default).  The relief responds to industry concerns, raised with ASIC, in relation to the interaction of the requirement for the additional information in exit statements given on or after 1 July 2006 and the exit of members from funds as part of the wind-up of superannuation funds ahead of trustee licensing under the [Superannuation Industry (Supervision) Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default) (SIS).  It applies to the requirement for an exit statement given on or after 1 July 2006 to contain a transaction listing and disclosure of the effect of indirect costs on a member's benefits. All other requirements for detailed disclosure in exit statements remain.  The full effect of the superannuation trustee licensing and fund registration provisions of the SIS Act commenced on 1 July 2006. The Registrable Superannuation Entities (RSE) licensing system has prompted some superannuation fund trustees to wind-up their funds and exit the superannuation industry by 30 June 2006.  A copy of the class order is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=co06-538_pdf" \t "_new).  **2.4 Guide for stakeholders**  On 10 July 2006, the Australian Securities and Investments Commission (ASIC) published "ASIC: a guide to how we work", setting out what ASIC does, how it approaches its activities, how it is organised, how it consults and how it is accountable.  The publication of the guide follows the release of ASIC's Service Charter, which outlined what Australian companies, financial services businesses and professional service providers can expect from ASIC, including how long it will take to process applications or requests.  A copy of the guide is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC+PDFW?opendocument&key=asic_guide_how_we_work_pdf" \t "_new).  **2.5 Updated fees and costs disclosure guide**  On 5 July 2006, the Australian Securities and Investments Commission (ASIC) issued an updated guide for product issuers to help them comply with the [Corporations Amendment Regulations 2005 (No 1)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83651" \t "Default) (the enhanced fee disclosure regulations).  First issued in March 2006, the revised "Enhanced fee disclosure regulations: Questions and Answers – an ASIC Guide" responds to some commonly asked questions about compliance with the enhanced fee disclosure regulations. It also incorporates some questions and answers issued during 2005.  In particular, the updated guide incorporates answers to five new questions (see questions C1 to C5) on periodic statements. The new answers include guidance to issuers of pure defined benefit super funds. They also provide guidance on disclosure of GST, stamp duty, and income tax and grouping of transactions.  **Background**  The enhanced fee disclosure regulations include measures on the disclosure of transactions and fees and costs in product disclosure statements (PDSs). These provisions require PDSs for certain investment–linked financial products to include:   * a standardised fee template (with accompanying explanation); * an example of annual fees and costs for a balanced or similar fund; and * a boxed consumer advisory warning.   The regulations applied to PDSs for superannuation products from 1 July 2005 and other financial products, including managed investment products, from 1 July 2006.  The regulations also mandate certain transactional disclosures in periodic statements of product issuers of superannuation products (from 1 July 2006) and of managed investment products (from 1 July 2007).  Copies of the updated enhanced fees and costs disclosure regulations can be obtained from the [ASIC website](http://www.asic.gov.au/fsrpolicy" \t "_new).  **2.6 Service charter**  On 30 June 2006, the Australian Securities and Investments Commission (ASIC) launched a Service Charter outlining a range of standards and principles aimed at improving the standard of its service as part of ASIC's ongoing commitment to better and more transparent regulation.  The Charter sets out what Australian companies, financial services businesses and professional service providers can expect from their dealings with ASIC. The Charter identifies how long it will take to process applications or requests. ASIC will report on its performance against key efficiency indicators in its annual report.  The Charter is available on the [ASIC website](http://www.asic.gov.au/asic/ASIC_PUB.NSF/print/06-215+ASIC+launches+service+charter?opendocument" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 ASX markets supervision: new structure operates from 1 July 2006**  On 1 July 2006, the Australian Stock Exchange (ASX) implemented the new market supervision arrangements announced in December last year, to strengthen market integrity and bring greater transparency and accountability to its supervisory operations.  From 1 July 2006, all ASX's supervisory operations will be conducted by a subsidiary company: ASX Markets Supervision Pty Ltd. ASX Markets Supervision will operate under its own Charter and in line with its own principles-based approach to supervisory operations.  Under the new structure, ASX supervisory operations will be conducted by existing Market Supervision staff reporting to the Chief Supervision Officer (CSO).  The CSO position has been filled by Eric Mayne, currently ASX's Group Executive, Market Supervision. As previously announced, the CSO will report to the Board of the subsidiary company on operational supervisory matters.  The new subsidiary company will be responsible for monitoring the conduct of market users and their compliance with ASX's Operating Rules, enforcing the Operating Rules and ensuring that sufficient resources are allocated to it to perform its supervisory functions. It will also have primary responsibility for monitoring the handling of conflicts between the commercial and supervisory interests of ASX.  These new arrangements enable ASX to reinforce the confidence of listed entities and investors, continue to address the perception of conflicts between ASX's commercial and supervisory operations, and minimise the costs of compliance for market users.  ASX Limited remains the licensed operator of its markets, as required under corporations law, and continues to be subject to the conditions of those licences.  In addition, the existing oversights of ASX supervision provided by the Australian Securities and Investments Commission (ASIC) and ASX Supervisory Review (ASXSR) will continue.  ASX announced the decision to create a new supervisory company on 15 December 2005.  Further information is available on the [ASX website](http://www.asx.com.au/about/media/index.htm" \t "_new).  **3.2 Other ASX developments**  **(a) Rule lodgement**  Recent rule lodgement changes are (i) on 1 June 2006, amendments to the ASTC Settlement Rules relating to the audit of Sponsoring Participants' Sponsorship Agreements and other matters – effective as of 30 June 2006; and (ii) on 8 June 2006 an amendment to the ASX Market Rules relating to automatic order cancellation under ITS – effective as of 7 July 2006.  **(b) ASX market rules**  On 22 May 2006, a package of miscellaneous amendments to the ASX Market Rules came into force. Among other things, these amendments:   * remove the obligation on Market Participants to provide certified copies of insurance documents. Uncertified copies will now be acceptable; and * remove the requirement for Market Participants to enter into a Warrant Client Agreement when the client is selling a warrant.   **(c) Federal Court approves ASX-SFE merger**  The Federal Court of Australia has approved the SFE Corporation Limited (SFE) scheme of arrangement. This approval clears the way for the two organisations to merge. Previous issues of the Corporate Law Bulletin have contained information about the merger. |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Andean Resources Limited – Panel declines to commence proceedings**  On 5 July 2006, the Takeovers Panel announced that it had declined to commence proceedings in response to an application from Kingsgate South America Pty Ltd (Kingsgate) dated 30 June 2006 in relation to Kingsgate's off-market takeover offer (Offer) for Andean Resources Limited (Andean).  Kingsgate's application submitted that Andean failed to update the market and Andean shareholders on the status of its discussions with possible competing bidders in accordance with paragraph 51 of ASIC Policy Statement 25 "Takeovers: false and misleading statements" (PS 25). PS 25 requires a target that has stated in its discussions with a possible competing bidder to:  a) update the market about material developments in the discussions; and b) in any event, update the market about the status of those discussions not more than 14 days and not less than 7 days before the end of the offer period.  Andean submitted that the application was premature and noted that its legal advisers had advised Kingsgate that it intended to comply with its obligations under PS 25. (Kingsgate's Offer was due to close on 11 July 2006 and accordingly, Andean was required under PS 25 to update the market by no later than 4 July 2006, which was 7 days before the end of the Offer.)  The Panel decided not to commence proceedings after:  a) Andean provided the Panel with a draft announcement (Announcement) which it proposed to make to the ASX on 4 July 2006 regarding the status of parties interested in Andean; b) Andean offered to undertake to send all Andean shareholders a copy of the Announcement; and c) the independent directors of Andean offered to undertake to update the market prior to the close of the Offer if the parties which continue to conduct due diligence in relation to Andean, and have expressed interest in making an offer, withdraw such interest.  The Panel notes that previous Panel decisions have endorsed the general policy of PS 25 on several occasions. The Panel considers that the requirement of paragraph PS 25.51 is consistent with that general policy and also the policy of several provisions of Chapter 6 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) relating to the last 7 days of the offer period. Accordingly, the Panel considered it to be important that Andean make an announcement as required by paragraph PS 25.51.  Andean provided the Panel with a draft of the Announcement, which its independent directors considered to comply with paragraph PS 25.51. The Panel was not in a position to determine whether the Announcement complied with paragraph 25.51.  The Panel does, however, assume and works on the basis that the independent directors of Andean are aware of, and will comply with, their responsibilities under the Act, including those regarding supplementary target's statements. The Panel notes that the statements made by Andean in relation to the status of its discussions with possible competing bidders would almost certainly be material from the point of view of a holder of Andean shares. It follows that, if the independent directors of Andean became aware that those statements had become misleading or deceptive, they would be obliged under section 644 of the Act to prepare a supplementary target's statement to remedy the defect. Because those statements concern a future matter, the directors would risk personal liability under Chapter 6B of the Act if they did not have reasonable grounds for making the statements and leaving them uncorrected in each subsequent supplementary target's statement. The undertaking given by Andean's independent directors with respect to updating the market is consistent with these obligations.  Accordingly, in the absence of any probative material to suggest that the independent directors of Andean are not acting or proposing to act in accordance with their obligations, the Panel did not consider it appropriate to conduct proceedings to scrutinise the basis for the Announcement more closely. Of course this decision would not preclude further application to the Panel or proceedings in another forum if those obligations were not observed. |
| **5. Recent Corporate Law Decisions** |
| **5.1 Circumstances of related entities can have a bearing on whether there are reasonable grounds for suspecting insolvency**  (By Mark Cessario, Corrs Chambers Westgarth)  Dean-Wilcocks re Venwood Trading Pty Ltd v Commissioner of Taxation [2006] NSWSC 676, Supreme Court of New South Wales, Barrett J, 4 July 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/july/2006nswsc676.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/july/2006nswsc676.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In this case the liquidators of Venwood Trading Pty Ltd ("Venwood") brought proceedings against the Deputy Commissioner of Taxation ("Commissioner") claiming that payments made by Venwood to the Commissioner were insolvent transactions and seeking orders that the payments were voidable transactions and for the Commissioner to be directed to pay the relevant sum to Venwood pursuant to section 588FF of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The Commissioner's defence pleaded the "good faith defence' in section 588FG(2).  This decision concerns an application by the liquidators to extend the date by which a reply to the Commissioner's defence could be filed. The proposed reply sought to put in issue whether the Commissioner had reasonable grounds for suspecting Venwood's insolvency, because he had consented to judgment being entered against him in similar proceedings brought by liquidators of a related company.  Barret J found that the propositions raised by the proposed reply were not "untenable" such that they could not possibly succeed and therefore granted leave for the reply to be filed.  **(b) Facts**  The liquidators of Venwood brought proceedings against the Commissioner claiming that $173,788 in payments made by Venwood to the Commissioner were "insolvent transactions". The Commissioner filed a defence in the proceedings and pleaded the "good faith" defence in section 588FG(2). Section 588FG(2) provides that a court is not to make an order about voidable transactions materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:  (a) the person became a party to the transaction in good faith; and (b) at the time when the person became such a party:  (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and  (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.  The liquidators then sought an extension of time in which to file a reply to the defence.  The proposed reply took issue with the propositions in the defence that, at the time the payments were made, the Commissioner did not have reasonable grounds for suspecting that Venwood was insolvent, or likely to become insolvent, and that a reasonable person in the Commissioner's circumstances would have had grounds for so suspecting.  The liquidators took issue with the defence because the sole director of Venwood was the wife of the sole director of a related entity - Melwood Trading Pty Ltd ("Melwood"). The business of the two companies was conducted from the same address and they had the same registered office. At the same time that Mr Dean-Wilcocks and Mr Malanos were appointed as the liquidators of Venwood, they were also appointed as liquidators of Melwood.  As the liquidators of Melwood they also brought proceedings against the Commissioner seeking recovery of payments Melwood had made to the Commissioner. In those proceedings, judgment was entered by consent and without admissions in favour of the liquidators of Melwood.  In seeking leave to file their reply in these proceedings, the liquidators claimed that the similarities and connections between Melwood and Venwood, and the fact that judgment was entered against the Commissioner in the Melwood proceedings, were capable of having a bearing on the question of whether or not the Commissioner could make out a defence under section 588FG.  **(c) Decision**  On a technical level, Barret J's decision turned on whether or not leave should be granted to the liquidators to file their reply out of time. His Honour therefore approached the issue on the basis that leave would only be denied if it was demonstrated that the claims in the reply were so obviously untenable that they could not possibly succeed.  Barret J noted that subparagraph (i) of section 588FG(2) looks to the actual content of the defendant's mind and involves a subjective inquiry, whereas subparagraph (ii) involves an objective test involving a standard of measurement of a hypothetical person with the knowledge and experience of an "average business person", rather than a reasonable person with the knowledge and expertise of the creditor in each individual case.  His Honour accepted the liquidator's submission that the circumstances of Melwood would be of some significance to a business person considering the circumstances of Venwood. Therefore, it was held that the factual coincidences between the circumstances and affairs of the two companies may be of probative value when it came to the question of whether there were grounds for suspecting that Venwood was insolvent.  In opposing the liquidator's application the Commissioner contended that, even though judgment was entered by consent and without admissions in the Melwood proceedings, the liquidators of Venwood could not re-litigate anything in the present proceedings that had been litigated in the Melwood proceedings. These submissions were made based on res judicata, issue estoppel and Anshun estoppel.  Barret J noted that such barriers can only operate between the same parties and that, while both proceedings were technically between the liquidators and the Commissioner, both the Melwood proceedings and these proceedings were commenced under section 588FF(1), which allows a "company’s liquidator" to pursue claims. Given that, his Honour considered that the plaintiffs in both proceedings were not likely to be Mr Dean-Wilcocks and Mr Malanos. Rather the plaintiffs were simply the liquidators for the time being of each company. His Honour therefore considered that the coincidence of identity of the individuals who were liquidators of the two companies did not give cause to erect the kind of barriers of estoppel the Commissioner sought to rely on.  Barret J therefore held that the matters the liquidators of Venwood sought to raise in their reply were not untenable and granted the liquidators the extension of time necessary to file the proposed reply.  **5.2 Discretionary trusts and family trusts and the scope of the definition of 'property' when applying 1323 of the Corporations Act**  (By Leisha Marasinghe, Mallesons Stephen Jaques)  Australian Securities and Investments Commission In the Matter of Richstar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 6) [2006] FCA 814, Federal Court of Australia, French J, 29 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca814.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca814.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The Australian Securities and Investments Commission (ASIC) made an application to the Federal Court seeking to amend earlier court orders. The application related to court orders made on 20 April 2006 which appointed receivers to eight of the nine defendants. ASIC sought to amend the receiver orders of 20 April 2006 to seek variations, inter alia, to bring into the scope of receiver orders property held by a third party as a trustee for any trust in which the defendant is a beneficiary.  Specifically, the ASIC application sought orders that the definition of "property" as referred to in the earlier court orders includes property held by a third party on trust, whether discretionary or otherwise, of which the relevant person is a beneficiary.  French J made orders:   * extending the scope of definitions of "Individual Property" and "Corporate Property" in the earlier court orders as requested by ASIC so that the amended definition relates to property held by trustees and, in the case of individual defendants relates to properties held by third parties on behalf of a superannuation fund in which the defendant is a beneficiary; and * extending the scope of property to include the class of discretionary trusts.   In doing so, his Honour made orders authorising the receivers to obtain necessary information from the defendants and from the trustee of any trust of which a defendant is a beneficiary so that a decision may be made whether to extend the receiver orders to the property of that trust.  **(b) Facts**  On 29 March 2006, ASIC applied to the court for orders to appoint receivers to the property of four companies in the Westpoint Property and Finance Group, and four individuals who were officers or former officers in the group. On 20 April 2006, orders were made appointing receivers to the property of the four individuals and three of the corporations.  The application to extend the receiver orders to trust property involved a consideration of the court's powers under the relevant parts of section 1323 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The original orders were made pursuant to section 1323 of the Act which allows the court to make an order that "prohibits a person holding money, financial products or other property, on behalf of the relevant person".  In this case, ASIC sought orders that the term "property" extends to include property held by a third party as trustee for any trust in which the person is a beneficiary.  **(c) Decision**  The court ruled that any trusts that were effectively controlled by the defendants came with the scope of "property" as described in section 1323. The term "property" as defined in section 9 of the Act "means any legal or equitable estate or interest in real or personal property of any description and includes a thing in action."  His Honour noted that section 1323(1)(h) does not authorise the appointment of a receiver of property of third parties other than the relevant person. However, if the relevant person has an interest in property of a third party and that interest falls within the definition of property in section 9 of the Act, then a receiver appointed under section 1323 may be appointed a receiver of that interest.  **Discretionary trusts**  The Full Court of the Supreme Court of Western Australia in R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd (1992) 10 WAR 59 held that a beneficiary of a discretionary trust does not have a proprietary interest. ASIC submitted that a beneficiary under a discretionary trust has a "contingent interest" within section 9 of the Act. ASIC submitted that a "contingent interest" in property equates to a proprietary interest.  "Contingent interest" may be described as the possibility that a right of a proprietary character will come into existence at a future time if some event occurs. ASIC cited Craig v Federal Commissioner of Taxation (1945) 70 CLR 441 where it was observed that in its ordinary sense or popular sense, the word "interest" as applied to property may include a contingent interest.  His Honour noted the difficulty in applying the notion of contingent interests due to the uncertainty of defining the scope and value of the subject under the trust. Further, his Honour stated that it was more plausible to think a beneficiary under a discretionary has an expectancy or mere possibility of distribution rather than a "contingent interest". However, his Honour considered that where the beneficiary is the effective controller, thereby enjoying at least a contingent interest, if not effective ownership of the trust property, this would fall within the ambit of "property" as referred to in section 1323 of the Act.  Accordingly, the court made orders authorising the receivers to require the defendants to provide necessary information to identify in which trusts they were beneficiaries. Such information extended to the terms of the trust, the classes of its beneficiaries and its distribution history.  **5.3 No winding up in insolvency of company already in voluntary liquidation**  (By Rebecca Tsang, Blake Dawson Waldron)  Deputy Commissioner of Taxation v Tull Reinforcing Pty Ltd [2006] FCA 810, Federal Court of Australia, Besanko J, 20 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca810.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca810.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This case concerned an application by the Deputy Commissioner of Taxation under section 259P of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) for an order that Tull Reinforcing Pty Ltd (Company) be wound up in insolvency. By the time the application came before the Court, the Company had entered into voluntary liquidation.  Besanko J held that:   * the Registrar's lack of power to make an order under section 482 of the Corporations Act was no obstacle to the Registrar's power to make an order winding up the Company in insolvency; and * there was no good reason to make an order that the Company be wound up in insolvency in circumstances where it was already in voluntary liquidation. No circumstances providing a sufficient basis for an order winding up a company in insolvency were present.   **(b) Facts**  **(i) The application**  On 28 February 2006, the Deputy Commissioner of Taxation applied under section 259P of the Corporations Act for an order that the Company be wound up in insolvency under section 459A of the Corporations Act. The basis of the application was the alleged insolvency of the Company and the allegation of insolvency was grounded on the failure by the company to comply with a statutory demand: section 459C of the Corporations Act. Under section 467B, the court may make an order under sections 233, 459A, 459B or 461 even if the company is being wound up voluntarily.  On 7 March 2006 an administrator was appointed to the Company by the directors under Part 5.3A of the Corporations Act. On 29 March 2006 the administrator convened a meeting of the creditors of the Company. Two creditors attended, one of whom was the Deputy Commissioner. The creditors resolved that the Company be wound up under s 439C of the Corporations Act. Accordingly, the administrator became the liquidator of the Company.  The Deputy Commissioner appeared before the Registrar on 29 March 2006 and maintained the application for an order winding up the Company in insolvency.  The application came before the Registrar on 19 April 2006. In addition to the orders set out in the application, the Deputy Commissioner sought an order under section 482 of the Corporations Act that the creditors' voluntary winding up be terminated. Pursuant to section 35A of the [Federal Court of Australia Act 1976 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "Default) and regulation 16 and Schedule 2 of the [Federal Court (Corporations) Rules 2000](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19255" \t "Default), a Registrar may exercise certain powers in the Corporations Act, but the power in section 482 is not one of them. This being the case, the Registrar referred the application to a Judge of the Federal Court.  By the time the application came before Besanko J on 28 April 2006, the Deputy Commissioner had further argued that there was no need to make an order terminating the voluntary winding up and that the Court could simply make an order winding up the Company in insolvency.  The advertising and other requirements of the Corporations Act were complied with and the liquidator consented to an order that the Company be wound up in insolvency and to acting as the liquidator under the proposed orders. The Australian Securities and Investments Commission did not seek to make submissions.  **(ii) Questions before Besanko J**  There were two questions before Besanko J. First, should an order be made winding up the Company in insolvency, having regard to the fact that the Company was already in voluntary liquidation? Second, if the answer to the first question was yes, was it necessary to first make an order terminating the voluntary winding up?  Because of the importance of the second question to the Registrar's jurisdiction to make the orders sought, Besanko J considered the second question first.  **(c) Decision**  **(i) Second question**  Besanko J held that it was not necessary to make an order terminating the voluntary winding up of the Company before making an order winding up the Company in insolvency because section 467B contemplates an order winding up a company in insolvency even though the company "is already being wound up voluntarily". His Honour noted that there was no suggestion in the authorities he had considered that an order terminating the voluntary winding up was necessary (Citrix Systems Inc v Telesystems Learning Pty Ltd (in liq) (1998) 28 ACSR 529; and Re Green (as liq of Australian Resources Ltd (in liq)) (2004) 52 ACSR 452).  Accordingly, the Registrar's lack of power to make orders under section 482 was no obstacle to the Registrar’s power to make an order winding up the Company in insolvency.  **(ii) First question**  Besanko J held there was no good reason to make an order that the Company be wound up in insolvency when it was already in voluntary liquidation.  His Honour noted that the authorities establish that a Court will not make an order winding up a company in insolvency in circumstances in which the company is already the subject of a creditors' voluntary winding up unless there is good reason to do so, such as:   * if the liquidator has not given the appearance of being independent; * if an insurance policy responding to claims for insolvent trading by directors may cover such claims only if the liquidator is appointed by the Court; or * the fact that a charge or certain dispositions of property may only be challenged if the Court has ordered the company be wound up under section 459A.   Besanko J held that none of those circumstances were present in this case. Neither was it suggested that an order of the Court winding up the Company in insolvency would provide a benefit to the general body of creditors of the Company. His Honour further held that the fact that there was no opposition to the proposed order could not be a good reason for making the order, nor could the desire to recover costs.  **5.4 Application to manage a corporation by disqualified person**  (By Tarryn Billings, Phillips Fox)  Re Etick Ltd; ex parte Mansell [2006] WASC 111, Supreme Court of Western Australia, Master Newnes, 19 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasc111.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasc111.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The plaintiff was disqualified in 2003 from managing a corporation for a period of five years. He was convicted of a charge of gaining a benefit, by deceit or fraudulent means, with intent to defraud. The plaintiff sought an order under section 206G of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) granting him leave to manage a corporation after just three years of disqualification.  Master Newnes applied the six principles outlined in Adams v Australian Securities and Investments Commission (2003) 46 ACSR 68. On balance he decided that leave should be granted and the plaintiff allowed to accept a management role.  The leave was not however, extended to allow the appointment of the plaintiff as a director of a company. Master Newnes did not consider that the appointment of the plaintiff as a director was reasonably required under the circumstances.  Further conditions were placed on the plaintiff, stipulating that he must provide monthly financial reports to the board and attend ASIC approved management education.  **(b) Facts**  The plaintiff was an accountant. In 1998 he was employed by a group of companies known as the Progressive Group. The group was experiencing financial difficulties and the directors looked to the possibility of a merger to save the group from liquidation.  The plaintiff, as part of the merger negotiations, organised a refinance on a boring machine. In the process of doing this, he misrepresented the ownership of the boring machine and banked the cheque for the refinance into the account of Progressive Civil Engineering Company Pty Ltd (PCEC). PCEC was set up to become the trading entity for the amalgamated group.  The boring machine was in fact subject to an existing encumbrance. St George Bank took possession of the machine when the Progressive Group went into liquidation. BankWest ultimately bore the loss resulting from the plaintiff's deception.  It was accepted at the plaintiff's sentencing that at the time of the offence the plaintiff was trying to keep the group of companies afloat. He believed that the merger would go ahead and that his actions would not cause loss or detriment to any of the parties. The plaintiff received no personal benefits from the transaction.  The plaintiff later gained employment with ComputerCorp Pty Ltd (ComputerCorp) as chief financial officer. The Managing Director of ComputerCorp was informed of his conviction.  ComputerCorp expanded, and began to look to the possibility of obtaining a buyer for its shares. A buyer was found in 2006 and an agreement was entered into to sell the ComputerCorp shares, ultimately to a listed company called Etick Limited (Etick). Etick was to change its name to ComputerCorp Limited (CCL) and the business of ComputerCorp was to be carried on by the new company. The plaintiff was given responsibility for continuing the day to day operations under the direction of a new director, Domenic Martino.  Mr Martino filed an affidavit in support of the plaintiff's application, saying that the success of CCL was contingent on an executive director running the day to day operations. Mr Martino argued that the plaintiff's knowledge of the operations of ComputerCorp, as well as the respect the plaintiff had of management, creditors, debtors, vendors and financial institutions, made him the ideal choice to manage the company.  Mr Martino went further, to say that the plaintiff's appointment as director was essential to the future success of the company and was one of the factors that encouraged Mr Martino to purchase ComputerCorp. All three of the incoming owners of CCL were aware of the plaintiff's conviction and disqualification and they were confident that he should have a management role despite the conviction.  Arguments were put to the court as to why CCL required the plaintiff to be employed in a managerial position. These arguments were supported by persuasive affidavits from the former director of ComputerCorp and from the plaintiff himself. Both argued that none of the other employees in the company had a working knowledge of the entire business and substantial hardship would be caused to the existing employees of the company, as well as to the financial outlook of the company if the plaintiff's disqualification were to continue.  The plaintiff explained the circumstances of his two bankruptcies, which had occurred in 1992 and 1996. He argued that the second bankruptcy was largely a product of his financial circumstances resulting from the first bankruptcy and he expressed embarrassment at both bankruptcies as well as remorse for the actions which led to his conviction.  The application was opposed by ASIC, who submitted that the plaintiff's conviction should be viewed in light of the predominant need to protect creditors and shareholders. The plaintiff's offence was considered a serious one involving dishonesty.  It was further submitted by ASIC that the plaintiff had been engaged in the management of Progressive Group whilst bankrupt and he had been engaged in the management of ComputerCorp since his conviction.  ASIC were concerned by the fact that the proposed directors of CCL had little knowledge of the IT business. If the disqualification was lifted, the directors would be situated on the east coast of Australia, giving the plaintiff free reign in the day to day activities of the company in Western Australia.  Finally, ASIC argued that although the company would suffer some hardship through the continuing disqualification of the plaintiff, this was not determinative. The evidence did not demonstrate that the company would be unable to continue to operate successfully without the plaintiff operating in a management role.  **(c) Decision**  Master Newnes set out six principles relevant to an application such as the one before him. These principles were set out in the judgment of Lindgren J in Adams v Australian Securities and Investments Commission (2003) 46 ACSR 68 and have been considered and applied in subsequent authorities. These are:  1. The applicant bears the responsibility of establishing that the court should make an exception to the legislative policy underlying the prohibition.  2. The legislative policy is one of protecting the public, not one of punishing the offender.  3. Another objective is to deter others from engaging in conduct of the particular kind in question.  4. There is also the objective of deterring others from abusing the corporate structure to the disadvantage of investors, shareholders and others dealing with a company.  5. The prohibition contemplates that there will be hardship to the offender. This alone is not a persuasive ground for the granting of leave.  6. The court will have regard to the nature of the offence which the applicant has been convicted of, the nature of his involvement and the general character of the applicant, including his conduct since he was disqualified. The court will also have regard to the structure, nature of business, interests of shareholders, creditors and employees of the companies the plaintiff seeks to manage and the risks to all or any of these if leave is granted.  Master Newnes considered that the plaintiff's conviction was of a serious nature. It had occurred in the course of his employment in a misguided attempt to assist his employer. Whilst the plaintiff did not gain personally from the offence, a significant loss was suffered by BankWest as a result.  It was held that the policy behind section 206B(1)(a) of the Act was a factor which must be given due consideration. In normal circumstances it is in the public interest that a person convicted of an offence such as the plaintiff's should not be permitted to participate in the management of a company for a period of five years.  The Master held that the plaintiff's age was relevant (57 years, with a long working life behind him) as was the fact that he had no other convictions. The offence could be regarded as an isolated incident with little chance of reoccurrence. He also held that there was not enough evidence to prove that the plaintiff had acted in a management capacity whilst disqualified.  It was accepted that the plaintiff played an important role in the success of ComputerCorp and that his knowledge and experience in a management role was highly desirable for the continued success of the business. The Master did not accept ASIC's argument that the other directors lack of specific knowledge of the IT industry would lead to a lack of supervision of the plaintiff.  Leave was therefore granted to the plaintiff to act in a management role. Master Newnes did not think that it was reasonably required for him to go further and grant leave for the plaintiff to be appointed as a director. The granting of leave was subject to reporting and training conditions.  **5.5 Conversion: liability in respect of fraudulent deposits into a client segregated account**  (By Jonathan Stewart, Blake Dawson Waldron)  NIML Ltd v Man Financial Australia Ltd [2006] VSCA 128, 19 June 2006, Supreme Court of Victoria Court of Appeal, Buchanan and Nettle JJA and Bongiorno JJA, 19 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/june/2006vsca128.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/june/2006vsca128.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) The facts**  Shane Joseph Burke (Burke) was employed by NIML Ltd (NIML), was NIML's company secretary and financial controller, and, most importantly, was an authorised signatory of NIML's Westpac cheque account. Burke had a private futures trading account with Man Financial Australia Limited (formerly Ord Minnett Jardine Fleming Futures Limited) (Man).  As required under section 1209 of the former Corporations Law (which was a precursor to section 981B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)), Man held a client segregated account – a trust account – with Westpac (Account) into which clients' money received by Man in relation to a client's account was paid. Clients, such as Burke, deposited money into this account and Man could only apply the moneys held in the account to cover or settle trades, to meet margin calls and to pay its fees or certain other expenses. The bank account statements Man received from Westpac did not identify the direct depositors by name and did not specify the client account to which any direct deposit was to be credited. Instead, Man relied on its clients to identify any deposits made.  Over a period of 14 months, Burke deposited $2,596,777 worth of cheques drawn from NIML's cheque account into the Account. Burke identified the NIML cheques he deposited into the account as deposits made by him and Man credited the deposits to Burke's Futures Account. Though the utilisation of the deposits was not detailed in the decision at first instance, the Court of Appeal judgment lists the uses to which the money credited to Burke were put; while some of the funds were used to settle trades and pay fees, the majority of the funds were directed by Burke to be paid by Man to third parties – such as the renovator of Burke's house – for Burke's benefit.  **(b) The proceedings**  NIML sued Man for the moneys it had not recovered from Burke. At first instance NIML plead three causes of action: breach of trust, restitution (money had and received) and conversion. Harper J dismissed all three claims (NIML Limited v Man Financial Australia Limited [2004] VSC 449).  On appeal, the Court of Appeal unanimously found (with Buchanan JA and Bongiorno AJA agreeing with Nettle JA) in favour of NIML on conversion. In passing, Nettle JA noted that he agreed with Harper J's findings in respect of the two other causes of action.  **(c) Conversion**  Conversion involves the intentional dealing with goods or chattel by a person in a manner that is incompatible with another person's immediate right of possession to that property. The basis of NIML's claim in conversion is that Burke had no present right to present the cheques and, by paying the cheques into the Account, NIML's property was improperly dealt with by Westpac and/or Man.  The Court of Appeal agreed with Harper J's view that Westpac could not be liable under conversion as there was nothing on the face of the cheques that disclosed that they were drawn for Burke's private purposes and Burke did not disclose to Westpac that the cheques were deposited for his own purpose. Accordingly, Westpac was entitled to rely on Burke's apparent authority to sign cheques on behalf of NIML.  However, Nettle JA disagreed with Harper J's finding that, because Westpac was not liable in conversion, neither was Man. (Though note Harper J's comments in NIML Limited v Man Financial Australia Limited [2004] VSC 449, [103] that, in NIML's statement of claim, only conduct by Westpac was alleged to have constituted conversion).  Nettle JA held that Man was on notice of an irregularity because Man knew, through its deposit collecting agent Westpac, that the deposits to the Account were made by cheques drawn on NIML's account and it knew, through its employees, that these amounts were being credited to Burke's futures trading account for his personal benefit. In Nettle JA's view, Westpac "was but an instrument" of Man's will. In effect, Nettle JA held that Man's knowledge that the amounts were to be credited to Burke's trading account (which only arose after the cheques were deposited into the Account following Burke's indentification of the deposits as his), rendered the prior depositing of the cheques a conversion of NIML's property.  Nettle JA set aside Harper J's decision and ordered judgment for NIML for damages for conversion.  **(d) Conclusion**  This case provides a salient reminder that Australian financial service licensees should review their procedures and policies in relation to client trust accounts to ensure that:  1. the depositor (or payee) of funds is the client to whom those funds are credited by the Australian financial service licensee; or  2. if the depositor (or payee) and client are not the same person, appropriate enquiries are made to ensure that the deposits have been lawfully made.  **5.6 The application of the "good faith defence" to insolvent transactions where creditor informed about payment difficulties**  (By Jeremy McCarthy and Susannah Macknay, Corrs Chambers Westgarth)  Tectron Industries Pty Ltd v Taylor [2006] SASC 175, Supreme Court of South Australia, White J, 16 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2006/june/2006sasc175.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2006/june/2006sasc175.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  This was an appeal from a decision of the Magistrates Court of South Australia that neither the "good faith defence" in section 588FG(2) nor the "running account defence" in section 588FA(3) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) applied to payments made to the appellant by the company (which subsequently entered liquidation) which were insolvent transactions within the meaning of the Act.  The Supreme Court of South Australia held that the good faith defence applied to payments made before the appellant received written notification of the company's inability to pay its debts, but not to payments made after that time.  The running account defence was held to be established for all of the payments, however White J's findings in relation to the good faith defence meant that the running account defence could not be invoked.  **(b) Facts**  The appellant (Tectron Industries Pty Ltd) sold electrical goods for the installation of air-conditioning systems to Scott Morphett Electrical Pty Ltd (the company) for approximately eight to ten years before the company was wound up.  The company's liquidator sought to recover the amount of ten payments made by the company to the appellant between 9 October 2001 and 9 April 2002 (the relation back period) on the basis that they were unfair preferences and therefore insolvent transactions within the meaning of the Act. The payments totalled $41,288.95 however, because of the Magistrates Court's jurisdiction, the liquidator limited the claim to $40,000. The appellant sought to rely on both the good faith defence and the running account defence.  On 16 January 2002, the appellant received a letter from the company in relation to the company's account with the appellant which said, amongst other things, that the company was "currently short of funds to pay outstanding accounts" and asked the appellant to understand the company's predicament.  To establish the good faith defence the appellant needed to prove that:   * on the information known to it about the company, there were no reasonable grounds for suspecting that the company was insolvent; and * that a reasonable creditor in the circumstances would not have had grounds for suspecting the company's insolvency.   To establish the running account defence the appellant needed to prove that it had with the company a continuing relationship of debtor and creditor and that the payments in question were made in the expectation that the appellant would continue to supply the company.  At first instance a magistrate found for the liquidator and rejected both the good faith defence and the running account defence.  On appeal to the Supreme Court of South Australia it was not in dispute that the transactions in questions constituted unfair preferences and therefore insolvent transactions. What was in issue was whether the defences were available to the appellant.  **(c) Decision**  **(i) Good faith defence**  The court held that the good faith defence was available for payments made to the appellant before 16 January 2002 (when the appellant received the letter from the company which said that the company was short of funds).  Although the company's account with the appellant had increased to higher levels than usual from the start of the relation back period on 9 October 2001 until 16 January 2002, White J took account of the fact that the appellant had been flexible about payments terms with the company in the past and found that a reasonable creditor in the appellant's circumstances would not have had grounds for suspecting the company’s insolvency prior to 16 January 2002.  White J found that the magistrate's conclusion that the appellant had reasonable grounds for suspecting that the company was insolvent after 16 January 2002 was well justified given the wording of the letter and the fact that nothing happened after that date to indicate that the company's difficulties with payment had been alleviated.  **(ii) Running account defence**  The court found that the running account defence could be invoked for all the payments made to the appellant by the company. Throughout the relation back period the appellant and the company continued to have a relationship of supplier and customer and White J considered that a significant purpose of the payments was to maintain the company's relationship with the appellant so as to maintain the availability of supplies.  While the court considered that the magistrate was in error in concluding that the running account defence could not be invoked, White J's findings on the good faith defence and the fact that the company's indebtedness to the appellant increased after 16 January 2002 made it unnecessary to apply the running account defence to the circumstances of the case.  **(iii) Result**  In summary, of the $40,000 claimed by the liquidator, the court ordered that the amount received by the appellant after 16 January 2002 (being $9,015.25) was recoverable by the liquidator.  **5.7 Administrators held to be validly appointed**  (By Conor Seenan, Freehills)  Brian Keith McMaster as administrator of Eznut Pty Ltd (administrators appointed) v Eznut Pty Ltd (administrators appointed) [2006] WASC 109, Western Australia Supreme Court, Simmonds J, 16 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasc109.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasc109.htm" \t "_new)  **(a) Summary**  Brian Keith McMaster and Oren Zohar, the plaintiffs, were held to be validly appointed as the administrators of Eznut Pty Ltd under section 436A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). This was despite the fact that they were appointed under a resolution that was made by directors who were themselves appointed following interlocutory orders for their reinstatement which were later reversed after the above resolution was passed.  **(b) Facts**  Eznut Pty Ltd (Eznut), the first defendant, is a company which is concerned with the development of a self-tightening fastener known as the "Eznut". At the time of hearing the case, there were two sets of patents pending in relation to the Eznut device in Australia and elsewhere.  The two initial directors of Eznut were Hanna Smolarek, the second defendant, and David Liwszyc, the first-named fourth defendant. The second defendant also had the vast majority of shares in Eznut when it is incorporated in 2002. On 1 July 2003, Gheorghe Emil Duta, the second-named fourth defendant, was appointed as another director of Eznut.  At directors' meetings on 9 and 16 April 2005, efforts were made to raise $67,000 for Eznut via a share issue. Shares were offered to all shareholders in proportion to their shareholding at the time. The second defendant did not accept the offer and the shares originally offered to her were then offered to and accepted by the remaining shareholders. There was a dispute between the defendants as to whether or not $67,500 was paid to the company as a result of the issue of 1.5 million shares.  Another disagreement arose between the second defendant and the fourth defendants over a purported transfer of shares in Eznut from the second defendant to her daughter named Christina Smolarek (who is also the third defendant). The disagreements culminated in a shareholders meeting of Eznut on 27 May 2005, at which a resolution was passed to remove the first-named fourth defendant as a director and to replace him with the third defendant. Forms were lodged with ASIC notifying it of the change of directors including a form stating that the second-named fourth director had ceased to act as a director of Eznut.  The fourth defendants then initiated legal proceedings on 17 June 2005 (in COR 144 of 2005) against the first, second and third defendants in the present case seeking amongst other things the reinstatement of the fourth defendants.  Two sets of interlocutory orders were made in COR 144 of 2005. Firstly, an interlocutory order was made that restrained the defendants in those proceedings from binding Eznut without the approval and consent of the plaintiffs in those proceedings or the court or both. This was later varied to allow the second defendant to act so as to maintain the patent application lodged in the United States.  Secondly, interlocutory orders were made as a result of the decision of Hasluck J on 2 September 2005 in Liwszyc v Smolarek [2005] WASC 199 (Liwszyc). Such orders included the reinstatement of the fourth defendants in the current proceedings as directors of Eznut and restraining the daughter from acting as a director of Eznut. This decision was later appealed and the appeal is contained below.  Back to the present case – The second defendant called a shareholders meeting of Eznut on the 21 November 2005 for the shareholders to consider a resolution for the removal of the first-named fourth defendant as a director. The fourth defendants both attended the meeting which was adjourned to 29 November 2005. Simmonds J held that the first-named fourth defendant was not removed as a director of Eznut at either meeting.  On 11 January 2006, a board meeting of Eznut was held at which the financial position of the company was discussed. The board also passed a resolution under which they appointed the firm, that the plaintiffs are both partners of, as the administrator of Eznut. As Simmonds J notes in his judgment, this resolution was not in the form required by section 436A(1) of the Corporations Act 2001 (the Act) and so was not valid.  On 27 January 2006, there was another board meeting of Eznut at which resolutions were passed by the fourth defendants in the terms of section 436A(1) of the Act. The second defendant expressed concern that the administrators were not, in her opinion, validly appointed at this meeting.  The Court of Appeal in Smolarek v Liwszyc [2006] WASCA 50 (Smolarek) delivered its decision on 29 March 2006 on the appeal from the decision of the Western Australian Supreme Court in Liwszyc. The court of Appeal allowed the appeal but only to the extent that it set aside the decision of the trial judge, Hasluck J, to reinstate the second-named fourth defendant as a director.  The issue then arose as to whether the decision of the Court of Appeal in Smolarek took effect from the date of its pronouncement on 29 March 2006 or from the date of Hasluck's J order. Accordingly, the Court of Appeal then delivered a supplementary decision in Smolarek v Liwszyc [2006] WASCA 50(S) (Smolarek supplementary) in which it held that its earlier order took effect from the date on which its order was pronounced (namely 29 March 2006).  Brian Keith McMaster and Oren Zohar, the plaintiffs, then sought an order under section 447C of the Act that they had been validly appointed as the administrators of Eznut under section 436A of the Act. This section provides that a company may, by writing, appoint an administrator if the board resolves that the company is, or is likely to become, insolvent and an administrator of the company should be appointed.  In deciding if the appointment was valid on the facts, Simmonds J considered numerous issues including:   * whether a resolution to appoint administrators under section 436A of the Act could be made as a result of a vote of directors who were themselves appointed following interlocutory orders for their reinstatement which were later reversed after the above resolution was passed; * whether the resolution was for an improper purpose; and * whether the resolution was bona fide and genuinely formed.   Alternatively, the plaintiffs sought an order under section 447A of the Act that Part 5.3A of the Act should operate in relation to Eznut as if the plaintiffs had been validly appointed as the administrators of Eznut.  **(c) Decision**  **(i) Was the resolution valid given the unique circumstances?**  Simmonds J noted that on 27 January 2006, when the resolution was passed which purportedly appointed the plaintiffs as the administrators of Eznut, the fourth defendants were validly appointed directors of Eznut. This was so because of the interlocutory orders of Hasluck J in Liwszyc which, amongst other things, re-instated the fourth defendants as directors of Eznut. Simmonds J noted that this order was later varied in Smolarek on 29 March 2006 (after the date the resolution was passed) but was not antedated as noted in Smolarek supplementary.  Simmonds J held that the power of the fourth defendants to appoint an administrator derived solely from the interlocutory orders made by Hasluck J in Liwszyc. He added that the interlocutory orders were made, as noted by Hasluck J in Liwszyc at 123, only to preserve the status quo that then existed in relation to the board management structure.  Accordingly, Simmonds J held that whilst the resolution to appoint the plaintiffs as administrators of Eznut was "a fundamental change in its affairs" (at 84), the resolution was not designed to change the board management structure.  **(ii) Other issues**  An improper purpose for the purpose of passing a resolution is defined as a purpose other than one "in furtherance of the object of Pt 5.3A as set out in s.435A": Kazar v Duus (1998) 88 FCR 218, per Merkel J at 233. Simmonds J held that the resolution to appoint the plaintiffs as administrators was for a proper purpose. This was so because Simmonds J held that the financial position of Eznut was "a viable concern" (at 82) and placing Eznut into administration would enable it to produce a return for the company's creditors and members because it would protect one of Eznut's patents in the US without incurring liability for insolvent trading.  There was no purpose outside the scope of Pt 5.3A of the Act which was "a substantial purpose in the sense that the decision would not have been made but for the ulterior purpose": Kazar v Duus (1998) 88 FCR 218 per Merket J at 233.  Also, Simmonds J held that the opinion of the directors that Eznut was either insolvent or likely to become insolvent was "genuine, bona fide and concluded" for the above reasons: Kazar v Duus (1998) 88 FCR 218, per Merkel J at 231.  **(iii) Final order**  For the above reasons, Simmonds J made an order under section 447C of the Act stating that the plaintiffs had been validly appointed as administrators under section 436A of the Act on 27 January 2006. Accordingly, it was not necessary for Simmonds J to make any order under section 447A of the Act.  **5.8 The exercise of power by an administrator of a statutory corporation**  (By James Williams, Phillips Fox)  Hillig v Darkinjung [2006] NSWSC 594, New South Wales Supreme Court, Austin J, 15 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/june/2006nswsc594.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/june/2006nswsc594.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Three applications were made to the court which all related to the issue of whether Mr Hillig ('Hillig'), the administrator of Darkinjung Local Aboriginal Land Council ('the Land Council'), by resolutions had validly removed the defendant directors as directors of Darkinjung Pty Ltd ('Darkinjung'), the first defendant, reduced the number of directors of Darkinjung to one, appointed himself to that position and repealed Darkinjung's constitution ('the Constitution'). Austin J held that these acts were invalid and found that the defendant directors had made out their case for the orders sought.  **(b) Facts**  The Land Council was a Local Aboriginal Land Council formed under section 50 of the [Aboriginal Land Rights Act 1983 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6630" \t "Default) ('the ALR Act'). Mr Hillig was appointed administrator of the Land Council pursuant to section 222(1)(b) of the ALR Act on 2 May 2006.  The Land Council created the Darkinjung Local Aboriginal Land Council Trust ('the Trust') and its structure and powers mirrored those of the Land Council. Darkinjung, formed in May 2006 and wholly owned by the Land Council, became the trustee company of the Trust. The Land Council became entitled to $42 million by way of proceeds from the sale of land at North Entrance to a company in the Mirvac group and decided to transfer this entitlement to the Trust.  The Constitution stipulated that Darkinjung was to have five directors. However, it also provided for an increase or reduction and the appointment or removal of directors upon Darkinjung passing a resolution to that effect. Importantly, the relevant constitutional provisions stated that in the event that the Land Council held shares in Darkinjung, a resolution couched in the same terms as the company's resolution was also required to be passed by 66% of the Land Council's members. The Constitution stated that the same process was required to effect an amendment to the Constitution itself.  Hillig, purporting to act in his capacity as administrator of the Land Council, signed a number of separate minutes of resolutions by the sole member of Darkinjung. The resolutions, affecting Darkinjung, relevantly provided for the removal of the defendant directors as directors, the reduction of the number of directors to one, the appointment of himself as the sole director and the Constitution to be repealed.  Hillig then signed minutes of resolutions of the Land Council which approved and confirmed the Darkinjung resolutions. Then, purporting to act as the sole director of Darkinjung, Hillig signed a resolution withdrawing the retainer of the Darkinjung's solicitors and directing them to return funds held by them on the company's behalf and debts due by them to the company.  Hillig, acting in his capacity as administrator of the Land Council, filed the first application which claimed that Darkinjung's solicitor could not act for Darkinjung as the solicitor had previously acted for the Land Council. The second application was filed by the defendant directors. They sought declaratory and injunctive relief to restrain Hillig from acting as a director of Darkinjung and in reliance upon any of the aforementioned resolutions. The defendant directors also sought a declaration from the court that the resolutions passed were invalid. The third application, filed by Hillig, sought declarations that the defendant directors were not directors of Darkinjung and that Hillig was a director.  Hillig presented four main grounds upon which his case was based. First, Hillig argued that his exercise of powers as administrator of the Land Council was valid by virtue of section 125(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Corporations Act'). Secondly, he claimed that the constitutional requirements relating to resolutions having to be passed by 66% of the Land Council was satisfied by himself, as administrator, passing such resolutions. Thirdly, Hillig argued that in the event that the previous ground failed, those constitutional requirements were void under the ALR Act. Hillig's final ground was that the establishment of the Trust and the fact that Darkinjung was made trustee constituted a scheme to achieve an improper purpose.  **(c) Decision**  Having outlined the relevant facts and the three applications to be determined, Austin J then addressed each of Hillig's four grounds.  Section 125(1) of the Corporations Act relevantly provides that an exercise of a power by a company is not invalid merely because it is contrary to an express restriction or prohibition contained within that company's constitution. Hillig claimed that the constitutional provisions requiring a resolution to be passed by 66% of the Land Council's members constituted an express restriction on Darkinjung's power to appoint, remove and reduce the number of the company's directors. Therefore, he maintained that by virtue of section 125, his exercise of those powers as administrator of the Land Council was not invalid merely because the requisite number of members had not passed the resolutions.  However, Austin J held that the requirements contained within the Constitution did not constitute restrictions on the exercise of powers by Darkinjung. His Honour cited Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd [1992] 2 VR 279, as authority for the view that the requirements were simply restrictions on Darkinjung's members in exercising those powers. Austin J stated, "[a] provision directed only to powers of directors, the members in general meeting or any other person acting for the company could not be the express restriction or prohibition contemplated by s 125(1)."  Austin J then considered Hillig's second argument, namely that a resolution passed by an administrator appointed under the ALR Act was to be treated as the equivalent of the requisite 66% vote of the members of the Land Council. Section 41 of the ALR Act states: "an Aboriginal Land Council may do or suffer in relation to its property any act or thing that it could lawfully do or suffer if it were a natural person having, in the case of the land, the same estate or interest in the property as the Council …".  His Honour noted that a natural person holding shares in a company has the rights conferred in relation to those shares under the company's constitution. Therefore, if the company's constitution contains a restriction on one of the rights attaching to the shares, such as a requirement affecting the manner in which a resolution is to be passed, then that restriction will be effective as a part of the shareholders' rights, unless contrary to law.  Thus, Hillig as administrator of the Land Council and holder of the shares, was duly affected by the further requirement relating to 66% of the members of the Land Council having to pass a resolution, which restriction attached to the voting rights of the shareholders of Darkinjung. Further, his Honour held that "[t]he fact that the Administrator acquires all the functions and powers of the Land Council upon appointment does not mean that he or she acquires a power conferred on the members of the Land Council." Austin J therefore held that the relevant resolutions passed by Hillig, in his capacity as administrator, were ineffective.  Austin J then addressed Hillig's third argument that Darkinjung's constitution could not validly require a resolution to be passed by 66% of the Land Council's members because such a requirement was inconsistent with section 77 of the ALR Act, which stipulates that a majority of votes by the members of the Land Council constitutes a decision of the Land Council. However, his Honour held that "[t]o the extent that they impose the additional requirement of a resolution by the members of the Land Council, as a condition for an effective decision of the Darkinjung shareholders/shareholder, the Provisos are not inconsistent with s 77."  Austin J decided that Hillig's fourth submission, which claimed the creation of the Trust and the diversion of funds to the Trust constituted a scheme for an improper purpose, was better dealt with in a separate proceeding where the issue had been raised, rather than in the present interlocutory applications.  Finally, his Honour held that Hillig's challenge to Darkinjung's solicitor's retainer was to be more appropriately determined in a hearing conducted by the Corporations Judge at a later date.  Austin J held that the defendant directors had successfully established their case for the orders they sought. His Honour held that Hillig had failed to establish his entitlement to the orders requested.  **5.9 Promissory notes offered in information memoranda**  (David van Dieren and Lev Ramchen, Mallesons Stephen Jaques)  Emu Brewery Mezzanine Ltd (In Liq) v Australian Securities and Investments Commission [2006] WASCA 105, Supreme Court of Western Australia, Court of Appeal, McLure JA, Pullin JA and Buss JA, 15 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasca105.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasca105.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Background**  In 2003 Emu Brewery Mezzanine Limited ("EBM") published a document entitled "Information Memorandum: Mezzanine Finance $35 million Promissory Notes Issue" ("the Information Memorandum"). In the Information Memorandum investors were invited to participate in a fundraising by EBM whereby they would be issued instruments referred to as "promissory notes" (each with a face value exceeding $50,000) ("the Notes").  The funds raised by EBM were on-lent by it to Emu Brewery Developments Pty Ltd ("the Developer") as trustee of the Emu Brewery Trust. The loan's purpose was to facilitate financing preliminary expenses relating to a proposed development by the Developer on the Emu Brewery East site at the edge of the Perth CBD.  The loan was secured by:   * A second-ranking mortgage over the Emu Brewery East site; * A second-ranking charge over the present and future assets and undertaking of the Developer; and * A guarantee from Westpoint Corporation and related entities.   The Australian Securities and Investments Commission ("ASIC") commenced proceedings in the Western Australian Supreme Court for a declaration that EBM had offered to issue securities to investors and did not comply with the relevant requirements of Pt 6D.2 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Alternatively, ASIC sought a declaration that the conduct of EBM in inviting investors to subscribe for the Notes to be issued by EBM on the basis of the Information Memorandum, without registering a managed investment scheme under section 601EB, in accordance with section 601ED of the Act, contravened Ch 5C of the Act.  This case is an appeal of the decision in Australian Securities and Investments Commission v Emu Brewery Mezzanine Ltd [2004] WASC 241. In the first instance decision, Simmonds J found that there was no offer of securities and accordingly the appellant was not required to comply with Ch 6D of the Act, but EBM operated a managed investment scheme to which Ch 5C applied.  EBM appealed against the decision that EBM operated a managed investment scheme, and ASIC cross appealed against the decision that there was no offer of securities.  **(b) The securities issues**  The primary focus of the fundraising provisions in Ch 6D of the Corporations Act is to ensure that investors in newly issued securities of a corporation have access to the information which a reasonable investor would require for the purpose of making an investment decision. Ch 6D specifically applies to the offer and sale of "securities". Section 761A of the Act defines securities to include a "debenture of a body". Section 9 carves out of this definition any undertaking to pay money under a promissory note that has a face value of at least $50,000 dollars.  ASIC commenced proceedings in the Supreme Court seeking a declaration that the Notes EBM offered were, in effect, securities and not promissory notes for the purposes of the exception to the definition of a debenture, and thus EBM had contravened the Act by not complying with the following requirements:   * preparing a disclosure statement in accordance with Pt 6D.2 of the Act; * lodging the disclosure document with ASIC in accordance with section 718 of the Act; * providing a copy of the disclosure document to investors in accordance with section 721 of the Act; * entering into a trust deed in compliance with section 283AB(1) of the Act; and * appointing a trustee in compliance with section 283AC of the Act.   **(i) Ground 1**  ASIC contended that "upon proper construction" of the Information Memorandum, acceptance of the proposal created two independent obligations to repay to investors the same amount of money:   * the Note; and * a loan agreement between EBM and the investor.   ASIC argued that the promise to repay monies created by the Information Memorandum and subscription by an investor was an "offer of securities" for the purposes of Ch 6D of the Act, with the loan agreement being a debenture. To support this argument ASIC made reference to statements made by EBM in the Information Memorandum.  The Court of Appeal disagreed. According to Buss JA, the statements in the Information Memorandum were not intended, objectively, to have contractual force. Consequently, EBM made a promise in each Note to pay the amount of the Note on the expiry date but did not make a separate and distinct contractual obligation to pay the same amount.  **(ii) Ground 2**  ASIC further contended that the Note did not fall within the meaning of a "promissory note" set out in section 89 of the [Bills of Exchange Act 1909 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6864" \t "Default).  ASIC raised two concerns in connection with this issue. Indeed, ASIC argued that the Note was not a "promissory note" for the purposes of the Bills of Exchange Act for the reasons that:   * the Note specified a date on which EBM is obliged to repay the principal, but also conferred on EBM the right to make discretionary payments from time-to-time before that date; and * the right set out above was conferred not by the Note itself but by a separate agreement.   Buss JA examined several English, Canadian and United States authorities, with a particular emphasis on the reasoning and decisions of the Supreme Court of Canada in McLeod Savings & Credit Union Ltd v Perrett [1981] 1 SCR 78 and John Burrows Ltd v Subsurface Surveys Ltd [1968] SCR 607, and the dissenting judgment of Ormerod J in Williamson v Rider [1963] 1 QB 89 to conclude that the right to repay the principal early does not:   * modify the unconditional promise to pay at the time fixed by the Note; rather it is merely an option to make early repayments; * render the sum payable at a fixed time uncertain (indeed, at the fixed payment date the full amount is payable less the amount of the prepayments); or * render the negotiable character of the promissory note illusory.   Similarly, his Honour opined that merely because the right to early repayment was embodied in a separate agreement to which EBM and the investor are parties, the existence of the right does not mean that the Note is not a promissory note.  The Court of Appeal concluded that the proposal set out by EBM in the Information Memorandum did not constitute an offer of securities. Rather it was an undertaking to pay money under a promissory note that has a face value of at least $50,000 dollars.  The proposal was, therefore, not an offer of securities and EBM was not required to comply with Pt 6D.2 of the Act.  **(c) The managed investment scheme issue**  The issue of whether or not the EBM scheme constituted a managed investment scheme was substantially addressed at first instance by Simmonds J. The issue was not considered by the Court of Appeal.  Indeed, unless ASIC was able to show either that the Notes were not promissory notes or there was a separate distinct implied undertaking to repay arising from the Information Memorandum, it appears that the scheme would be a managed investment scheme as held by Simmonds J at first instance.  This is partly because if the scheme was held to be "the issue of debentures or convertible notes by a body corporate" the managed investment scheme provisions of the Act do not apply (see paragraph (j) of the definition of "managed investment scheme" in section 9 of the Act).  **5.10 Standing of unregistered transferee to seek winding up order**  (By Michelle Shek)  Maertin v Klaus Maertin Pty Ltd [2006] NSWSC 588, Supreme Court of New South Wales, Barrett J, 14 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/june/2006nswsc588.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/june/2006nswsc588.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  Phillip Maertin ("Maertin") sought an order that Klaus Maertin Pty Ltd (the "Company") be wound up. The originating process stated that the application was made under sections 461(1)(e), (f) and (k) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). Maertin subsequently sought and was granted leave to add references to sections 232 and 233 as provisions upon which the application was advanced. Barrett J held that Maertin had standing as a creditor to bring the winding up application and appointed a provisional liquidator.  **(b) Facts**  The Company was a family company. The Company had three directors: Ida Maertin, Helmut Maertin (the third defendant) and Sabine Maertin (the fourth defendant). There were 1,810 shares on issue of which two were held by Helmut Maertin, two were held by Sabine Maertin and 1,806 were held by Ida Maertin.  On 8 February 2005, Ida Maertin died. Probate of her will was in due course granted to the executor, Mr Singer (the second defendant). By her will, Ida Maertin gave her 1,806 shares in equal parts (to be held on trust) to her three children Helmut Maertin, Sabine Maertin and Maertin.  By the time the application was before Barrett J, the second defendant had executed and delivered to each of the three children a transfer of the shares given by the will. However, none of the transfers had been registered.  Maertin sought an order winding up the Company and for appointment of a provisional liquidator. The issue was whether Maertin as a transferee under an unregistered transfer had standing to seek the order.  **(c) Decision**  **(i) "Contributory"**  It was submitted that Maertin had standing to make a winding up application as a "contributory" under section 462(2)(c) of the Act. Section 9 of the Act defines "contributory" as including "a holder of fully paid shares in the company". Barrett J held that Maertin was not a "contributory" as the import of the word "holder" in the definition was membership of the company by virtue of registration as a holder of fully paid shares. Maertin was not so registered.  **(ii) Standing under section 232**  It was submitted that if Maertin was not a "contributory", he nevertheless had the necessary standing by reason of section 232. An application for relief under section 233 (being relief that may be granted in a case within section 232) could be made by, amongst others, "a member of the company". "Member" under section 232 has an extended meaning and also includes "a person to whom a share in the company has been transmitted by will or by operation of law".  Barrett J was not convinced that section 232, and the special provision it made with respect to the meaning of "member", could be relied upon where an application was advanced principally under the winding up provisions. However, Barrett J did not explore the issue of the separateness of the two jurisdictions further, as his Honour:   * was of the opinion that Maertin had standing as a creditor of the Company under section 462(2)(b), for the purposes of the application; and * was not persuaded that Maertin was a person to whom shares had been "transmitted by will or by operation of law".   **(iii) Set-off**  With respect to Maertin's standing as a creditor of the Company, the Company submitted that because Maertin jointly owed money with QPI (the "QPI Debt") to the Company, there was a set-off which destroyed his status as a creditor.  This argument was rejected by Barrett J, who was satisfied that, even if the QPI Debt was a debt jointly owed to the Company by QPI and Maertin, set-off did not deprive Maertin of creditor status.  **(iv) Transmission by will or operation of law**  Barrett J explored the concept of "transmission by will or by operation of law" under section 232, by examining sections 1071B and 1072E of the Act. Barrett J concluded that "transmission" occurs where a legal personal representative (such as an executor) becomes the registered holder of the shares or obtains the ability to transfer the shares without first becoming the registered holder of the shares. This was to be contrasted with the act of the executor, who by the execution and delivery of a transfer of shares to Maertin, conducted an act of "transfer" and not a "transmission".  **(v) Conclusion**  In deciding whether a provisional liquidator should be appointed, Barrett J noted that:   * there was evidence that the third defendant used Company assets for his own purposes; * there were clear tensions between the shareholders; * the assets of the Company were in jeopardy; and * there was a lack of effective governance.   Barrett J held that these elements combined to make the appointment of a provisional liquidator appropriate. Accordingly, Barrett J held that Maertin had standing to bring the winding up application, and appointed a provisional liquidator.  **5.11 Winding applications held to be an abuse of process**  (By Sarah Gaggin, Clayton Utz, Brisbane)  Australian Beverage Distributors v Evans & Tate Premium Wines Pty Ltd [2006] NSWSC 506, Supreme Court of New South Wales, White J, 6 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/june/2006nswsc560.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/june/2006nswsc560.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  In this case, Evans & Tate Premium Wines Pty Ltd ("ETPW") and Evans & Tate Ltd ("ET") successfully applied to summarily dismiss winding up applications brought by Australian Beverage Distributors Pty Ltd ("ABD").  **(b) Facts**  ETPW supplied wine to ABD, a wine distributor. ETPW was a subsidiary of ET. This case involved two separate winding up proceedings brought by ABD against ETPW and ET. Both applications were filed on the same day.  In earlier and separate court proceedings, ABD had been awarded costs against ETPW. ETPW had begun proceedings to have the costs order stayed pending the outcome of other litigation between the companies. While those proceedings were pending, ABD applied to wind up ETPW in insolvency, based on the costs certificate.  It also applied to wind up ET in insolvency. It claimed to have standing to make that application by virtue of its holding convertible notes for which ET was liable. It had acquired those convertible notes a few days before the winding up application was made.  A day after the winding up applications were filed, a newspaper published a story about the applications, with quotations from ABD's in-house counsel. Around the same time, ABD issued a media release announcing the making of the applications.  ETPW and ET now sought the summary dismissal of the winding up applications.  **(c) Decision involving ET**  ET submitted that the winding up application against it should be dismissed on three grounds:   * ABD had only a contingent or prospective debt and therefore required (but had failed to obtain) the leave of the court under section 459P(2)(a) to begin the winding up proceedings; * the winding up application had been brought for an improper purpose; and * ABD's comments to the media had constituted premature publication of the application in breach of rule 5.6 of the [Supreme Court (Corporations) Rules 1999 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19658" \t "Default).   The court held that "ABD's only standing as a creditor of Evans & Tate limited is as a beneficiary of the convertible notes, or as a creditor of ETPW for whose debts Evans & Tate Limited might become liable in the future...". This meant that it was only a contingent or prospective creditor and should have obtained leave of the court before beginning the winding up application. It had been a "serious abuse of process" to commence proceedings against ET without that leave.  Leave of the Court, nunc pro tunc, was refused on the basis that there was insufficient evidence to support that application and that "ABD has no genuine interest to protect as a prospective creditor or as a contributory. It has a miniscule holding of notes and shares..."  His Honour next held that the proceedings had been brought for an improper purpose (including applying pressure to ETPW in relation to its application to have the costs order stayed).  Finally, his Honour examined the issue of the media statements. Rule 5.6 requires publication of the statutory notice of winding up application no less than three days after service of the application. The question for the Court was whether the rule also constitutes a prohibition on any other publication about the application within that three-day period. White J held that the purpose of the rule is to give the company a breathing space to take steps to prevent the damage that can be caused when a winding up application becomes public. It would frustrate that purpose if the rule did not also prohibit the winding up applicant from making any other public statement about the application.  A breach of the rule would not automatically lead to a dismissal of the winding up application: the Court would be entitled to take into account matters such as whether the breach had been inadvertent. Here, the breach had been deliberate and calculated to cause harm to ET. It therefore warranted dismissal of the winding up application. The Court dismissed an ABD argument based on section 467A. That section prohibits the dismissal of a winding up application merely because of a defect or irregularity that has not caused substantial injustice. The Court said that, regardless of the question of substantial injustice, a breach of the rules was not "merely" a defect or irregularity.  **(d) Decision involving ETPW**  ETPW's application for summary dismissal of ABD's winding up application was based on four grounds:   * ABD was not a creditor, because ABD owed ETPW a debt (for goods sold and delivered) that could be offset against the costs certificate; * it was an abuse of process to apply for winding up on the basis of a debt against which there was a counterclaim for an admitted debt; * the application was brought for an improper purpose; and * ABD's comments to the media had constituted premature publication of the application in breach of rule 5.6 of the Supreme Court (Corporations) Rules 1999 (NSW).   Justice White, in obiter, disagreed with the argument that the alleged debt for goods sold and delivered could be offset against the costs certificate so as to impugn ABD's standing as a creditor, because there was no close connection or mutuality between the two. However, he said that it was not necessary to reach a concluded view on this issue, because ETPW succeeded on other grounds.  The first of these grounds was the alleged abuse of process. ETPW's application to have the costs order stayed brought ABD's status as a creditor into dispute. It would be an abuse of process to allow a winding up application to be brought where the creditor's standing was in dispute. This abuse was exacerbated by evidence that ABD had made the winding up application in order to deter ETPW from its application to stay enforcement of the costs order.  The premature publication of the application was an additional ground for dismissing the winding up application.  **5.12 Entitlement to vote at a meeting of creditors, in respect of the costs of a trial and of a successful appeal, where no court order for the amount of such costs by the company has been made prior to the appointment of an administrator to the company**  (By James Williams, Phillips Fox)  Environmental & Earth Sciences Pty Limited v Vouris [2006] FCA 679, Federal Court of Australia, Graham J, 1 June 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca679.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/june/2006fca679.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The plaintiff, Environmental & Earth Sciences Pty Ltd, sought a declaration that the first defendant, Mr John Vouris ('the Administrator'), who was appointed administrator of the second defendant, Charben Haulage Pty Limited ('Charben'), erred in rejecting the plaintiff's entitlement to vote, at a meeting of creditors, in relation to the costs of a trial and of a successful appeal where no order for the payment of such costs had been made prior to the appointment of the Administrator. Graham J held that the Administrator's rejection was invalid and directed the Administrator, pursuant to section 447D(1) of the [Corporations Act (2001) (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'), to admit the plaintiff's claim for costs for the purposes of voting at the next meeting of creditors.  **(b) Facts**  Charben purchased the site of the Caltex garage located on the Pacific Highway at Killara. In 2002, Charben issued proceedings against the plaintiff, and Caltex Petroleum Pty Limited, alleging misleading conduct in relation to two reports relating to the service station site. On 8 April 2004, the Court found in favour of Charben and awarded it $2,147,800.  The plaintiff paid Charben $1,400,000 in partial satisfaction of the judgment, before successfully appealing against the decision in December 2005. However, costs associated with the initial hearing and the appeal were reserved. On 19 May 2006, Charben was ordered to pay 80% of the plaintiff's costs associated with the appeal, to pay the costs of the plaintiff relating to the hearing at first instance and to pay the costs of the plaintiff in relation to the costs application.  Prior to that, on 31 March 2006, Charben appointed the Administrator pursuant to section 436A of the Act. In accordance with section 436E of the Act, the Administrator then convened a meeting of Charben's creditors for 7 April 2006. At the meeting, the plaintiff lodged a proof of debt with the Administrator, claiming an entitlement to $617,000, for the legal costs which had not then been awarded by the Court, in addition to $1,400,000 being the sum owing under the judgment of 22 December 2005.  The Administrator accepted the plaintiff's entitlement in so far as the $1,400,000 was concerned, but rejected the claim relating to the legal costs associated with the proceedings. The Administrator again rejected the plaintiff's claim at a further meeting held on 27 April 2006 and the meeting was then adjourned until 23 June 2006. The minutes of the meeting state, "[t]he Chairman advised that as the Court order had not been handed down with respect to the total payment of $2,017,000 and based on legal advice, he would allow … EES to vote to the value of $1.4 million." The legal advice referred to by the Chairman relevantly provided, "[a]s long ago as 1899 the Courts had determined that the legal costs arising out of court proceedings are not provable unless an Order is made for the payment prior to the date of the winding up."  The plaintiff sought a declaration from the Court that the Administrator's decision to reject the plaintiff's proof of debt was invalid, an order that the plaintiff's proof of debt be admitted in full or, alternatively, an order that the Administrator's rejection of the plaintiff's proof of debt be modified or varied so as to allow the plaintiff's proof of debt in whole or in part as the court may deem appropriate.  Thus, the fundamental question was whether the plaintiff's claims for costs should be allowed for the purposes of voting at the adjourned creditor's meeting, even though no court order had been made in relation to those costs by the time the Administrator was appointed.  **(c) Decision**  Graham J cited section 553(1) of the Act which relevantly provides, "Subject to this Division, in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company."  In analysing the meaning of section 553(1) of the Act and its applicability to the facts at hand, Graham J stated that Barrett J noted, in McDonald v Commissioner of Taxation (2005) 187 FLR 461 at 472, that the section directs attention to whether "the circumstances giving rise to" the debt or claim occurred before the "relevant date", rather than focusing on the actual time at which the debt or claim arose.  Graham J also referred to the case of McCluskey v Pasminco Limited (Administrators appointed) (2002) 120 FCR 326. The case involved the status of claims for legal costs and expenses, which had not yet been determined by the court, incurred in prosecuting injury compensation claims prior to the date of the commencement of the administration. Goldberg J held that any claims for legal costs and expenses associated with prosecuting the injury compensation claims prior to the date of the commencement of the administration were admissible to proof as contingent claims because of their connection with the primary claims for injury compensation, regardless of the fact that there had not been any costs orders obtained for the payment of such legal costs and expenses prior to the commencement of the administration.  After citing relevant case law on the subject, Graham J concluded that the plaintiff possessed a present claim to costs at the date of the appointment of the Administrator to which section 553(1) was applicable. His Honour stated, "[o]ne could say that 'the seeds' of the costs orders were the circumstances occurring before 31 March 2006, namely the delivery of the judgment in the plaintiff's favour on 22 December 2005."  Graham J declared that the Administrator erred in rejecting the plaintiff's claim for costs for the purposes of voting at the first meeting of creditors and directed the Administrator to admit the plaintiff's claim for costs for the purposes of voting at the meeting to be held on 23 June 2006, in addition to the outstanding amount owed by Charben to the plaintiff.  **5.13 Liquidator's powers to preserve the value of a business for the purposes of sale**  (By Tarryn Billings, Phillips Fox)  Warne v GDK Financial Solutions [2006] NSWSC 464, New South Wales Supreme Court, Austin J, 19 May 2006  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc464.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/may/2006nswsc464.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**  The judgment addressed two applications made to the court in an attempt to allow a company's liquidators to attend to some urgent payments in connection with the management of two retirement villages. One application was made by Peridon Village Nominees Pty Ltd (in liq) (Nominees) and the other by its liquidators (the Liquidators).  Nominees sought to vary undertakings given to the court in order to allow the urgent payments to be made. The undertakings would otherwise have prevented the payments being made.  The Liquidators sought relief of three kinds, which his Honour summarised in the following manner:  Firstly, they sought the court's approval to enter into occupation agreements on behalf of Nominees.  Secondly, they sought the court's advice and direction as to whether:  1) Entering into the leases would be carrying on the business of Nominees so far as is necessary for the disposal or winding up of the business, and which is within the power conferred to them as liquidators by sections 477(1)(a) and 506(1)(b) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act); and 2) The payment to the former and departing residents, who were unsecured creditors of Nominees at the date of, and subsequent to the appointment of the Liquidators, of their entitlements under their leases and the provisions of the [Retirement Villages Act 1999 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18118" \t "Default) would be payments in the course of carrying on the business of Nominees so far as is necessary for the beneficial disposal or winding up of the business within sections 477(1) and 506(1)(b) of the Act.  Finally, the Liquidators sought advice and direction from the court under section 63 of the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default) as to whether the Liquidators would breach their duties under the Trustee Act in entering into the leases of residential units, and making payments to the former and departing residents of their entitlements under their leases.  The Liquidators made out a convincing case for allowing the payments to be made and the Judge was persuaded that relief should be granted in the manner suggested above. The Judge also made orders that the undertakings of Nominees be varied in order to remove any obstacle to the making of the payments, the granting of leases or the making of other occupation arrangements.  **(b) Facts**  The retirement villages in question were part of an unregistered managed investment scheme which was in the process of being wound up. Liquidators were appointed in August 2005. Nominees, as a defendant in earlier proceedings, gave undertakings which affected its ability to enter into leases with new residents and terminate leases with outgoing residents. It also left uncertainty regarding its ability to pay refunds and capital gains to outgoing residents unless those transactions were in the 'ordinary course of business'.  The residents of the retirement villages occupied their units under long term lease agreements between the resident and the owner/licensor (Nominees in this case). The land on which the villages were constructed vested in Nominees as registered proprietor. Nominees held the land on trust for the purposes of the scheme. The scheme operated so that the resident paid the owner a large ingoing contribution at the commencement of occupation. When the lease was terminated, the outgoing resident was entitled to an ingoing contribution refund, described in the lease agreement as the repayment of a loan. The resident was entitled to a payment if there had been any capital gain and was contractually liable to pay a departure fee.  At the time of this hearing a number of outgoing residents were owed money that had been outstanding for some months. Outgoing residents were advised that any proceeds obtained through the re-leasing of a unit would be paid to the Liquidator, and the resident's claim to receive a refund payment would be an unsecured debt ranking with the other debts of Nominees. This situation dissuaded departing residents from assisting the village owner to sell their units. Current and former residents were reported to be concerned about their inability to progress with selling and re-leasing units and with the uncertainty regarding payment of the refunds owed.  This delay was also preventing the generation of income through departure fees and capital gains sums. This was harming the goodwill of the business and could have a potential effect on the Liquidator's ability to sell the business. The Liquidators argued that their inability to ensure that outgoing residents would receive refunds following resale hindered the progress of sales and depressed market prices of the village premises.  Nominee was the only party with the power to enter into leases or licences for units in the village. The Liquidators needed the approval of the court under section 477(2B) of the Act, or a resolution of the creditors, before entering into new agreements for a term of more than three months.  The Liquidators proposed to use the money provided from ingoing contributions by new residents to pay the amounts due to the outgoing residents. There were also amounts due to a management company, Village Care. The Liquidators proposed to pay these also.  The opinion was expressed that it would be wise to pay all outgoing residents in full, notwithstanding the fact that they were unsecured creditors. The likelihood would be that any future purchaser and operator of the retirement village would be more likely to pay a higher price for the business if these liabilities to outgoing residents had been discharged.  **(c) Decision**  **(i) Application for approval of leasing**  The Liquidator's aim was to procure new residents for the vacant units in the retirement village and grant leases to them. His Honour identified four legal issues raised by this proposal.  The first issue was whether the Liquidators had the power to grant leases. A liquidator's power in a winding up extends only so far as is necessary for the beneficial disposal or winding up of the business. A liquidator is permitted to carry on the business in an effort to sell it at a higher price as a going concern. In the present case his Honour found that section 477(1)(a) of the Act would authorise the Liquidators to grant new leases as this would be necessary for the beneficial disposal or winding up of the business. He also held that the granting of leases were steps in the carrying on of the business, which was a business of the company (Nominees) for the purposes of section 477(1) (a) of the Act.  The second issue was whether the court should approve, under section 477(2B), the granting of leases by the Liquidator. A liquidator must not, without court or creditor approval, enter into an agreement if the term of the agreement may end more than 3 months after the agreement is entered into. His Honour decided that the court should grant approval to the Liquidators in the form of a general permission. His reasoning was that the delay and problems that had arisen upon the winding up of the scheme would be alleviated by this proposed course of action. As such, the transactions would aid the proper realisation of the assets of the company or would otherwise assist in the winding up of the company.  The third and fourth issues identified by his Honour in the granting of leases were the need for a variation of the undertakings, which otherwise would prevent the Liquidators taking this course of action, and the Liquidator's request for the advice or direction of the court. His Honour granted orders removing any obstacle caused by the undertakings but declined to grant advice and directions, instead making a declaratory order in terms equivalent to the proposed advice and directions.  **(ii) Application for directions as to payments to outgoing residents and Village Care**  The Liquidators also proposed to pay the departing residents their entitlements under the occupation arrangements and pay the moneys owed to Village Care for its work in managing the retirement village. These payments would be sourced from the incoming contributions of new residents.  The two questions this raised were whether the Liquidators were empowered by section 477(1)(b) to pay the outgoing residents and Village Care, and if so whether they should exercise that power in the manner proposed. This issue was addressed in Re Walker Hare Pty Ltd (in liq) [1968] VR 477 where Newton J found that if full payment to a class of unsecured creditors is beneficial to the winding up of the company, this payment is likely to be facilitated.  His Honour considered the reasoning in Walker and found that in this case, the implementation of the steps proposed by the Liquidators would preserve the value of the business and facilitate its sale on a going concern basis. In order to achieve this, outgoing residents and Village Care, both unsecured creditors, should be paid in full. These payments would ultimately be for the benefit of all unsecured creditors as the value of the business would be preserved and its realisation upon winding up enhanced.  His Honour therefore gave a direction to the Liquidators that they would be justified in paying outgoing residents and Village Care their full entitlements. The obstructive undertakings made earlier to the court were removed to enable the Liquidators to follow this course. |
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