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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Report on role of ratings in structured finance**  On 17 January 2004, the Bank for International Settlements (BIS) released the latest report from the Committee on the Global Financial System (CGFS) titled “The role of ratings in structured finance: issues and implications”. The report highlights several of the characteristics of structured products, challenges arising for the rating agencies and other market participants, and implications for central banks and investors. The report was prepared by the CGFS Working Group on ratings in structured finance, established to explore the role of rating agencies in the rapidly evolving markets for structured finance instruments. To facilitate a better understanding of this role and of structured finance markets more broadly, the Working Group has sought to identify and explain methodological differences that exist between the rating of structured finance instruments and more traditional credit products. Furthermore, the Group explored the various methodological and organisational challenges involved in rating structured finance products. Documenting the Working Group’s findings, the report complements earlier work by the CGFS and other official forums, such as the Joint Forum. The Working Group comprised representatives of 16 CGFS-participating central banks and the BIS. The Committee on the Global Financial System is a central bank forum established by the Governors of the G10 central banks to monitor and examine broad issues relating to financial markets and systems. Its mandate is to elaborate appropriate policy recommendations to support central banks in the fulfilment of their responsibilities with regard to monetary and financial stability. The report is available on the [BIS website](http://www.bis.org" \t "_new).**1.2 Canada's securities regulators issue guidance on executives’ retirement benefits disclosure** On 14 January 2004 the Canadian Securities Administrators (CSA) issued guidance on disclosure of retirement benefits that goes beyond the disclosures required in securities regulation. The guidance was issued to assist issuers that choose to provide additional disclosure in identifying items that could be disclosed, as well as the assumptions used to derive the information, in a form that is clearly presented for the benefit of investors.Additional disclosure could include the total retirement benefit liability of the issuer associated with each executive, the total service costs in respect of the plan during the past year, and the estimated annual benefits payable to specific executives on their retirement. Some of the key assumptions that the CSA suggest could also be disclosed include assumptions on retirement age, vesting, increases in compensation, interest rates and employee contributions.The guidance is available at: [http://www.osc.gov.on.ca](http://www.osc.gov.on.ca/%22%20%5Ct%20%22_new)**1.3 The UK 2003 Combined Code - one year on** The UK Financial Reporting Council (FRC) has previously announced that it will carry out a formal assessment of how the Combined Code is being implemented.  This will take place in the second half of 2005.  In preparation for this review the FRC has carried out an informal assessment of the impact of the revised Combined Code and concluded that encouraging progress had been made since the Code took effect in November 2003 according to a press release on 13 January 2005.Between September and November 2004, the FRC held discussions with business and investors and analysed annual reports and publicly available survey data.  The FRC found that:         investors and companies alike considered the corporate governance climate has improved over the last twelve months;          investors reported an increased dialogue with companies and greater chairman involvement on corporate governance issues during that period;          some companies have already reported in their 2004 annual reports, a year in advance of the need for compliance, how they stand in relation to the revised Combined Code;          companies may need time to implement some provisions, for example where they need to rebalance board membership to meet the provision that at least 50% of the board should be independent NEDs.  This needs careful planning if it is to result in a balanced board with both sufficient executives and non-executives and an appropriate mix of skills and experience; and          other issues, leading to greater professionalism, such as performance evaluation and professional development, are being taken seriously, with significant debate about the best approaches.**1.4 Analysis shows proxy voting rising and institutional activism growing** An analysis of proxy voting results in Australian Stock Exchange (ASX) top 200 companies during 2004 revealed a continuing rise in voting levels and an increasing level of institutional activism.The analysis by institutional governance advisor Proxy Australia was published on 10 January 2005. **(a) Overview**Shareholder participation is increasing. Shareholders representing an average of 50.4% of issued capital submitted proxy instructions across ASX 200 companies. This figure has increased significantly from 5 years ago (1999), where general levels of 40% were widely reported.196 companies and 1032 resolutions were considered in the study. Nearly half of all company business was taken up with resolutions concerning the election of directors (513 in total or 49.7%). Approximately one-in-eight resolutions, (153 in total or 14.8%) dealt with executive pay issues.Proxy Australia categorized approximately 20% (203 in total) resolutions as ‘controversial’, where they were clearly outside the corporate governance guidelines issued by major Australian investor groups. 46% of all executive pay resolutions failed the benchmarks set by IFSA and ACSI, a slight improvement on 2003. Nearly all Board-endorsed resolutions received enough shareholder support to be carried.**(b) Executive pay**In 2004 only two executive pay resolutions (both at Novogen) were defeated. The resolutions to issue options to two executives were in fact declared to have been passed at the meeting on a show of hands. However, subsequent analysis of proxy instructions indicated they would have been defeated on a poll, and so the company subsequently cancelled the options a few days after the meeting. Two controversial executive pay resolutions were withdrawn (Fleetwood Corporation / ALH) following shareholder pressure or intervening corporate action.However executive pay was the focus of considerable institutional dissatisfaction. In 2004 an average level of 21.5% of all votes were cast against the Board’s position on controversial executive pay resolutions. This level of dissent was the highest across all resolution categories.High dissent levels (against or abstain) were recorded in companies such as Spotless, Sonic Healthcare, Coates Hire. In some companies, such as IOOF, contentious executive pay resolutions would have been defeated without the support of a single major shareholder.**(c) Election of directors**Institutions appear less likely to use voting as a mechanism to express dissatisfaction with the performance of Australian company directors. Assuming that open proxies would have been cast in support of a board-endorsed candidate, the average candidate would have been supported by 94.6% of all proxy instructions received.Several board candidates (e.g. Ross Dunning at Toll Holdings and John Cassidy at Hills Motorway) withdrew their candidature for re-election before proxies were counted, though it is not known whether this was due to lack of institutional support. All 12 shareholder-nominated director candidates were unsuccessful. John Ducker’s attempt at re-election as an independent candidate for Aristocrat Leisure received only 2% support, compared with the massive endorsement given when he last stood for re-election as a board-endorsed candidate in 2001. Chris Komor’s independent candidature at Kingsgate Consolidated was the most successful attempt, attracting 33% against the Board’s position.**(d) The use of ‘polls’ to pass resolutions**The analysis revealed that only 22% of companies put at least one resolution to a poll in which all proxies were counted. Technically this meant that in most Top 200 companies, resolutions were actually passed on a ‘show of hands’ of those shareholders present, with no regard to the proxy instructions received. This aberration was well illustrated at Novogen, where a resolution had been passed on a ‘show of hands’ with no regard to the majority of proxies which were against the resolution. There is growing momentum for companies to abandon the use of ‘show of hands’ altogether, and put every resolution to a compulsory poll. Rio Tinto is one Australian company that has adopted this measure.**(e) Unusual situations**James Hardie withdrew a standard resolution relating to the approval of its accounts before the meeting.Newcrest Mining and CSL Limited withdrew resolutions seeking shareholder support for constitutional changes to the tenure of non-executive directors after significant proxies were cast against the proposals. An identical proposal put forward by Wattyl received 99% support by institutions.**1.5 Survey of financial literacy**Australians are being encouraged to take a greater interest in understanding their finances following the release of a survey published on 11 January 2005 which reveals that only 18 per cent of Australians can tell the difference between a franked and unfranked dividend and only 23 per cent feel confident reading a company balance sheet - yet 60 per cent of Australians claim to be financially literate.  The survey of 1200 people, commissioned by the Institute of Chartered Accountants in Australia, also revealed that 25 per cent of respondents regularly source information on the financial markets while 22 per cent confessed that they never kept up-to-date.   The most popular source of financial information was the media, with 80 per cent of people listing it as a place that they gather information from. Professional advisers came in a distant second (38%) and friends/ colleagues (36%) were also nominated as sources of financial information.  Over 60 per cent of Australians agreed that they would be interested in receiving financial information and training, such as seminars or brochures, at their workplace.  Newspoll conducted the survey of 1200 adult respondents nationally. The survey examined the Australian public’s ability to understand and interpret financial information such as company annual reports, stock market information and financial information in the media. **1.6 Draft superannuation choice regulations published**On 12 January 2005 the Australian Government announced the next phase of public consultations into superannuation choice of fund, inviting comments on the draft regulations that set out the obligations for employers and employees.The choice of fund legislation requires a number of matters to be prescribed in the regulations. These include the standard choice form to be provided to employees, the minimum level of death cover to be offered by default funds, the information an employee must give their employer about their chosen fund, and exemptions from the employer ‘kick-back’ rule. The Government is seeking comments on both the draft regulations and the standard choice form. The draft regulations and standard choice form are available on the [Treasury website](http://www.treasury.gov.au" \t "_new). **1.7 Hong Kong proposals to enhance the regulation of listed companies** On 7 January 2005 the Hong Kong Securities and Futures Commission (SFC) and the Financial Services and the Treasury Bureau (FSTB) published a public consultation paper containing legislative proposals to enhance the regulation of listed companies.The two sets of proposals are interrelated and form a package of proposed legislative amendments which would implement the Government's policy conclusions last March on how to improve regulation of listing in Hong Kong.The Government's proposals for public consultation would make certain amendments to the Securities and Futures Ordinance (SFO). The SFC's proposals for public consultation relate to amendments to the Securities and Futures (Stock Market Listing) Rules (SMLR) as subsidiary legislation under the SFO. The proposed new amendments to the SMLR would codify existing important requirements in the Listing Rules of The Stock Exchange of Hong Kong Limited covering three areas. They follow the Government's policy direction as stated in its March 2004 Consultation Conclusions:          disclosure of price-sensitive information and specific events;         disclosure/publication of annual and periodic reports, including annual and interim accounts; and         disclosure of, and shareholders' approval for, notifiable transactions and connected transactions.In codifying the more important requirements of the Listing Rules into provisions in the SMLR, the SFC followed four general principles:          the requirements relate only to disclosure. They do not include Listing Rules dealing with issues of corporate governance;         there are no substantive changes from the present Listing Rules, other than in a few instances which are individually analysed and explained;         there are no pre-vetting or approval requirements. Listed companies which follow the SMLR would not have any extra compliance or administrative burden; and         the Stock Exchange will remain the frontline regulator and continue to receive applications and other disclosure materials, and administer the processing.Details of the SFC's proposals are set out in the document, “A Consultation Paper on Proposed Amendments to the Securities and Futures (Stock Market Listing) Rules”.The consultation paper is available on the SFC website at: [http://eapp01.sfc.hk/apps/cf/smlr.nsf/eng/main](http://eapp01.sfc.hk/apps/cf/smlr.nsf/eng/main%22%20%5Ct%20%22_new)**1.8 Review of the Insurance Contracts Act 1984: final report released** On 5 January 2005 the Parliamentary Secretary to the Australian Treasurer, the Hon Chris Pearce MP, released the final report of the second stage of the review of the [Insurance Contracts Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6416" \t "default) (the Act). This deals with all provisions of the Act other than section 54 (which was covered by the first stage of the Review). The report concludes that the Act has generally been operating satisfactorily and that it strikes an appropriate balance between the interests of insurers and consumers. The report recommends some changes to update the Act, recognises developments in the insurance market, clarifies provisions in light of judicial interpretation and addresses some anomalies in the operation of the Act. The Government intends to prepare a draft Bill to address the report’s main recommendations. This will be exposed for public comment prior to its introduction. It will also include proposed amendments to section 54 of the Act. These amendments will take account of subsequent consultations on this provision. The report identifies several areas in which further work is required. These include updating the standard cover regulations in consultation with stakeholders and collecting data on claims by innocent co-insureds. These recommendations will be progressed separately by Treasury. The members of the Review Panel were Mr Alan Cameron AM, a former Chairman of the Australian Securities and Investments Commission, and Ms Nancy Milne, a specialist insurance lawyer. The final report on the second stage of the review is available at: [http://icareview.treasury.gov.au](http://icareview.treasury.gov.au" \t "_new). **1.9 APRA proposals on compliance committees for life insurance branches**  On 4 January 2005 the Australian Prudential Regulation Authority (APRA) released a draft Prudential Standard and Discussion Paper for public consultation on establishing and operating a Compliance Committee for life insurance branches registered in Australia. The purpose of the proposed Committee is to provide greater assurance that branches will comply with the prudential requirements placed upon entities registered to conduct life insurance business in Australia. The proposal forms part of the amendments to the [Life Insurance Act 1995](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6638" \t "default) (the Life Act) resulting from the Free Trade Agreement negotiated this year between Australia and the United States.Key points contained in the proposed standard include:(a)  the Board of Directors (the Board) of a foreign life company with a registered Australian branch must delegate sufficient powers of management to the Committee to enable it to ensure the branch complies with the Life Act; and(b)  ultimate responsibility for ensuring compliance with Australia’s prudential regime remains with the Board. To this end, the Board must:(i) have the power to appoint and remove the members of the Committee at its discretion, subject to certain composition and residency requirements as outlined in the standard;(ii) ensure the delegation of managerial powers is not irrevocable and does not exclude, if necessary, the Board from exercising these powers; and(iii) establish adequate procedures for monitoring and supervising the operations of the Committee, as well as assessing its performance.APRA will consider extending this proposal to the branches of foreign general insurers in due course.A copy of the standard and discussion paper is available on the APRA website at: [http://www.apra.gov.au/policy/Draft-Prudential-Standard-for-Eligible-Foreign-Life-Insurance-Companies-Compliance-Committee.cfm](http://www.apra.gov.au/policy/Draft-Prudential-Standard-for-Eligible-Foreign-Life-Insurance-Companies-Compliance-Committee.cfm%22%20%5Ct%20%22_new)**1.10 ASIC and APRA consult the funds management industry on good practice in unit pricing**  On 23 December 2004 the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) released a consultation paper seeking industry comment on proposed guidance for good practice in unit pricing.The release of this consultation paper follows a joint review of unit pricing practice in life companies, superannuation providers and fund managers conducted by the regulators from July to December 2004.Both ASIC and APRA have raised concerns about unit pricing practices in these entities in recent years. There have been several instances of unit pricing errors involving compensation of more than $10 million and affecting many thousands of investors.The joint review has found that particular attention must be paid to:         establishing an effective risk management culture;          developing and consistently applying appropriate unit pricing policies;          maintaining robust systems, processes and interfaces to cope with the necessary volume and frequency of unit pricing activity and the diversity, complexity and variability of product designs and fund structures;          aligning unit pricing practices with statements in related documents;          taking responsibility for all unit pricing functions, even when those functions are outsourced;          timely and reasonable allowance for the value of all assets and liabilities attributable to unit holders, including non-market assets and future tax assets and liabilities;          reconciling values used in unit pricing with those reported in published accounts;          complying with obligations to prevent unit pricing errors, treat unit holders equitably, and to act in the best interests of unit holders as a whole; and          accepting the obligation to compensate all unit holders in an equitable fashion when material errors are identified.Further details are provided in the consultation paper, which is available on APRA's website at: [http://www.apra.gov.au/Superannuation/Superannuation-Publications.cfm](http://www.apra.gov.au/Superannuation/Superannuation-Publications.cfm%22%20%5Ct%20%22_new) **1.11** **Shareholders’ Association outlines shareholders' expectations**In December 2004 the Australian Shareholders’ Association published a document titled “Shareholders’ Expectations”.The topics dealt with in the document are:**(a) Compliance** **(i) Compliance with laws and regulations**Shareholders expect companies to comply with all laws relating to companies (primarily, in Australia, the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and associated regulations), general laws and regulations, specific laws and regulations affecting the operations of particular companies, accounting standards, and Listing Rules.**(ii) Behaviour of company managers and directors**Shareholders expect companies, and their managers and directors, to act responsibly and ethically. Nevertheless, while companies must comply with the legal regime that is the outcome of the general democratic process, it is not their role to comply with the dictates of unelected pressure groups. Moreover, ASA has stated in a separate key policy (Political donations) that it is not the role of companies to divert shareholders’ funds to political purposes by the making of donations to political entities.**(iii) Financial performance is a primary goal**Subject to this level of compliance and behaviour, shareholders expect companies to use the resources entrusted to them to generate value for shareholders through maximising cash flows and profits. This economic function is their primary purpose.**(iv) Directors**Directors are elected by shareholders to oversee the management of companies in the interest of the company itself and its stakeholders. Shareholders expect directors to be accountable to them as ultimate owners for the performance of this role. A key policy statement (Non-executive directorships) states ASA’s view that directors who are over-committed risk failing in their duty as directors of all the entities with which they are associated, and ASA will not support election of directors who have more than five equivalent directorships (counting a chairmanship as equivalent to three directorships).**(b) Issuing and management of equity capital****(i) Initial public offers - new listings**ASA believes that IPOs should remain open until a fixed date, allotments should be proportional to applications, and that reimbursements of application money should carry interest if reimbursements are paid more than five days after the fixed closing date, and be paid promptly by transfer into specified bank accounts or by cheque.**(ii) Raising of additional equity**Unless it would be uneconomic, shareholders expect that the raising of fresh equity capital will be done through renounceable rights issues that allow existing shareholders to preserve their level of equity in the company without dilution of the value of their holding. Moreover, shareholders expect that appropriate arrangements be included in the rights issue to enable them to receive the residual value of their rights, where for any reason their entitlements lapse.Shareholders recognise that in some circumstances rights issues might be uneconomic, usually where the amount to be raised is small in relation to the existing level of shareholders’ funds, and/or where equity needs to raised quickly. In such circumstances placements of equity would be reasonable, provided that invitations to participate in the placement are made to shareholders who qualify as substantial investors and have registered their names with the company for the purpose. Placements should be restricted to 15% of the existing equity in any year, unless shareholder approval is obtained for a higher level, and any discount at which a placement is made versus the market value should be limited to the extent of the costs of a general rights issue relative to the amount such an issue would raise (a discount of 2.5% would be reasonable on this basis).ASA notes that share purchase plans based on regulations that permit limited issues of equity without the need for a prospectus are inherently inequitable, because the plans are based on a fixed amount (currently $5000 per year) regardless of the size of a shareholder’s holding. The schemes therefore encourage the splitting of holdings to take advantage of any discount relative to share price. It would, in ASA’s view, be fairer to shareholders for non-prospectus issues of this sort to be capped by a percentage of each holding rather than a dollar amount.**(iii) Compulsory acquisition of small holdings**ASA supports the concept of rationalisation of share registry costs by acquisition by the company of security holdings that are less than a marketable parcel, provided that such acquisition is within the entity’s constitution. However, shareholders expect reasonable notice – normally a minimum of six weeks - of the intention of the company to acquire their holding (or refusal to register a newly acquired holding), and the amount to be paid to be at least as great as the market price on the date of the notification. **(c) Remuneration of executives and directors****(i) Remuneration of non-executive directors**Shareholders expect non-executive directors to be paid fixed fees that reflect the skill required and demands of the position. Such directors should not participate in incentive schemes, including equity-related schemes. Nor should they participate in retirement allowance schemes if they are covered by the statutory Superannuation Guarantee scheme. **(ii) Executive remuneration**ASA has a key policy statement (Director and executive remuneration), the cornerstone of which is that there should be a rational relationship between growth in total remuneration and performance. Shareholders expect full disclosure of remuneration arrangements and explanation of disparities between rewards and performance. Performance measurement for this purpose should reflect the company’s role of creating value for shareholders.**(iii) Equity-based incentive schemes**Where remuneration arrangements for executives include an equity-based component, the scheme determining it should be designed to reward the scheme participant for achieving an outcome for shareholders above the level that would be expected in the absence of the scheme. As pointed out in ASA’s separate key policy on the matter (Equity-based incentive schemes), it is not the purpose of such schemes simply to generate windfalls from movements in the company’s share price not directly related to the direct influence of the scheme participants. The goal is to reward superlative performance.**(d) Communications with shareholders****(i) Openness and clarity**Shareholders expect directors to communicate with them candidly and clearly. Spin, jargon and other means of deliberate or inadvertent obfuscation are unwelcome.**(ii) Dissemination** Written communications should be mailed to all shareholders, unless they have specifically requested otherwise.**(iii) Historic data for tax purposes**Shareholders (or in the case of trusts or issuers of stapled securities, unitholders) expect annual reports or the security issuer’s website to provide historical information about issues of securities and distributions that will enable investors to obtain the information required for completion of tax returns. Capital gains tax is the main generator of this need, which means that actions by the issuer since commencement of that tax in 1985 that have affected the capital value of holdings should be described.**(iv) History of financial performance**Shareholders expect annual reports to include a table showing the 5-year financial history that will enable them to assess financial performance of the company. In particular, data should include;          turnover levels,          financing costs,          profits as defined by accounting standards,         abnormal items,          earnings per share,          dividends per share and the extent of their franking,          operating cash flows, investing cash flows, capital issues, other financing cash flows; and         gearing and return on shareholders’ funds.Data relating to executive remuneration prescribed by accounting standards should also be presented for the period since commencement if less than five years, otherwise for five years. The accumulation index for the entity’s securities from commencement of the 5-year period should also be provided.**(e) Meetings with shareholder****(i) Conduct of meetings**Shareholders expect general meetings to be conducted in a way that permits reasonable expression of their views on the matters to be decided and, in the case of the annual general meeting, on the performance of the company. They expect the chair to act in a presidential style – not dictatorially, nor defensively in protection of the board or other stakeholder groups, nor in a confrontational way. Meetings of shareholders are not public meetings.Management of business needs to recognize that sometimes the length of a meeting is indeterminate. Consequently, where voting is to be on a poll the poll should be opened at the commencement of the meeting so that shareholders who wish to depart before the formal vote can participate. Moreover, regardless of whether a poll is to be conducted, shareholders expect that all voting should initially be on a show of hands so that the strength of votes by individual shareholders is evident.Shareholders expect to be able to discuss each agenda item separately. It is inappropriate for a chair to take all questions before the first resolution, and to prevent the raising of issues on subsequent resolutions.**(ii) Proxies**Proxy forms should be structured so that the shareholder may first nominate their preferred proxy holder (which may be a corporate nominee), then offer an option of nominating the chair of the meeting. Automatic default of a proxy to the chair is inappropriate.**(f) Dividends****(i) Dividend policies**Shareholders expect directors of the companies in which they invest to pursue clearly articulated distribution practices. ASA’s key policy statement on the matter (Dividends and franking) recognises that dividend decisions are the responsibility of directors who are charged with ensuring the continued solvency of the company and the protection of the rights of its creditors. It asserts, however, that shareholders are entitled, as ultimate owners of the company, to a presumption that profits will be fully distributed annually unless directors provide a satisfactory explanation for something less.**(ii) Franking**Shareholders expect companies to recognise that the franking system reflects the payment of tax on behalf of shareholders. If a company allows franking credits to accumulate in its own hands, rather than to transmit the value of the credits through dividends or other appropriate means, it causes its shareholders to pay more tax, or to pay tax sooner, than necessary. **(iii) Method of payment of dividends**Shareholders expect dividends to be declared within a reasonable time of the determination of results and to be paid promptly thereafter. Shareholders recognise that direct crediting of dividends to bank accounts is the most efficient and economic method of payment, and therefore in the interest of all shareholders. However, shareholders expect sensitive application of this process.**(g) Managed investments**Many ASA members, and other retail shareholders, invest in managed funds – or would benefit from such investment – but ASA is unable to support them because of deficiencies in the managed investments regime. An ASA committee is working on this issue in the hope of contributing to such matters as:         standardisation of the measurement of expense rates, both numerator and denominator, preferably in line with the APRA, ASIC or other regulatory authority definitions, if any,           clarification of when expense rates, and fees, should be reported, and in what manner,         standardisation of the reporting of financial performance, both gross and net of expenses or fees borne by unit holders,         holding of an annual meeting with unit holders for all ASX-listed managed funds, and possibly others, which all directors of the Responsible Entity attend in the absence of due cause. ASA is also concerned about non-involvement of investors in the supervisory process, and will examine proposals to reinstate some form of supervisory board for each fund, to which unit holders would elect representatives.**1.12 IAASB issues new standard for the form of an auditor’s report and addresses issues of international comparability** To enhance the transparency and comparability of auditors’ reports across international borders, the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) issued in New York on 28 December 2004 an International Standard on Auditing (ISA) that establishes a new form of auditor’s report. The updated standard, ISA 700, The Independent Auditor’s Report on a Complete Set of General Purpose Financial Statements, sets out a framework to separate audit reporting requirements in connection with an ISA audit from additional supplementary reporting responsibilities required in some jurisdictions.ISA 700 is available from the [IFAC website](http://www.ifac.org/%22%20%5Ct%20%22_new).**1.13 Report on life mutuals and corporate governance best practice**On 20 December 2004 the final report of Mr Paul Myners’ independent review of the governance of UK mutual life offices was published.Commenting on the review’s recommendations, Mr Myners said: “The recommendations I am making aim to achieve greater accountability by life mutuals to their members. In doing so I have looked to develop a package of measures to help improve accountability, recognising that there are limits on what can be expected of life mutual members. This includes measures to better enable other external monitors to scrutinise life mutuals, promoting better internal scrutiny of management by firm’s boards as well as the role of the Financial Services Authority.”“My approach is to address these issues in a realistic and proportionate way, with recommendations based on established practice and common sense.  Taken together they provide the basis for life mutuals to ensure that their governance will compare very favourably to best practice in proprietary companies.  I am not recommending legislation, as the issues identified do not warrant it.  I expect the recommendations in the report to be taken forward by life mutuals and their trade bodies, supported by FSA supervision.”Recommendations include:         Promoting greater engagement by life mutuals of their members, through guidance on fair and accessible voting procedures on a member relations strategy.  This includes promoting dialogue with members as well as facilitating communication among members.  Members also have a clear responsibility to look after their own interests as the effective owners of life mutuals;          Proposals to better inform life mutual members and the market through providing better information, including on directors’ remuneration, and for large mutuals, publication of forward-looking strategic information in the form of an Operating and Financial Review;          Promoting adherence to best practice corporate governance through producing a life mutual specific piece of guidance.  This takes the form of a number of annotations to the Combined Code to reflect the particular characteristics of life mutuals. The Review’s objective is that this Code will be used by the FSA as its benchmark when it looks at governance as part of its risk monitoring process;          Proposals that give particular prominence to the need for a strong independent element on life mutuals’ boards, and underlines the importance of board appraisals.  Monitoring of business risks should be an explicit function of the non-executive directors; and          Helping equip non-executives to deal with the challenges they face in monitoring a complex, technical business. Proposals in the report aim to foster informed discussion. The company secretary or equivalent in friendly societies has a very valuable and pro-active role to play in this regard and in supporting non-executives more generally.The full report is available at: [http://www.hm-treasury.gov.uk/independent\_reviews/myners\_review/review\_myners\_index.cfm](http://www.hm-treasury.gov.uk/independent_reviews/myners_review/review_myners_index.cfm%22%20%5Ct%20%22_new)**1.14 Corporations Act regulations amendments****(a) Fees regulations**The [Corporations (Fees) Amendment Regulations (No 2) 2004 No 400 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82324" \t "default) amend the [Corporations (Fees) Regulations 2001 No. 194 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56762" \t "default). According to the explanatory memorandum, the amending Regulations clarify the basis on which the Takeovers Panel may charge fees in respect of applications made to the Panel, and increases the amount of the fees as prescribed in the principal Regulations.The amending Regulations:        increase the fee for making an application to the Takeovers Panel from $540 to $2,010, by inserting a new item in the principal Regulations;        prescribe a new fee of $2,010 payable where a company refers a financial report to the Financial Reporting Panel for consideration (no fee was previously prescribed); and        prescribe a new fee of $330 payable by a clearing and settlement facility licensee upon giving its annual report to the Australian Securities and Investments Commission (no fee was previously prescribed).**(b) Corporations Amendment Regulations No 8**The [Corporations Amendment Regulations (No 8) 2004 No 398 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82322" \t "default) amend the [Corporations Regulations 2001 No. 193 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "default). According to the explanatory memorandum, the amending Regulations make a number of amendments concerning clearing and settlement facilities, widely held market bodies, prescribed financial markets and fees in relation to a company's register of relevant interests.The amending Regulations make the following amendments:        prescribe additional obligations for the purposes of defining a clearing and settlement facility, which arise from certain financial products including foreign exchange contracts, contracts to transfer rights that include an undertaking by a body to repay a debt as money deposited with or lent to the body, and repurchase agreements;        prescribe two additional "widely held market bodies" for the purposes of controlling ownership of significant clearing and settlement facilities;        prescribe Australia Pacific Exchange Limited (APX) as a "prescribed financial market", to ensure that entities listed on APX must comply with additional obligations contained in the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default);        prescribe fees which a company or responsible entity may charge for inspecting the register of relevant interests or obtaining a copy of or part of this register; and        delete an unnecessary reference to the President of the Takeovers Panel.**(c) Corporations Amendment Regulations No 9**The [Corporations Amendment Regulations (No 9) 2004 No 399 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82323" \t "default) amend the [Corporations Regulations 2001 No. 193 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "default). According to the explanatory memorandum, the amending Regulations allow the Australian Securities and Investments Commission (ASIC) to approve particular forms and prescribe certain forms to facilitate the operation of the Financial Reporting Panel, as well as to prescribe additional auditing standards, with the aim of streamlining reporting requirements for insolvency practitioners.Schedule 1 (Insolvency forms) of the amending Regulations removes a number of forms from the principal Regulations, allowing ASIC to replace these forms where necessary with ASIC approved forms. The removed forms primarily relate to Chapter 5 (External administration) of the [Corporations Act 2001 No. 50 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).Schedule 2 (Financial Reporting Panel and Auditing Standards) of the amending Regulations prescribes the form for notification where ASIC proposes to refer a matter to the Panel, and the referral forms where ASIC or a lodging entity refers a matter to the Panel. Schedule 2 also prescribes two additional auditing standards for the purposes of transitional arrangements under the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 No. 103 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default). These are AUS 206 Quality Control for Audits of Historical Financial Information, which applies to financial reporting periods beginning on or after 15 June 2005, and AUS 210The Auditor's Responsibility to Consider Fraud and Error in an Audit of a Financial Report, which applies to financial reporting periods beginning on or after 15 December 2004.**(d) Draft superannuation fee disclosure regulations**The Department of the Treasury has released the draft [Corporations Amendment Regulations](http://treasury.gov.au/documents/943/PDF/Corporations_Amendment_Regulations_2005.pdf%22%20%5Ct%20%22_new) (December 2004), which set out "measures for the disclosure of transactions and fees and costs to give effect to the fee disclosure package announced on 16 June 2004 by the Government in support of the Superannuation Choice of Fund reforms". **1.15 The CEO's path to the top - study of Fortune 100 executives**In a new study that compares Fortune 100 executives in 1980 with their counterparts in 2001, Peter Cappelli, Director of Wharton Business School's Center for Human Resources, and Monika Hamori, a professor at Instituto de Empresa in Madrid, document how the road to the office of CEO and the characteristics of the executives who get there have changed significantly over the last two decades. To summarise: Today's executives are younger, more likely to be female, and less likely to have Ivy League educations. They make their way to the executive suite faster than ever before (about four years faster than their counterparts in 1980), and they hold fewer jobs along the way. They spend about five years less in their current organization before being promoted, and are more likely to be hired from the outside.The article is available at [http://knowledge.wharton.upenn.edu/article/1121.cfm](http://knowledge.wharton.upenn.edu/article/1121.cfm%22%20%5Ct%20%22_new) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC issues licensing relief for securitisation special purpose vehicles**On 11 January 2004 the Australian Securities and Investments Commission (ASIC) announced a conditional exemption for securitisation special purpose companies and trustees from the requirement to obtain an Australian financial services (AFS) licence.The exemption applies to dealing in and providing custodial services in relation to financial products as part of securitisation transactions.The relief was issued after consultation with participants in the securitisation industry, industry groups and the Australian Prudential Regulatory Authority (APRA). This included the issue of a public Consultation Paper in August 2004.Class Order [CO 04/1526]: Securitisation special purpose vehicles has been issued to give the relief, effective from 1 July 2005. To ensure that there is adequate time for industry to comply with the AFS licensing requirements of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) or ASIC's exemption under [CO 04/1526], ASIC has provided a further transitional period until 30 June 2005. ASIC has extended the interim relief under Class Order [CO 03/1098] Securitisation special purpose vehicles and securitisation managers.ASIC has also issued amendments to Policy Statement 167 Licensing:Discretionary powers and transition [PS 167], reflecting the ongoing relief for special purpose securitisation entities. These amendments will also be included in an updated version of PS 167, likely to be issued early in 2005.A copy of [CO 04/1526] and [CO 03/1098] is available on [ASIC's website](http://www.asic.gov.au/%22%20%5Ct%20%22_new) or by calling ASIC's Infoline on1300 300 630. A copy of the amendments to [PS 167] are available from ASIC’s website at: [http://www.asic.gov.au/fsrrelief](http://www.asic.gov.au/fsrrelief%22%20%5Ct%20%22_new)**2.2 ASIC consults on the regulation of non-cash payment facilities**On 22 December 2004 the Australian Securities and Investments Commission (ASIC) announced the issue of its policy proposal paper, 'Non-cash payment facilities'. ASIC is seeking comment on its proposed longer term approach to regulating non-cash payment (NCP) facilities, including its proposals for licensing and disclosure relief for certain kinds of NCP facilities. A NCP facility is a facility through which a person can make a payment or cause a payment to be made otherwise than through the physical delivery of Australian or foreign currency. For example, a NCP facility includes cheque accounts, travellers cheques, stored value cards, electronic cash, direct debit services, gift vouchers and cards, funds transfer services, electronic bill payment services and some loyalty schemes.The policy proposal paper sets out how ASIC plans to approach the regulation of NCP payment facilities on an ongoing basis by discussing:          what class order relief it is considering from the licensing and disclosure obligations of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) for low-value NCP facilities (including limited use low-value NCP facilities) and NCP facilities issued under loyalty schemes; and          how ASIC proposes that the Corporations Act 2001 applies to NCP facilities that are not covered by its proposed relief.ASIC has already provided interim licensing, conduct and product disclosure relief for low-value NCP facilities and loyalty schemes. This relief has been given on a case-by-case basis and expires on 30 June 2005 .ASIC aims to issue its final policy on the regulation of NCP facilities around May–June 2005.If necessary, ASIC will consider extending its interim relief when finalising its policy to give relevant financial service providers sufficient time to comply with the Corporations Act*,* or conditions of any permanent relief ASIC may issue. ASIC requests comments on its policy proposals by 25 February 2005.A copy of the policy proposal paper is available from the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new) or by calling the ASIC Infoline on 1300 300 630.**2.3 ASIC extends transitional relief for certain managed investment schemes**On 22 December 2004 the Australian Securities and Investments Commission (ASIC) announced the extension of interim relief available for certain managed investment schemes from 31 December 2004 to 30 September 2005. The extension applies to relief contained in the following class orders:         [Class Order [CO 98/51]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co98-51_pdf" \t "_new) Relief from the duty to separate assets of a managed investments scheme;         [Class Order [CO 98/55]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co98-55_pdf" \t "_new) Investments in unregistered schemes; and         [Class Order [CO 02/239]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co02-239_pdf" \t "_new) Participating property syndicatesThis extension of time:         only applies to relief with a time limit under these three Class Orders (relief with a 'sunset' date) and          does not affect any other relief referred to in the Class Orders.ASIC has also amended [Class Order [CO 04/194]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-194_pdf" \t "_new) Managed Discretionary Accounts by extending the date referred to in the Class Order in respect of an interest arising from an 'Eligible SELECT Master Agreement' within the meaning of [[CO 98/51]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co98-51_pdf" \t "_new) from 31 December 2004 to 30 September 2005. For further information about the above three Class Orders please visit the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.4 ASIC refines relief allowing Statements of Additional Advice**On 22 December 2004 the Australian Securities and Investments Commission (ASIC) announced a new class order refining the relief issued in July 2004 allowing Statements of Additional Advice (SOAA) to be provided to retail clients instead of a Statement of Advice (SOA) in certain circumstances. An SOAA is a document which incorporates by reference information from another document which has previously been provided to the client. The class order announced on 22 December 2004 [[CO 04/1556]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-1556_pdf" \t "_new) expands the relief ASIC previously gave to allow an SOAA to be given to a retail client instead of an SOA. The main changes to the relief brought about by [CO 04/1556] are that:          an adviser will now be able to incorporate by reference information from more than one clearly identified 'eligible advice document' previously given to the client;          the documents which satisfy the definition of 'eligible advice document' from which information can be incorporated by reference into an SOAA has been expanded to include SOAs, SOAAs and certain documents provided to the client before the FSR regime applied to the adviser. This expansion is intended to cover documents used by industry such as client fact finds and financial plans; and          an adviser will now be able to incorporate by reference information from an eligible advice document provided to the client by a different adviser representing the same licensee.As with the original relief, if the client requests it, a copy of any eligible advice document must be provided free of charge.This class order does not affect or reduce the requirement to give appropriate advice in accordance with section 945A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The previous relief contained in class order [CO 04/576] is now revoked.Copies of class order [CO 04/1556] can be obtained from the ASIC Infoline by calling 1300 300 630 or from the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.5 ASIC extends interim relief for managed investment scheme constitutions**On 22 December 2004 the Australian Securities and Investments Commission (ASIC) extended until 31 March 2005 interim relief that permits fund managers in certain circumstances to provide estimates of the transaction costs, value of scheme property and other expenses in setting the application and redemption price for interests in registered managed investment schemes. The relief was due to expire on 31 December 2004.ASIC originally announced it would extend this relief in October to allow it to finalise policy development on this topic. Paragraph 601GA(1)(a) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act), as modified by ASIC Class Order [CO 98/52], requires a managed investment scheme constitution to make adequate provision for the consideration to acquire an interest in the scheme with only certain defined exceptions that allow the responsible entity to determine the price.ASIC considers that if a provision of a scheme's constitution allows the responsible entity discretion to determine any part of the issue price or the price paid to a member upon withdrawal, then the constitution does not comply with s601GA. ASIC is in the process of determining what relief might be granted from these requirements.On 15 December 2004, ASIC executed an instrument varying 55 instruments that granted relief from section 601GA to certain schemes, so that interim relief that it has granted remains effective until 31 March 2005 rather than 31 December 2004. A copy of the instrument will be published in the ASIC Gazette and is available from the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.6 ASIC grants relief for secondary financial service providers**On 22 December 2004 the Australian Securities and Investments Commission (ASIC) granted relief to secondary service providers from the Financial Service Guide (FSG) obligations, so that secondary service providers can give their clients access to FSG information in a practical manner.A secondary service provider is a licensee (or authorised representative) who provides financial services to retail clients via another person (referred to as the 'intermediary').ASIC has granted class order relief in four areas:**(a) General FSG relief** Where an arrangement exists for an intermediary to give a retail client the secondary service provider's FSG, and other conditions are met, the secondary service provider has been granted relief from the consequences of failing to actually provide an FSG. This relief applies from 1 July 2005. See [CO 04/1571] for full details of the relief. **(b) Transitional FSG relief**Until 30 June 2005, secondary service providers can meet their obligations to provide an FSG to retail clients by posting it on their website (if they have one), making it available on request and meeting some other conditions. This relief gives secondary service providers a reasonable opportunity to put in place the arrangements under ASIC’s general FSG relief, which commences on 1 July 2005. See [Class Order [CO 04/1571]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-1571_pdf" \t "_new) for full details of the relief.**(c) FSG relief for experts**Where an expert's report is to be included in a third party's disclosure document (such as a prospectus or product disclosure statement), the expert's FSG may be included as a separate and clearly identifiable part of the expert's report if other conditions are met. See [Class Order [CO 04/1572]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-1572_pdf" \t "_new) for full details of the relief.**(d) FSG relief for arrangers**Where a person is arranging for the issue of a financial product by a product provider under an intermediary authorisation (paragraph 911A(2)(b) of the Act) and other conditions are met, the arranger's FSG can be included as a separate and clearly identifiable part of the product provider's PDS. See [Class Order [CO 04/1573]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-1573_pdf" \t "_new) for full details of the relief.Further guidance on secondary services provision and complying with the Act is available from the ASIC website: [http://www.asic.gov.au/fsrrelief](http://www.asic.gov.au/fsrrelief%22%20%5Ct%20%22_new) and will be available in ASIC's suite of FAQs in early 2005. It will include how to identify whether a service is a secondary service. Copies of Class Order [CO 04/1571], [CO 04/1572] and [CO 04/1573] can be obtained from the ASIC website at: [http://www.asic.gov.au/co](http://www.asic.gov.au/co%22%20%5Ct%20%22_new) **2.7 ASIC assists managed investment schemes move to new accounting standards**On 22 December 2004 the Australian Securities and Investments Commission (ASIC) allowed managed investment schemes to change some references in their constitutions to accounting standards without a meeting of members, to help them move smoothly to the new Australian accounting standards equivalent to International Financial Reporting Standards (AEIFRS). ASIC's [Class Order [CO 04/1575]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-1575_pdf" \t "_new) allows responsible entities to make specified changes to their constitution without calling a meeting of members if the changes are for the limited purposes specified in the class order. Under [CO 04/1575], responsible entities must ensure that investors' rights are not affected by the changes ASIC has permitted. Calculations affecting investors will be done in the same way as they have been done up to now.AEIFRS will apply to the financial reports of managed investment schemes progressively from 1 January 2005. Many scheme constitutions refer to accounting standards or generally accepted accounting principles for purposes other than a scheme's financial reporting obligations. Typically, constitutions refer to the standards for the purpose of working out the value of scheme assets and liabilities and these values are in turn used to set the price of new interests in a scheme, the amount a holder is entitled to if they exit the scheme, the fees paid to investment managers and so on.[CO 04/1575] will permit responsible entities to make changes to constitutions so that these references continue to be to the current accounting standards, and are not affected by the changed standards that will apply when the scheme prepares financial reports under AEIFRS.[CO 04/1575] will facilitate a smooth transition to the AEIFRS regime and avoid the need to change systems used for unit pricing and other purposes. For a copy of the Class order[CO 04/1575] visit the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new). **2.8 ASIC issues final versions of CLERP 9 policies**On 21 December 2004 the Australian Securities and Investments Commission (ASIC) issued final versions of the two policy statements and two practice notes issued as 'proof' versions on 1 July 2004. The policies provide guidance on several aspects of the new requirements of the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) (CLERP 9).The final CLERP 9 policies issued are:          [Policy Statement 180: Auditor registration](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps180_pdf" \t "_new) [PS 180]          [Practice Note 34: Auditors' obligations: reporting to ASIC](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=pn34_pdf" \t "_new) [PN 34]          [Practice Note 66: Transaction-specific disclosure](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=pn66_pdf" \t "_new) [PN 66], and          [Policy Statement 173: Disclosure for the on-sale of securities and other financial products](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps173_pdf" \t "_new) [PS 173]. Copies of the final policy statements and final practice notes are available from the ASIC website at [www.asic.gov.au/ps](http://www.asic.gov.au/ps%22%20%5Ct%20%22_new).These can also be obtained by calling ASIC's Infoline on 1300 300 630.**2.9 ASIC and ACCC sign new MOU** A new agreement covering liaison, cooperation, assistance, joint enquiries and exchange of confidential information arrangements has been signed by the Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) according to a press release issued by ASIC on 21 December 2004. The new Memorandum of Understanding (MOU) updates the existing MOU that has been in place since 1998. It reflects the close working relationship the two agencies have developed. The MOU will reinforce the cooperative approach the agencies have been taking to address wealth creation seminars and get rich quick schemes, as well as misconduct in debt collection. ASIC and the ACCC recently released a joint brochure outlining their respective roles in relation to debt collection.The full text of the MOU and the joint brochure on debt collection are available on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new) and the [ACCC website](http://www.accc.gov.au/%22%20%5Ct%20%22_new).**2.10 ASIC issues report on recent relief applications from financial service providers**On 21 December 2004 the Australian Securities and Investments Commission (ASIC) released a report outlining some of its decisions on recent applications for relief by financial service providers from the licensing, conduct, disclosure and managed investments provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act).ASIC has a number of exemption and modification powers under the financial services provisions of Chapter 7 of the Act (inserted by the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default)) and the managed investments provisions under Chapter 5C. The report, which covers relief applications considered by ASIC between 11 October 2003 and 14 August 2004, provides an overview of the circumstances in which ASIC has exercised, or refused to exercise, its discretionary powers to grant relief.The report also outlines limited instances where ASIC decided to take a no-action position in relation to non-compliance with provisions of the Act. It includes an appendix detailing the relief instruments ASIC has executed for the matters referred to in the report. For ease of reference, the appendix contains cross-references linking the instruments to the relevant paragraph(s) of the report.The report is available from the [ASIC website](http://www.asic.gov.au" \t "_new) or by calling ASIC's Infoline on 1300 300 630. ASIC has published an earlier overview of relief decisions as an attachment to [Information Release [IR 03/31]](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR%2B03-31%2BASIC%2Bprovides%2Boverview%2Bof%2Bapplications%2Bfor%2Brelief%2Bunder%2BFSRA?openDocument" \t "_new) ASIC provides overview of applications for relief under FSRA, also available from the [ASIC website](http://www.asic.gov.au" \t "_new). ASIC's general policy is only to consider granting relief from the requirements of Chapters 5C and 7 of the Act to address atypical or unforeseen circumstances and unintended consequences of those provisions. The criteria that ASIC will apply in considering applications for relief are most recently outlined in:          [Information Release [IR 03/29]](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR%2B03-29%2BASIC%2Bissues%2Badditional%2Bguidance%2Bfor%2BFSR%2Brelief%2Bapplicants?openDocument" \t "_new) ASIC issues additional guidance for FSR relief applicants;         [Policy Statement 136](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps136_pdf" \t "_new): Managed investments: Discretionary powers and closely related schemes [PS 136];          [Policy Statement 167](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps167_pdf" \t "_new): Licensing: Discretionary powers and transition [PS 167], and          [Policy Statement 169](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps169_pdf" \t "_new): Disclosure: Discretionary powers and transition [PS 169].ASIC is required to publish a copy of each exemption and/or modification instrument issued in the [ASIC Gazette](http://www.asic.gov.au/gazettes%22%20%5Ct%20%22_new), which is available from the [ASIC website](http://www.asic.gov.au" \t "_new). Copies of ASIC's policy statements, information releases and class orders are available from the same web address or by calling ASIC's Infoline on 1300 300 630.**2.11 ASIC issues guidance on PDS disclosure**On 21 December 2004 the Australian Securities and Investments Commission (ASIC) provided guidance for product issuers preparing and reviewing Product Disclosure Statements (PDSs). The guidance highlights a number of compliance issues product issuers should take into account to ensure that their PDSs meet both the content and presentation requirements of the law.The guidance follows an ASIC review of over 100 PDSs prepared before 11 March 2004. ASIC also announced that it plans to conduct nation-wide campaigns into PDSs issued by the financial services industry, and the findings from its recent review will be used to focus on specific disclosure issues for particular product classes.One of the central aims of the uniform disclosure regime introduced by the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) (FSR Act) is to ensure that consumers have sufficient information to help them make informed choices when considering the acquisition of financial products. Under this regime, PDSs must be provided to all retail clients who are being sold financial products, other than shares and debentures. This includes financial products such as banking, life and general insurance, superannuation, derivatives, unit trusts and other managed investment schemes. Shares and debentures continue to be sold using prospectuses.Given the breadth of the FSR regime, the law creates a principles-based framework for determining the content of disclosure documents. The law also states that the information contained in disclosure documents must be worded and presented in a 'clear, concise and effective' manner. ASIC's goal is to ensure compliance with both of these objectives so that the desired outcome, the informed consumer, is achieved. ASIC has the power to issue a stop order if a PDS is 'defective'. A defective PDS includes a document that:         contains a misleading or deceptive statement;          fails to include certain required disclosures; and          is not worded and presented in a clear, concise and effective manner.ASIC will consider taking regulatory action where the manner in which information is presented in a PDS actually impedes the consumer from making an informed decision about whether to acquire a financial product. For more information on ASIC's policy in relation to PDSs, see [Policy Statement 168 Disclosure: Product Disclosure Statements (and other disclosure obligations)](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=PS168_pdf" \t "_new) [PS 168], which includes the Good Disclosure Principles. [PS 168] is available from the ASIC website at: [http://www.asic.gov.au/fsrpolicy](http://www.asic.gov.au/fsrpolicy%22%20%5Ct%20%22_new) or by calling the ASIC Infoline on 1300 300 630. |
| **3. Recent Takeovers Panel Developments** |
| **3****.1 Rivkin Financial Services: Panel makes declaration of unacceptable circumstances and accepts undertakings** On 20 January 2004, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances in response to an application from Network Limited (Network) under section 657C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in relation to the affairs of Rivkin Financial Services Limited (RFS). The Panel has accepted undertakings from RFS which address its concerns. The application relates to a 1 for 3 pro-rata renounceable rights issue proposed by RFS, to be fully underwritten by Westchester Financial Services Pty Limited (Westchester) and fully sub-underwritten by Central Exchange Limited (CXL).The Panel considered that unacceptable circumstances existed in that:         RFS is subject to an ongoing contest for control, the current status of which is clouded by uncertainty, due to the conflicting voting patterns of shareholders regarding the composition of the board of RFS as between RFS’ EGM and AGM, each of which was held on 29 November 2004;          the Rights Issue and Underwriting had the capacity to significantly impact that contest for control. There are no genuinely independent members of the board of RFS, and the contest for control could have been determined by the Rights Issue in favour of interests associated with the incumbent directors;          there was no immediate or compelling need for the Rights Issue, nor any pressing need for it to occur before two proposed shareholder meetings which may remove the uncertainty as to the status of the incumbent board of RFS and the contest for control of RFS. There is no ASX listing requirement to increase RFS’ capital at this time and, in the Panel’s view, the amount of capital to be raised by the offering would be unlikely to materially change the market’s perception of RFS as an investment company;          the Rights Issue and Underwritingwas not in pursuance of a course which had been put before, or approved by, RFS shareholders, notwithstanding that it is likely that shareholder approval will be required for a proposed spin off of RFS’ Avcol business;          there was inadequate disclosure in the Rights Issue prospectus of the potential impact of the Rights Issue on the control of RFS;          the Rights Issue was announced on 24 December 2004, a time at which many of RFS’ approximately 2,400 shareholders may not have made arrangements to receive a rights offer (there having been no earlier indication to the market of the intention to make the Rights Issue) and in the circumstances this militated against the “genuine accessibility” of the issue;          the pricing of the Rights Issue, in that the discount was at the lower end of discounts that would have encouraged a take-up of Rights or trading in Rights; and          in all of the above circumstances, the ‘underwriting’ and ‘sub-underwriting’ arrangements may be characterised as a de facto placement to a substantial shareholder with interests aligned with the incumbent board members since, unlike conventional underwriting arrangements, their structure was likely to increase rather than minimise the shortfall in take-up in a situation where the sub-underwriter was not receiving any benefit which could reasonably be seen as offsetting that risk other than increased control over RFS. For instance:(a) RFS retained the right to approve sub-underwriters;(b) CXL offered to sub-underwrite the entire Rights Issue; (c)  CXL stipulated that it could terminate any sub-underwriting arrangements if certain other persons were appointed as sub-underwriters (which it was apparent to the Panel would include, at least, Pinnacle and likely Network); and (d)  CXL offered to sub-underwrite the Rights Issue for no fee.The Panel considered that it was the combination of the above elements, rather than any one particular factor - and notwithstanding what might otherwise be regarded as mitigating factors such as the fact that the issue was renounceable and that an offer of sub-underwriting was made to other significant shareholders, that caused unacceptable circumstances to exist in relation to the Rights Issue.The Panel was concerned that if it permitted the Rights Issue to continue it would be doing so in circumstances which could result in:         an acquisition of control in RFS taking place in a market which was not efficient, competitive and informed; and          all shareholders in RFS not having a reasonable and equal opportunity to participate in benefits accruing to holders through a proposal pursuant to which CXL might acquire a substantial interest in RFS, where it was practicable to avoid that inequality of opportunity.RFS undertook to the Panel that the Rights Issue (and therefore the Underwriting) would not proceed unless the acquisition of relevant interests in the RFS shares pursuant to the Underwriting is first approved under item 7 of section 611 of the Corporations Act on the basis that each of the following persons are associates of one another: CXL, Sofcom Limited (Sofcom), Fastscout Limited (Fastscout), Altera Capital Limited (Altera), Westchester, and their respective officers, related parties and associates.RFS also undertook that RFS would not make any rights offer for three months if the rights offer might result in any of the above persons acquiring a relevant interest in shares in RFS pursuant to an underwriting or sub-underwriting arrangement and increasing the collective voting power of the above persons over or further over 20%, unless the acquisition of shares is approved under item 7 of section 611 on the basis that each of the above persons is to be regarded as an associate of each other for the purposes of the undertaking given by RFS. The Panel considered that these undertakings remedied the unacceptable circumstances. Accordingly, it was not necessary for the Panel to make final orders in response to the application.The Panel considered that the undertakings from RFS are the most appropriate means of remedying all of the factors contributing to the unacceptable circumstances outlined above. The Panel is open to the possibility of permitting RFS to vary its undertakings in relation to future rights issues and underwriting arrangements if it is appropriate to do so – for instance, if, before the end of three months, the contest for control of RFS is resolved or RFS has an urgent or compelling need to conduct a fundraising.Further information about the decision is in the Panel’a media release which is available at: [http://www.takeovers.gov.au/display.asp?ContentID=904](http://www.takeovers.gov.au/display.asp?ContentID=904" \t "_new) |
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