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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 User friendly financial reports**On 19 September 2005, the Australian Institute of Company Directors (AICD) together with PricewaterhouseCoopers launched a guide to reporting that companies can offer shareholders, called The Shareholder Friendly Report. With the increasing complexity of reporting requirements, information provided to shareholders on company performance is becoming less meaningful without expert translation.Written from a non-technical perspective, the report provides a comprehensive scorecard on the company's overall performance. It reports not only the historic results and trends against key financial and non-financial strategies, but also the company's outlook for the future. The report has been welcomed by a number of groups including the Australian Shareholders Association. The report was developed by the Reporting Committee of the AICD, a policy think-tank that encompasses practising directors, audit, reporting and accounting experts.The key benefits of the report are:* Tables and graphs are easy to read and are accompanied by thorough explanations;
* Financial information is understandable and in a more informative form than statutory layouts;
* Describes company performance against stated corporate strategy;
* Written specifically to inform as a performance report from the stewards of the business (board and management) to the shareholders;
* The report is endorsed by the auditor as consistent with the full financial statements contained in the annual report;
* Summarised divisional reports are included to show what is happening within the company. They are still performance reports, and in a format consistent with the CEO's report;
* Does not require interpretation by finance experts to be meaningful to the broad base of Australian shareholders;
* Designed to provide an understanding of the business rather than act as a list of how a company complies with regulatory requirements;
* Includes overview statements preceding each section;
* Defines financial and non-financial measures used; and
* The report's framework is based on PricewaterhouseCoopers' (PwC) research into the information needs of corporate stakeholders.

The report is sectionalised so that there is:* a Chairman's review of strategy and governance, and a CEO's review of operations and risk management - including an evaluation of past performance, current direction and an outline of quantified future targets, key assumptions and sensitivities;
* summarised financial statements - presented in a more user-friendly format to statutory layouts;
* a directors' declaration - assures shareholders that in the board's opinion, the report is presenting a true financial picture of the company and that the company is not at risk of insolvent trading;
* an auditors' report - assures shareholders from an independent perspective that the summarised financial statements give an accurate reflection of the company's financial affairs as presented in the fully compliant annual report; and
* summarised divisional reports - gives shareholders insight into what is occurring within key areas of the company.

Sample reports are available on the [AICD website](http://www.companydirectors.com.au/%22%20%5Ct%20%22_new) or by calling (02) 8248 6600. **1.2 The rights of shareholders and creditors in voluntary administration - the Sons of Gwalia decision** On 15 September 2005, the Australian Federal Court handed down its judgment in Sons of Gwalia Ltd (administrator appointed) v Margaretic [2005] FCA 1305. The decision is one of the most significant corporate law decisions this year. It has important ramifications for the rights of shareholders and creditors on insolvency and for the running of administrations.Some of the newspaper headlines captured the importance of the decision - referring to it as a 'landmark decision' that 'boosts shareholder rights', and 'ranks shareholders alongside creditors'. In a media release, the administrators of Sons of Gwalia stated that the decision is likely to have significant consequences for 'commercial life in Australia'. The administrators have announced they will appeal the decision to the Full Federal Court and then to the High Court if necessary. The key facts in the decision were as follows. On 18 August 2004 Luka Margaretic purchased on the stock market $26,000 of shares in the mining company Sons of Gwalia Ltd. Only 11 days later the company went into voluntary administration. The shares were worthless when Margaretic bought them.Margaretic was funded by a professional litigation firm, IMF Australia, to bring an action alleging that when he bought the shares, Sons of Gwalia was in breach of its continuous disclosure obligations - in that the company knew but did not disclose that its gold reserves were insufficient to satisfy its delivery commitments to the extent that the company could not continue to operate.It is estimated that Sons of Gwalia has $900 million of liabilities and only $400 million of assets. Could Margaretic be counted as a creditor with a claim against the company alongside all other unsecured creditors? Many would think not. After all, section 563A of the Corporations Act states that payment of a debt owed by a company to the person in the person's capacity as a shareholder is postponed until all other debts are paid. In other words, upon insolvency, shareholders rank behind creditors for distributions from the remaining assets of the company. It is said this is the "deal" creditors contract for when they buy shares - unlike creditors, they get certain benefits such as the possibility of sharing in the profits of the company by way of dividends and also the right to vote on certain matters including the election of directors. They also have limited liability. However upon insolvency, shareholders rank behind creditors when company assets are distributed.But the court said that Margaretic's claim against the company was not bought in the capacity as a shareholder. Instead the claim arose as a result of laws designed to prevent misleading and deceptive conduct in relation to financial products and services. Therefore Margaretic does not have his claim against the company postponed while other claims or debts of unsecured creditors are paid. Indeed, the court went on to say that Margaretic is a creditor of the company in respect of his claim.The consequences of the decision are very significant. First, where shareholders can bring these types of claims as creditors, this will reduce the returns to the other unsecured creditors. It is the same pool of funds out of which all these claims must be paid. This can alter the risk/return calculation for creditors in other companies who may now need to factor into their financing decisions the implications of the court decision.Second, there are major implications for the running of administrations. The intention is that these will be run efficiently so that it can be decided as quickly as possible whether the company can continue (albeit with some restructuring) or whether it should be wound up. Lengthy delays in the administration can adversely affect the prospects of having the company continue. The decision will make administrations where these claims are brought more complicated, lengthier and more expensive. This is because there will generally need to be litigation to determine the merits of the shareholders' claims prior to being able to work out the returns to creditors. This litigation will take time and money - with part of the litigation effectively being funded out of the returns to creditors.Consider what is ahead in Sons of Gwalia. The court must now consider whether it should allow the claims of other shareholders who, like Margaretic, say they were mislead by the company when they purchased shares, to be brought as a representative action rather then as separate actions. Then the court will need to determine the merits of the shareholders' claims - were they actually mislead? Of course, it can be said in reply that this is just the price to be paid for ensuring that shareholders who are mislead when they buy shares are able to be treated the same as unsecured creditors for the purposes of distribution of assets.Third, where a shareholder with a claim against the company is counted as a creditor in an administration, the shareholder can vote along with other creditors on critical decisions such as whether the company should be wound up or allowed to continue. In other words, there is the prospect of the balance of power shifting in administrations.Fourth, the claim by Margaretics was for breach of the continuous disclosure requirements. The period shortly before administration can be a challenging time for a company in terms of ensuring that it complies with its continuous disclosure requirements while engaged in intensive discussions with creditors about the company's future. If shareholders are going to be successful with claims, continuous disclosure looms large as the basis for these claims. So we can predict more litigation as these claims are pursued. An important lesson from the Federal Court decision is that companies contemplating administration because of financial difficulties need to ensure they have good advice concerning the company's continuous disclosure obligations.The judgment will be further considered in the next issue of the Bulletin.The judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/september/2005%20fca%201305.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/september/2005%20fca%201305.htm%22%20%5Ct%20%22_new)**1.3 Doing Business in 2006: World Bank report** East Asian economies lagged in introducing reforms to help small and medium businesses generate jobs relative to most other regions, according to a new report published on 13 September 2005 by the World Bank Group. This finding compares with the performance of Eastern Europe, the fastest-reforming region in the world, which is aggressively courting entrepreneurs with far-reaching reforms that streamline business regulations and taxes. "Doing Business in 2006, Creating Jobs", co-sponsored by the World Bank and the International Finance Corporation, the private sector arm of the World Bank Group, finds that such reforms, while often simple, can create many new jobs.The annual report, which for the first time provides a global ranking of 155 economies on key business regulations and reforms, finds that while East Asian economies impose the fewest regulatory obstacles on entrepreneurs after OECD countries, they are now reforming more slowly than Eastern Europe, OECD countries, Latin America and the Caribbean, and South Asia. In fact, every country in Eastern Europe improved at least one aspect of the business environment last year.The report tracks a set of regulatory indicators related to business start up, operation, trade, payment of taxes, and closure by measuring the time and cost associated with various government requirements. It does not track variables such as macroeconomic policy, quality of infrastructure, currency volatility, investor perceptions, or crime rates.Overall, European nations were the most active in enacting reforms. The top 12 reformers in the past year, in order, were Serbia and Montenegro, Georgia, Vietnam, Slovakia, Germany, Egypt, Finland, Romania, Latvia, Pakistan, Rwanda, and the Netherlands.However, the authors of the study did note exceptions: Vietnam is the number 3 reformer in the past year, with reforms in the company registry, a new bankruptcy law, and measures to streamline contract enforcement and reduce the costs to register property. Indonesia and the Philippines also reformed several areas of business regulation.Other notable reforms in East Asian countries in the past year:* Many economies improved their regulations for protecting investors, including Hong Kong (China), Indonesia, Korea, Malaysia, Thailand, the Philippines, and Vietnam.
* China, Fiji, the Philippines, and Timor-Leste streamlined administrative barriers to trading. Upgrades to the ports in Shanghai cut loading times by two-thirds. Fiji introduced electronic filing of customs documents. The Philippines completed its phase-out of compulsory pre-shipment inspections. Timor-Leste introduced risk-based customs inspections.
* Cambodia cut registration fees and reduced the minimum capital required to start a business.
* The Philippines introduced online business registration, and Vietnam established electronic name verification, cutting one week off the time to start a business.
* Indonesia and Vietnam introduced new bankruptcy laws that clarified rules for closing insolvent businesses and reorganizing viable businesses.
* The Philippines and Vietnam sped contract enforcement by setting time limits on court judgments.

Doing Business in 2006 updates the work of last year's report on seven sets of business environment indicators: starting a business, hiring and firing workers, enforcing contracts, registering property, getting credit, protecting investors, and closing a business. It expands the research to 155 countries and adds three new indicators: dealing with business licenses, trading across borders, and paying taxes.The new indicators in this year’s report further reinforce the overwhelming need for reform, especially in poor countries. The report finds that poor countries levy the highest business taxes in the world. These high taxes create incentives to evade, driving many firms into the underground economy, and do not translate into higher revenues.The analysis also shows that reforming the administrative costs of trading can remove significant obstacles to exporting and importing. Contrary to popular belief, customs paperwork and other red tape (often called "soft infrastructure") cause the most delays for exporting and importing firms. Less than a quarter of the delays are caused by problems with "hard infrastructure" such as poor ports or roads. For manufacturers in developing countries, the administrative burdens of trading can pose larger costs than tariffs and quotas. For example, importers in Lao PDR face 78 days and 28 signatures from the time their goods arrive in port until they reach the factory. In comparison, OECD exporters need only 14 days and 3 signatures on average.The annually published report gives policymakers the ability to measure regulatory performance in comparison to other countries, learn from best practices globally, and prioritize reforms. Six East Asia economies make the list of top 30 economies in the world in terms of the report's ease-of doing- business index. In order, the list is New Zealand, Singapore, the United States, Canada, Norway, Australia, Hong Kong (China), Denmark, the United Kingdom, Japan, Ireland, Iceland, Finland, Sweden, Lithuania, Estonia, Switzerland, Belgium, Germany, Thailand, Malaysia, Puerto Rico, Mauritius, the Netherlands, Chile, Latvia, Korea, South Africa, Israel, and Spain.Elsewhere in East Asia, Taiwan (China) also has a high rank, at 35, as do most of the Pacific Islands. Lao PDR (147), Timor-Leste (142), and Cambodia (133) have the lowest ranks in the region. Several of the large emerging markets also have a low rank. Although Vietnam is reforming rapidly, it ranks at 99. The Philippines ranks at 113 and Indonesia at 115. China ranks at 91—with strong performance in some indicators but many obstacles in the legal environment for credit markets and business licenses. Governments in conflict-affected countries are especially hard pressed to create jobs. Continued peace depends on demobilizing rebel armies and finding livelihoods for thousands of refugees and former combatants. This year for the first time, Doing Business studies Timor-Leste. To start a business officially there takes 92 days and 10 procedures. And it takes 69 procedures and 990 days to enforce a contract through the courts.The doing business project is based on the efforts of more than 3,500 local experts – business consultants, lawyers, accountants, government officials, and leading academics around the world - who provided methodological support and review. The data, methodology, and names of contributors are publicly available online.Further information is available on the [IFC website](http://www.doingbusiness.org/documents/DB2006_PR_EAP_English.pdf%22%20%5Ct%20%22_new).**1.4 New global corporate governance ratings** On 13 September 2005, the corporate governance research and ratings agency, Governance Metrics International (GMI), announced new ratings on more than 3,200 global companies. Thirty-three companies, including twenty-two American, seven Canadian, two Australian and two British, were rated 10.0, GMI's highest rating. As a group, these companies outperformed the S&P 500 Index as measured by total shareholder returns for each of the last one, three, and five-year periods ending 1 September 2005, providing excess returns of 11.40%, 6.09% and 15.19% respectively relative to the index. With the release of its latest ratings, GMI chose to examine those US companies that were rated well above average (9.0 or higher) or well below average (3.0 or lower) in at least four of GMI's six ratings cycles. In total, 98 companies fell into one of these two categories. The average rating for the well governed companies was 9.1, compared to 2.3 for the poorly governed companies. The governance attributes of both groups are quite distinctive on a number of measures. Companies that were consistently poorly rated were far more likely to have restated earnings, been subject to accounting investigations by regulatory authorities or found guilty of accounting fraud. As a group they reported more related-party transactions involving senior officers or directors, they were more likely to have multiple classes of voting stock and their boards had fewer independent directors than companies with consistently good ratings. The average three-year total shareholder return for the consistently poorly rated companies was 8.73% versus 15.93% for the well governed companies through 1 September 2005. During the same period the S&P500 had an average return of 11.91%. **(a) Significantly improved governance**As part of this research GMI also screened for companies that have shown dramatic improvement since their first GMI rating. Three companies that stand out are Tyco International, Nomura Holdings in Japan and Koninklijke Numico in The Netherlands.Tyco's rating at the end of 2002 was 1.5 and reflected many of the governance deficiencies associated with the prior leadership. But as often happens when companies are plagued with stewardship scandal, the company's new leadership instituted a wide series of governance improvements, including the replacement of ten directors with a strong and independent group, significantly improved compliance and reporting mechanisms and governance disclosure that is among the most detailed available. In the current GMI release Tyco is rated 9.0.In July 2003, Numico, a Dutch food processing company, was rated 1.0, GMI's lowest rating, but today has an overall global rating of 8.5. The company has instituted a series of substantial governance improvements, including increased disclosure of board processes, introduction of new committees, an employee hotline, and a compliance checklist on its website of how they compare to the new Dutch governance code requirements; all of which in the last two years have helped lift their GMI rating by 7.5 points.Over the same time period Nomura, Japan's top brokerage firm, has increased its rating from 2.5 to a 6.5 by adopting several Sarbanes-Oxley type provisions. Nomura also provides detailed disclosure of executive compensation benchmarks and board and committee meeting attendance, both of which are extremely rare in Japan. Moreover, Nomura is also the only Japanese company to expense stock options. While none of these three firms have an overall global rating of 10.0, they each have shown significant advancement in their ratings through substantive governance improvements.**(b) Controlled companies**A subgroup of companies is controlled companies - defined as companies where a single entity controls at least 50% of the voting power. GMI examined a group of these companies to see if their governance practices differed markedly from widely held firms and also to see whether there were significant differences among controlled companies. There are 390 such companies in the GMI universe with 152 in North America, 156 in Europe and 82 in the Asia-Pacific region. As a group, controlled companies have an average rating below those of widely held concerns (5.0 versus 6.5). More of the lower rated controlled companies are found in Asia and Europe than North America. Of the controlled companies that received an overall governance rating of 4.0 or below, 65.4% were from Europe, 25.6% from Asia Pacific and 9% from North America. Nonetheless, there were some notable examples of poorly governed controlled companies in the US as well.The predominant governance features of controlled companies according to GMI are a lack of independent directors and/or directors that are appointed by the controlling shareholder; dual or multiple class stock with inferior rights held by common holders; lack of a board-level governance committee to oversee proper governance of the corporation and rights of shareholders; and frequent related-party transactions between the corporation and the controlling shareholder. Compared to widely held companies, the incidence of these attributes shows significant variance.In the United States, the NYSE and Nasdaq provide certain listing exemptions for controlled companies in recognition of the significant ownership differences that apply. Despite this, several controlled companies in this market go beyond the requirements and have adopted governance practices that are more often associated with widely-held firms. For example, UnionBanCal has a board with a majority of independent directors and Talbots maintains a dedicated Corporate Governance and Nominating Committee composed of a majority of independent directors. Five of the top six highest rated controlled companies are from the US: Talbots (8.5), UnionBanCal (8.5), Genworth Financial (8.0), Interactive Data Corp. (8.0) and Kraft Foods (8.0). Telstra Corp. (8.5) from Australia also ranks among the top controlled companies, and it maintains a board that is 89% independent. **1.5 Valuing employee stock options**On 9 September 2005, the US Securities and Exchange Commission (SEC) Chairman Christopher Cox announced the issuance of informal staff progress reports on the ongoing Commission evaluation of proposals to value employee stock options for financial reporting purposes. An extract from his statement follows:"It has been nine months since the Financial Accounting Standards Board issued its statement requiring the expensing of stock options, and almost six months since the SEC published a Staff Accounting Bulletin regarding the implementation of the FASB standard. Today, the Commission's staff are issuing informal commentary that assesses progress toward using market approaches to valuation of employee stock options. This commentary is intended to stimulate discussion and promote further efforts at the development of market instruments to value employee stock options."As our previous staff guidance has stated, it will be rare when there is only one acceptable choice in estimating the fair value of employee stock options. Indeed, many valuation approaches and measurement techniques are currently under study, or in various stages of development and implementation. The Commission's approach has been, and remains, the encouragement of robust efforts in the private sector to design market instruments that have the potential to accurately measure the cost of employee stock option grants to the issuer. Because so little empirical data is available, the views expressed today are necessarily tentative and subject to ongoing assessment."Today's incremental advancement of this cause comprises two documents: an overview by the Chief Accountant, and a brief progress report by the Office of Economic Analysis, setting forth their analysis to date of candidate instrument designs that have come to their attention in the last six months. As the OEA memorandum makes clear, the use of an appropriate market instrument for estimating the fair value of employee stock options has some distinct advantages over a model-based approach. Most importantly, the instrument's price could establish the issuer's true cost of the option grant, by having it priced by the market."The overview by the SEC Chief Accountant and the report by the Office of Economic Analysis are available on the [SEC website](http://www.sec.gov/news/press/2005-129.htm%22%20%5Ct%20%22_new).**1.6 Singapore enhances corporate governance for banks and insurers**On 8 September 2005, the Monetary Authority of Singapore (MAS) issued Corporate Governance Regulations ("Regulations") and Guidelines on Corporate Governance ("Guidelines"). The Regulations and Guidelines are enhancements to existing corporate governance requirements for banks, financial holding companies and direct insurers. The Regulations, which are mandatory, form the minimum corporate governance standards for banks, financial holding companies and significant insurers incorporated in Singapore. The Guidelines, which are based on the Code of Corporate Governance (Code) issued by the Council of Corporate Disclosure and Governance (CCDG), are best practice guidelines applicable to banks, financial holding companies and direct insurers. The Regulations and Guidelines took into account feedback received from a public consultation as well as extensive consultations with the industry. **(a) The regulations** Requirements that MAS considers essential for sound corporate governance are issued as regulations. These include requirements on the: * Composition of the board of directors (Board);
* Establishment, composition and responsibilities of various board committees;
* Separation of roles for the Chairman of the Board and Chief Executive Officer.

The presence of an independent element on the Board is important in any corporate governance framework. Accordingly, MAS has specified the proportion of directors on the Board and board committees who must be independent of the financial institutions' management, business relationships and substantial shareholders. **(b) The guidelines**The Guidelines are best practices that banks and direct insurers incorporated in Singapore are strongly encouraged to adopt. They are based on the Code issued by the CCDG, and supplemented with additional principles and guidelines to take into account the unique characteristics of the banking and insurance business, given the diverse and complex risks undertaken by these financial institutions and their responsibilities to depositors and policyholders. **(c) Implementation**Banks and significant direct life insurers will be given until their respective annual general meetings (AGMs) in 2007 to comply with the Regulations. Banks and direct insurers listed on the Singapore Exchange (SGX) should disclose their corporate governance practices and explain deviations from the Guidelines in their annual reports for AGMs held from 1 January 2007 onwards. Institutions that are not listed on the SGX should disclose the same on their websites.**(d) Enhancing SGX's corporate governance framework** MAS will also apply the Regulations to the SGX, with modifications to take into account SGX's regulatory role over its members. Key among these is the presumption that SGX directors who are related to a SGX member are not considered independent from management and business relationships. To this effect, MAS published draft regulations for consultation in January 2005 and is refining them to take into account the feedback received. MAS expects to bring the modified regulations for SGX into force later this year.The regulations and guidelines are available on the [MAS website](http://www.mas.gov.sg/masmcm/bin/pt1Home.htm%22%20%5Ct%20%22_new).**1.7 Survey of Australian directors on board performance** In the wake of the corporate failures and scandals that adversely affected major share markets around the world, regulators, investors and directors have worked assiduously at improving board performance and corporate governance. Over the last 12 months, McKinsey & Company, in association with HRI Corporation and supported by the Australian Institute of Company Directors surveyed Australian Stock Exchange (ASX) top 200 directors to obtain their views on how that work is progressing and on the challenges that lie ahead. 121 directors, with an average of nearly 16 years cumulative board experience, participated in the survey. More than 80% of respondents were directors of companies with a market capitalisation of more than $1 billion.The survey was published on 7 September 2005.Directors believe the work is progressing well, while recognising that there is still more to do. The survey identified three major insights: board performance has improved markedly in recent years; much of the improvement comes from the efforts of directors themselves; and the main challenges ahead to consolidate progress are to turn the board into a strategic asset for the company, starting with the board's relationship with the CEO, and to improve the flow of information between the board and management. **(a) Board performance has improved markedly**Directors were asked to compare board performance today with 5 years ago. They said board performance has lifted across all major dimensions, including board engagement, interpersonal interactions, communication with management, and CEOs' regard for boards. 31% felt actively involved in the companies they governed 5 years ago—today this has risen to almost four out of five (78%). 13% of directors 5 years ago felt largely or completely informed of ‘what was really going on’ in their companies; this has more than quadrupled to 57%. More than four out of five respondents (86%) described relations with management as cordial or very cordial—up from 49% 5 years ago. And 94% consider their communication with management to be open or very open—up from 52%. Directors also noted that meeting preparation, the quality of board discussions, director assertiveness, management responsiveness and the outcomes of board decisions had all improved in the last two years.**(b) Causes of improvement**Directors recognise that improvement has not happened coincidentally, but rather as a result of a concerted effort. Most think improvement efforts have succeeded moderately or largely (44.5% and 43% respectively). Just over half believe director efforts to improve corporate governance have been largely successful, and a further 36% believe these efforts have been moderately successful. By contrast, only 25% of directors surveyed believe that measures introduced by legislators and regulators have been largely successful, with another 42% describing these as moderately successful. 73% believe that new governance regulations have caused boards to focus more on preventing downside risk, rather than on creating upside potential (1%) or achieving a balance between the two (26%). And directors now spend, on average, 38% of their time on conformance.The new ASX regulations may have made directors' roles more challenging. 71.5% believe ('moderately' or 'largely') that ASX guidelines have created unrealistic performance expectations for directors and 61% said being a corporate director is less attractive as a result of governance reform.**(c) Challenges ahead**And what of the future? No directors think the work is complete. Most welcome pressure from outside the boardroom, but believe that much of the impetus for ongoing improvement will come from them. Further improvement in boards' relationships with their CEOs is a key part of the way forward. While three quarters of directors believe that CEOs need to regard their boards as a strategic asset to be truly effective, only one in seven thinks their board is currently regarded in this way. And there is still some way to go in optimising senior executive remuneration. 52% said that senior executive remuneration is too high or far too high.Directors said boards need to consolidate their progress to date in tying remuneration to company performance by using common metrics such as growth in both earnings and long-term share prices—as well as through more contemporary performance measures such as customer satisfaction, succession and sustainable development.The flow of information between management and directors also needs to improve for boards to be truly effective. 69% of directors surveyed believe that the nature of communication between boards and management needs to be truly open for boards to be effective; but just 35.5% believe that level of openness exists today. This is particularly important given that 70% of directors surveyed said they rely largely or completely on management presentations and opinion when making decisions, and 65% believe that the CEO largely controls and shapes what directors learn about the company.**1.8 Global fund management assets continue to grow** Total assets managed by the world's largest 500 fund managers grew to US$48.8 trillion in 2004, an increase of 13 per cent on 2003, according to Watson Wyatt research published on 5 September 2005. While global fund management assets continued to climb in 2004, growth was more moderate in comparison with the 22 per cent increase of 2003.The P&I / Watson Wyatt World 500 ranking, conducted in conjunction with Pensions & Investments, a US investment newspaper, also revealed that assets of the top 20 fund managers continued to grow and totalled US$18.2 trillion, representing 37 per cent of total assets.The continued depreciation of the US dollar against most world currencies was a contributing factor to both high double-digit asset growth for non-US based managers in US$ terms and the relative performance of US-based firms.During 2004, the concentration of assets beneath the top 20 remained relatively unchanged. Firms ranked from 21 to 50 managed 23% of the total assets; firms ranked from 51 to 250 managed 34% while firms ranked from 251 to 500 managed the remaining 6%. While concentration of assets remained largely static, the survey shows that smaller, niche managers are growing their assets faster at the expense of larger managers, continuing a trend which began in 2003.The top 20 asset managers ranked by total global assets under management as at 31 December 2004 are as follows (US$ millions):1. UBS, Switzerland, 1,975,0002. Allianz Group, Germany, 1,459,3233. Barclays Global Investors, UK, 1,361,9494. State Street Global Advisors, US, 1,354,3305. Fidelity Investments, US, 1,286,1076. AXA Group, France, 1,185,3167. Crédit Suisse, Switzerland, 1,078,8158. Capital Group, US, 1,020,9529. Vanguard Group, US, 848,39710. JPMorgan Chase, US, 791,55811. Deutsche Asset Mgmt, Germany, 730,53412. Mellon Financial, US, 707,07813. ING Investment Mgmt, Netherlands, 671,08814. Northern Trust Global, US, 571,88315. Morgan Stanley, US, 563,20816. Aviva, UK, 525,85317. AIG Global Investment, US, 524,67718. IXIS Asset Management, France, 505,98719. Prudential Financial, US, 499,57720. Merrill Lynch, US, 496,171 **1.9 Shell Group derivative settlement** On 31 August 2005, the Shell Group (Shell) announced that a settlement has been reached with the plaintiffs in shareholder derivative actions arising out of Shell's 2004 reserves re-categorisation. The four derivative actions, pending in United States Federal courts in New York and New Jersey and in a New York State court, sought to assert claims on behalf of The "Shell" Transport and Trading Company, and Royal Dutch Petroleum Company against certain current and former members of their Boards of Directors. The cases sought corporate governance and structural changes as well as unspecified monetary damages from the current and former directors. Under the terms of the settlement, Royal Dutch Shell plc has agreed to adopt and implement certain corporate governance principles negotiated with counsel for the derivative plaintiffs and a corporate governance expert retained by plaintiffs’ counsel. The principles include policies and standards in the areas of Board composition and qualifications; membership and functions of Board committees; director and senior management compensation; financial reporting and controls; and corporate compliance and ethics. Terms of the settlement also include payment by Shell of US$9.2 million in attorneys’ fees and expenses to counsel for the derivative plaintiffs. Further, as part of the settlement, the derivative plaintiffs and Shell have agreed to dismiss the claims sought to be asserted on behalf of Shell by the derivative plaintiffs and, subject to certain limitations, to release the current and former directors from future claims by or on behalf of Shell relating to the reserves re-categorisation. Accordingly, the settlement will resolve all matters raised in the shareholder derivative actions with respect to Shell and its current and former directors. The parties filed the settlement in the United States District Court for the District of New Jersey, and the Court has entered an order preliminarily approving the settlement and requiring the parties to provide notice of the settlement to shareholders. The settlement remains subject to final Court approval. More details of the corporate principles adopted are available on the [Shell website](http://www.shell.com/static/media-en/downloads/corp_gov_principles.pdf%22%20%5Ct%20%22_new).**1.10 APRA releases second IFRS discussion paper** On 31 August 2005, the Australian Prudential Regulation Authority (APRA) released the second of two discussion papers setting out its proposed prudential response to the adoption of International Financial Reporting Standards (IFRS) by APRA-regulated institutions. This paper deals with the treatment of eligible Tier 1 capital instruments and securitisation for authorised deposit-taking institutions (ADIs) and general insurers. APRA is proposing to de-couple the definition of capital instruments eligible for Tier 1 capital from Australian accounting standards. At the same time, it is proposing to harmonise its approach to innovative capital instruments with the decisions of the Basel Committee on Banking Supervision and regulatory practice in major jurisdictions. APRA has also taken the opportunity to introduce more flexibility into its approach to innovative capital by allowing innovative Tier 1 capital instruments to be issued directly and removing the requirement that directly issued instruments be subject to mandatory conversion. These changes will allow mutually owned institutions, such as building societies and credit unions, greater access to capital. APRA is also proposing to de-couple the assessment of securitised assets for capital adequacy purposes from the accounting treatment of these assets. APRA's Chairman, Dr John Laker, said that while APRA's objective is to align prudential and reporting standards with Australian accounting standards to the extent possible, there are sound reasons for departure on these two areas. A copy of the paper is available on the [APRA website](http://www.apra.gov.au/General/Other-Information-for-GIs.cfm%22%20%5Ct%20%22_new). **1.11 First major case on SEC Regulation FD** On 31 August 2005, in a case that the Wall Street Journal described as "the first major test of Regulation FD", a US Federal Court judge dismissed the US Securities and Exchange Commission's (SEC) Regulation FD legal action against executives of Siebel Systems Inc.Regulation FD requires an issuer whose securities are registered with the SEC to make public material information disclosed to security market professionals or holders of the issuer's securities who are reasonably likely to trade on the basis of the information. The rule prohibits companies from selectively providing material information to analysts and large investors.The judge said the SEC was applying the rule in an "overly aggressive manner" and essentially nitpicking statements made by Siebel executives.The SEC sued Siebel in June 2004, saying two executives privately gave institutional investors a rosier picture of the company's outlook than had been disclosed publicly. It pointed to April 2003, when Siebel said publicly it wouldn't meet first-quarter earnings targets and provided a pessimistic outlook when it announced results later that month. Shortly after reporting earnings, two Siebel executives made positive comments at a private meeting and a dinner with investors, saying Siebel's level of sales activity was "better" and that the company had coming deals valued at more than $5 million. The SEC said the information was material, citing an 8% jump in Siebel's stock following the meetings. The judge disagreed with the SEC's complaint, saying that the "nature and content of the statements that the SEC alleges violated Regulation FD do not support the Commission's claim that Siebel Systems or its senior officials privately disclosed material non public information." While stock movement is a "relevant factor," the judge said it isn't "a sufficient factor alone to establish materiality."The judge noted remarks made by the SEC's director of enforcement at the time Regulation FD was issued that the rule was not designed as a "trap for the unwary," the SEC was "not going to second-guess close calls regarding … materiality" and that an "incorrect determination that information is not material must represent an extreme departure from standards of reasonable care" to merit enforcement action.The court concluded that "Regulation FD was never intended to be utilized in the manner attempted by the SEC under these circumstances." Essentially finding that the private statements made were all covered by an umbrella of prior public disclosure by the company, the court went on to note that: "The SEC scrutinized, at an extremely heightened level, every particular word used in the statement, including the tense of verbs and the general syntax of each sentence. No support for such an approach can be found in Regulation FD. Such an approach places an unreasonable burden on a company’s management and spokespersons to become linguistic experts, or otherwise live in fear of violating Regulation FD should the words they use later be interpreted by the SEC as connoting even the slightest variance from the company's public statements."Regulation FD does not require that corporate officials only utter verbatim statements that were previously publicly made. The regulation does not prohibit persons speaking on behalf of an issuer, from providing mere positive or negative characterizations, or their optimistic or pessimistic general impressions, based upon or drawn from material information available to the public."Applying Regulation FD in an overly aggressive manner cannot effectively encourage full and complete public disclosure of facts reasonably deemed relevant to investment decision-making. It provides no clear guidance for companies to conform their conduct in compliance with Regulation FD. Instead, the enforcement of Regulation FD by excessively scrutinizing vague general statements has a potential chilling effect which can discourage, rather than encourage, public disclosure of material information."**1.12 New proposed Australian auditing standards** On 31 August 2005, the Australian Auditing and Assurance Standards Board (AUASB) released exposure drafts of the first five proposed new Auditing Standards, as part of a move towards the goal of creating legally enforceable standards for Australian company audits. Intended to apply to audits of financial reports for periods commencing on or after 1 July 2006, the proposed new Auditing Standards are part of the implementation of the Federal Government's Corporate Law Economic Reform Program (CLERP 9) initiatives, which also include a range of various other corporate governance reforms. The proposed new Auditing Standards are based on the existing standards, and will continue to be aligned to international standards developed by the International Auditing and Assurance Standards Board, on which Australia is represented. The proposed Standards are:* Exposure Draft ED 1/05, Proposed Auditing Standard: Understanding the Entity and its Environment and Assessing the Risks of Material Misstatements (Re-issuance of AUS 402)
* Exposure Draft ED 2/05, Proposed Auditing Standard: The Auditor's Procedures in Response to Assessed Risks (Re-issuance of AUS 406)
* Exposure Draft ED 3/05, Proposed Auditing Standard: Audit Evidence (Re-issuance of AUS 502)
* Exposure Draft ED 4/05, Proposed Auditing Standard: External Confirmations (Re-issuance of AUS 504)
* Exposure Draft ED 5/05, Proposed Auditing Standard: Existence and Valuation of Inventory (Re-issuance of AUS 506)

The exposure drafts are available from the [AUASB website](http://www.auasb.gov.au/%22%20%5Ct%20%22_new). **1.13 Mutual fund directors forum survey finds few costs to comply with SEC mutual fund governance regulations** On 30 August 2005, the US Mutual Fund Directors Forum ("Forum"), an independent not-for-profit membership organization devoted to educating and furthering the views of independent directors, announced the results of a survey of Forum member groups ("Member Groups") regarding costs of investment company boards having at least 75 percent independent directors and an independent board chair. Forum Member Groups that responded to the survey and currently conform to these governance enhancements reported that their related compliance costs had been minimal. An overwhelming majority of survey participants have boards composed of at least 75 percent independent directors. Respondents reported modest costs of changing the composition of their boards to meet this standard. Eighty percent of respondents to the survey currently have independent chairs. Thirty-one percent of Member Groups that have transitioned to an independent chair reported no additional costs attributable to the independent chair. The most common additional cost reported by respondents was additional compensation to the chair. The Securities and Exchange Commission ("Commission") has adopted rule amendments, which, when effective, will require most mutual funds to adopt these corporate governance enhancements. Critics of the Commission's action have expressed concern over the possible costs of compliance. In July 2004, in its report to the Commission, "Best Practices and Practical Guidance for Mutual Fund Directors", the Forum recommended that all mutual funds adopt these governance changes as best practices. The Forum believes that a mutual fund's board of directors comprised of 75 percent independent directors with an independent chair is important to the creation of an "environment of independence" allowing independent directors to protect shareholder interests without undue influence from the adviser and its affiliates. Subsequently, the Forum's Board of Directors submitted two letters to the Commission in support of the Commission's rule proposals intended to achieve these reforms. The Forum's Board of Directors continues to believe that industry-wide compliance with these recommended best practices is in the best interest of fund shareholders. The survey results, the Forum's survey, the letters to the Commission and further information about the Forum are available from the [MFDF website](http://www.mfdf.com/%22%20%5Ct%20%22_new).**1.14 KPMG to pay US$456 million for criminal fraud violations in relation to largest ever tax shelter fraud case** On 29 August 2005, KPMG admitted to criminal wrongdoing and agreed to pay US$456 million in fines, restitution, and penalties as part of an agreement to defer prosecution of the firm, the US Justice Department and the US Internal Revenue Service announced. In addition to the agreement, nine individuals-including six former KPMG partners and the former deputy chairman of the firm-are being criminally prosecuted in relation to the multi-billion dollar criminal tax fraud conspiracy. As alleged in a series of charging documents, the fraud relates to the design, marketing, and implementation of fraudulent tax shelters. In the largest criminal tax case ever filed, KPMG has admitted that it engaged in a fraud that generated at least US$11 billion dollars in phony tax losses which, according to court papers, cost the United States at least US$2.5 billion dollars in evaded taxes. In addition to KPMG's former deputy chairman, the individuals indicted include two former heads of KPMG's tax practice and a former tax partner in the New York, NY office of a prominent national law firm. The criminal information and indictment together allege that from 1996 through 2003, KPMG, the nine indicted defendants and others conspired to defraud the IRS by designing, marketing and implementing illegal tax shelters. The charging documents focus on four shelters that the conspirators called FLIP, OPIS, BLIPS and SOS. According to the charges, KPMG, the indicted individuals, and their co-conspirators concocted tax shelter transactions-together with false and fraudulent factual scenarios to support them-and targeted them to wealthy individuals who needed a minimum of US$10 or US$20 million in tax losses so that they would pay fees that were a percentage of the desired tax loss to KPMG, certain law firms, and others instead of paying billions of dollars in taxes owed to the government. To further the scheme, KPMG, the individual defendants, and their co-conspirators allegedly filed and caused to be filed false and fraudulent tax returns that claimed phony tax losses. KPMG also admitted that its personnel took specific deliberate steps to conceal the existence of the shelters from the IRS by, among other things, failing to register the shelters with the IRS as required by law; fraudulently concealing the shelter losses and income on tax returns; and attempting to hide the shelters using sham attorney-client privilege claims. The information and indictment allege that top leadership at KPMG made the decision to approve and participate in shelters and issue KPMG opinion letters despite significant warnings from KPMG tax experts and others throughout the development of the shelters and at critical junctures that the shelters were close to frivolous and would not withstand IRS scrutiny; that the representations required to be made by the wealthy individuals were not credible; and the consequences of going forward with the shelters-as well as failing to register them-could include criminal investigation, among other things. The agreement provides that prosecution of the criminal charge against KPMG will be deferred until 31 December 2006 if specified conditions-including payment of the US$456 million in fines, restitution, and penalties-are met. The US$456 million penalty includes: US$100 million in civil fines for failure to register the tax shelters with the IRS; US$128 million in criminal fines representing disgorgement of fees earned by KPMG on the four shelters; and US$228 million in criminal restitution representing lost taxes to the IRS as a result of KPMG's intransigence in turning over documents and information to the IRS that caused the statute of limitations to run. If KPMG has fully complied with all the terms of the deferred prosecution agreement at the end of the deferral period, the government will dismiss the criminal information.To date, the IRS has collected more than US$3.7 billion from taxpayers who voluntarily participated in a parallel civil global settlement initiative called Son of Boss. The BLIPS and SOS shelters are part of the Son of Boss family of tax shelters. The agreement requires permanent restrictions on KPMG's tax practice, including the termination of two practice areas, one of which provides tax advice to wealthy individuals; and permanent adherence to higher tax practice standards regarding the issuance of certain tax opinions and the preparation of tax returns. In addition, the agreement bans KPMG's involvement with any pre-packaged tax products and restricts KPMG's acceptance of fees not based on hourly rates. The agreement also requires KPMG to implement and maintain an effective compliance and ethics program; to install an independent, government-appointed monitor who will oversee KPMG's compliance with the deferred prosecution agreement for a three-year period; and its full and truthful cooperation in the pending criminal investigation, including the voluntary provision of information and documents. Richard Breeden, former Securities and Exchange Commission Chairman, has been appointed to serve as the independent monitor. After his duties end, the IRS will monitor KPMG's tax practice and adherence to elevated standards for two years. Should KPMG violate the agreement, it may be prosecuted for the charged conspiracy, or the government may extend the period of deferral and/or the monitorship.**1.15 Hong Kong consultation paper on reforms to the prospectus regime** On 29 August 2005, the Hong Kong Securities and Futures Commission (SFC) released a Consultation Paper launching the final phase of a three-part review and reform exercise designed to modernise the regime governing the public offering of shares and debentures set out in the Companies Ordinance (CO). The Consultation Paper invites public discussion and feedback on a series of possible reform initiatives presented as 21 proposals. The subjects covered are diverse and, if reforms are implemented in due course, would have a significant effect across the current CO prospectus regime.The overriding purpose of the three-part review of the CO prospectus regime is to encourage capital raising and issuance of securities in Hong Kong by adjusting and refining the legal framework to facilitate offers while ensuring satisfactory standards of investor protection.The following paragraphs serve to demonstrate the breadth of the review.**(a) Regulatory harmonisation/consolidation** To reduce regulatory arbitrage and achieve harmonisation in legal and regulatory treatment for investments with similar features, the Consultation Paper discusses the introduction of a unified offering regime for all regulated investments currently falling within either the CO or the Securities and Futures Ordinance (SFO). The existing framework in Part IV of the SFO already offers a flexible authorisation platform and this could be supplemented by non-statutory SFC product codes tailored to accommodate the particular product and regulatory characteristics of different investments (including conventional equity and debt capital-raising instruments). If the harmonisation proposal is not implemented, the CO prospectus regime provisions could nevertheless be imported into the SFO as a discrete Part. This would consolidate all securities laws in a single piece of legislation and produce opportunities to conform the regulatory philosophy, and remove technical differences and inconsistencies, between the CO and SFO.**(b) Enhancement of investor protection**Achieving greater accuracy and completeness of disclosures in prospectuses will increase investor protection. The Consultation Paper discusses whether sponsors and managers of an offering should be liable for untrue statements in the prospectus and, to promote greater due diligence by all those liable for the prospectus, whether the "reasonable belief" defence available to defendants in both civil compensation claims and criminal proceedings should be confined to cases where all reasonable inquiries have been made. There are discussions on extending the right to claim compensation for losses resulting from untrue statements in a prospectus to secondary market purchasers, and on removing the need to prove that the investor had relied on the prospectus. The Consultation Paper suggests that if an investor can demonstrate that an untrue statement in the prospectus caused the loss suffered then it should not matter that he bought his shares after the IPO or on the basis of extraneous information or circumstances.In order to emphasise that the prospectus should contain all information that investors and their professional advisers would reasonably require to make an informed investment decision, there is a discussion on highlighting this requirement as a "disclosure standard" in the body of the legislation and specifically attaching liability to any failure to meet it. Also, to encourage the issue of prospectuses containing relevant and meaningful information, this disclosure standard would be supplemented by prescribed content requirements tailored specifically for equity and debt instruments.**(c) Pre-deal research**The Consultation Paper discusses the high incidence in Hong Kong of information contained in pre-deal research reports being reported on in the media in the lead-up to and during the offer period for IPOs. This information is often not in the company's own prospectus and is therefore not part of the formal disclosure relating to the offer for which the directors are liable. The discussion recognises that while pre-deal research has a useful role to play in IPOs, investor interests are prejudiced when there are two or more sources of conflicting information relating to the company circulating indistinguishably in the public arena during an offer period. The Consultation Paper accepts that there may be a number of ways to tackle this issue and highlights two: (i) to ban all written pre-deal research by analysts connected with the sponsors, managers or underwriters of the offering, or (ii) if leakage results in media coverage, to require publication of pre-deal research by the issuer of the research and commentary by the company in the prospectus (or a supplemental prospectus) on all non-prospectus information.**(d) Incorporation by reference**To encourage shorter prospectuses without compromising the availability of more detailed or technical information, the Consultation Paper discusses the introduction of a framework permitting information lodged with a central online document repository to be treated as forming part of a prospectus. If this route were followed the prospectus would need to include an adequate description of the information and a statement that a copy will be provided free of charge on request. To ensure reliability of information incorporated by reference, prospectus liability would attach to it.**(e) Other initiatives**Other initiatives under the 21 proposals discuss whether:* to shift the focus of the CO prospectus regime from a "document-based" to a "transaction-based" approach by regulating the act of offering rather than any document containing the offer;
* to clarify that the CO prospectus regime applies to offers of options or other rights in or over shares or debentures where the issuer of the option or other right is in the same group of companies as the issuer of the related shares or debentures;
* to create a level playing field between issuers of prospectuses by providing that the CO prospectus regime should apply without regard to place of incorporation and to "bodies" rather than "companies";
* to exempt from the CO prospectus regime a takeover offer or an offer made in connection with a compromise or scheme of arrangement which complies with the laws and regulations of the target company’s home jurisdiction and any principal stock exchange on which it is listed;
* to prevent circumvention of the prospectus regime via offers for sale in circumstances where the on-sale transaction should be subject to full regulation;
* to provide that a prospectus for rights issues and issues of shares or debentures that are uniform with listed shares or debentures should comply with reduced (rather than negligible) content requirements;
* to require the publication of a supplemental or replacement prospectus (and an extension of the offer period and right to a refund) if a significant development affecting prospectus disclosure occurs during the offer period;
* to remove the 3-day waiting period between the issue of a prospectus and allotment of the relevant shares or debentures where the offer relates to a class already listed, and to extend this period in all other cases to allow potential investors more time to consider the offer; and
* to provide that an application form or procedure for shares or debentures may not be distributed or implemented by any person unless it is accompanied by or contained in a compliant prospectus.

The Consultation Paper should be seen as a "concept release" designed to promote discussion and feedback. A number of the initiatives are complex or challenging and will present a range of possible solutions. Public and market feedback will provide a guide as to how to move forward. The consultation will end on 30 November 2005. The Consultation Paper is available on the [SFC website](http://eapp01.sfc.hk/apps/cf/ProspectusRegime.nsf/eng/main%22%20%5Ct%20%22_new).**1.16 New guidelines for superannuation trustees to monitor listed companies** On 24 August 2005, the Australian Council of Superannuation Investors (ACSI) launched its revised corporate governance guidelines intended to provide a guide for superannuation trustees to monitor listed Australian companies.ACSI first developed these Corporate Governance Guidelines in March 2003 as a supplement to existing regulatory and industry standards and to articulate the position and expectations of trustees of superannuation funds.The revised guidelines will be used by a number of superannuation funds in respect of proxy voting and engagement with listed Australian corporations.Some key issues in the guidelines are highlighted below.**(a) Insider trading**ACSI believes there should be limitations on directors trading in their company's shares. Each company should disclose its policy with respect to trading in company securities by directors, officers and employees. ACSI supports an approach that restricts the times directors may trade shares to specific 'trading windows'. ACSI considers that the London Stock Exchange Model Code provides a useful way forward on these matters.**(b) Termination pay**A corporation should disclose its policy on notice periods and termination payments in Executive Service Agreements (ESA's). This includes reference to compensation provisions and relevant 'triggers' that are applicable upon the termination of an executive's employment.A corporation should ensure that such agreements provide a reasonable basis to procure the early termination of an executive, in circumstances where poor and inadequate performance by the executive against previously agreed benchmarks has occurred.ACSI supports properly constructed "liquidated damages" clauses as a way of restricting payouts to executives who depart following a period of poor performance.ACSI supports legislative reform that would provide shareholders with a greater say in termination benefits payment.**(c) Remuneration**ACSI continues to encourage the utilisation of dual performance hurdles (which measure the corporation's performance on an absolute and relative basis) to be satisfied before any share options or other long-term incentive instruments vest. ACSI will, however, accept the utilisation of one performance hurdle, provided it is a relative performance measure that is sufficiently challenging and requires the achievement of out-performance against relevant and disclosed external benchmarks.The guidelines now provide an outline of what ACSI will have regard to on a case-by-case basis in terms of assessing the reasonableness of performance measures.The guidelines now include specific provisions regarding valuation and expensing of options, dilution retesting of performance hurdles and protection of minority shareholders.**(i) Valuation and expensing**ACSI does not accept excuses for companies not properly providing valuation and expensing of share option arrangements.**(ii) Dilution**ACSI will not support share or share option plans, or grants under those plans, where the 'flow rate' (ie the total number of options and shares granted in any one year, expressed as a percentage of total issued ordinary shares) exceeds 2%. ACSI will consider, on a case-by-case basis, plans, and grants under plans, where the flow rate exceeds 1% but is less than 2%. A flow rate of less than 1% is generally acceptable. **(iii) Re-testing of performance hurdles** Where performance conditions or hurdles have not been met at the vesting date, the ability to 're-test' the hurdle on a future date or dates is now an unacceptable aspect of corporate governance in some countries.**1.17 Latest US board remuneration study** On 23 August 2005, Mercer Consulting published its latest study of board remuneration in 350 of the largest publicly traded companies in the United States. Following is an extract from the executive summary. All figures are in US$.**(a) Remuneration levels rise** Over the last four years, median director pay has increased by almost 50 percent, from $105,000 to $155,000. In 2004 alone, median total direct remuneration (pay for board service, committee service, and equity grants) rose 18 percent to $155,000, up from $132,000 in 2003. This included increases in cash (up 10 percent) and equity (up 30 percent). Mercer states that although there has been a distinct trend of companies trying to balance the mix of cash and equity for directors, Mercer's recent analysis shows that equity represents 55 percent of total direct compensation in 2004, up from 51 percent in 2003. Mercer suspects this slight imbalance was unintentional, a result of overall stock price increases among the Mercer 350.**(b) Annual retainers** Nearly all (98 percent) of the Mercer 350 companies pay their independent directors an annual retainer. Median board retainers increased 25 percent from $40,000 in 2003 to $50,000 in 2004, after remaining flat from 2002 to 2003. In addition to annual retainers, most companies also pay directors a fee for attending board meetings. The median board meeting fee has remained unchanged at $1,500 per meeting for the past four years. But the prevalence of board meeting fees has been declining as companies evaluate fixed (retainer) versus variable (per meeting fee) director compensation. Last year, 64 percent of companies paid board meeting fees, down from over 70 percent in 2002 and almost 75 percent in 2000.**(c) Committee meeting fees**Companies are also re-evaluating how to appropriately compensate directors for committee service. While the typical director serves on two committees, the meeting frequency, duration, and preparation required may vary greatly by committee. Mercer is seeing that the once-prevalent use of meeting fees – which reflect pay for workload – is declining as companies shift to annual committee retainers. The philosophy behind retainers acknowledges the intangible, ongoing oversight that the role increasingly requires.Last year, 65 percent of the Mercer 350 paid committee meeting fees, down from roughly 70 percent in the previous three years. While the prevalence declined, the median committee meeting fee size increased 25 percent to $1,500 – equal to the median board meeting fee. Approximately 13 percent of companies chose to compensate their directors with an annual committee member retainer, which at median was $5,000. Almost 20 percent of the companies in our survey provide a differential retainer for committees with greater workloads, such as the audit committee.**(d) Chair retainers** The large majority of companies (73 percent) pay a premium to committee chairs to compensate for the increased time commitment and additional responsibility. These premiums are primarily in the form of an annual retainer rather than a meeting fee. The standard chair retainer has increased to a median of $6,000 from what had been a constant $5,000 from 1998 through 2003. For the past five years, chair meeting fees had also remained constant at $2,000 per meeting. Further, some companies distinguish chair pay levels among their various committees, typically determined based on historical or estimated additional workload. Not surprisingly, this distinction is currently most evident for audit and compensation committee chairs. Approximately half of the Mercer 350 pay a special annual retainer to their audit committee chair at a median value of $12,000, a premium of $6,000 above that paid to other chairs. In comparison, only 13 percent of companies pay a special annual retainer to their compensation committee chairs at a median value of $10,000, a premium of $5,000 above the standard chair retainer.**(e) Equity awards** In 2004, median equity values rose by more than 30 percent to an all-time high of $85,000. But during this same period, the median number of shares granted was flat for all award types. Therefore, the equity value increase was driven by year-over-year stock price appreciation and a shift in the mix of vehicles.As companies anticipate mandatory stock option expensing and assess their use of options for employees, there is declining reliance on stock options and increased use of full-value awards. Of the companies shifting to full-value awards, approximately one-quarter granted dollar-denominated equity awards rather than share-denominated awards.**(f) More ownership guidelines**Although the SEC does not require companies to disclose their stock ownership guidelines for directors, 47 percent of the Mercer 350 companies reported ownership guidelines in 2004. This is the third consecutive year of double digit increases, up from 37 percent of companies disclosing guidelines in 2003 and 25 percent in 2002. While the reported prevalence of guidelines has changed dramatically, typical guideline content has remained relatively constant. In general, most companies express their guidelines as a multiple of their annual retainer – five times the annual retainer being the most common. Some companies express their guidelines as a defined number of shares. Further, most companies allow five years for a director to meet the guideline. In addition to stock ownership guidelines, some companies have instituted stock holding requirements for outside directors. These stipulate a specific holding period for shares granted as compensation or received upon exercise of stock options. Like ownership guidelines, companies are not required to disclose such requirements. But the number of Mercer 350 companies disclosing holding requirements was up from approximately 5 percent in 2003 to 8 percent in 2004. Among this group, the holding period is split evenly among (a) a one-year minimum, (b) until retirement from the board, and (c) until ownership guidelines are met.**(g) Independent directors**Several years ago, both the NASDAQ and the NYSE began requiring independent directors to meet regularly in executive sessions. As a result, the prevalence of lead directors has increased dramatically. In general, a lead director's major responsibilities include:* chairing executive sessions of non-employee directors,
* serving as the principal liaison between non-employee directors and the board chair,
* advising the chair and committee chairs with respect to agendas, and
* providing advice regarding the selection of committee chairs.

In 2004, 57 percent of the Mercer 350 disclosed having a lead director, up from only 13 percent in 2002. But only 22 percent of these companies pay any additional remuneration associated with the position. For those that did, the median additional remuneration for the role remained relatively flat at $20,000 per year. As advocates of governance reform have been calling for the separation of the CEO and chair positions, there has been an increase in the prevalence of both non-employee chairs and employee non-CEO chairs. Non-employee chair pay is generally structured like that of other directors on the board (retainer, meeting fees, and equity), while employee non-CEO chairs are typically paid like an employee (salary, incentives, and benefits). In 2004, the number of companies with a non-employee chair increased by almost 30 percent. These 46 non-employee chairs received a median total direct compensation of nearly $250,000, or more than 150 percent of the typical director's compensation and only 5 percent of the total direct compensation of their CEOs. On the other hand, 10 percent of the Mercer 350 have an employee non-CEO chair who generally receives the same total direct compensation as the company's CEO.**(h) The future**Over time, Mercer expects less variability and more transparency and simplicity in director pay programs. As audit and compensation committees tackle their share of hot topics, for example, their workloads may converge down the road, reducing both the differences in compensation among committees and the need to pay directors on a per meeting basis. Therefore, the cash elements of director compensation programs will be focused on annual board and committee member retainers rather than on meeting fees and meeting frequency. Fewer directors will get options. Directors will instead get full-value shares, many of them dollar-denominated rather than share-denominated. Based on these trends and Mercer's current work in this area, Mercer expects to see the following changes in director remuneration: * Retainer levels for board service will continue to increase as companies eliminate board meeting fees and shift the value to fixed annual retainers.
* Committee meeting fee levels will remain constant, but their prevalence will decrease as companies shift to committee member retainers.
* Committee chair retainers will continue to increase in value and prevalence. But the distinction among committee chairs will lessen as the demands of Sarbanes-Oxley compliance, FAS 123R, and deferred remuneration reform diminish.
* The lead director role and responsibility will expand and become more transparent. In turn, additional remuneration will be more prevalent and premiums will increase.
* Equity remuneration will be delivered through full-value shares, rather than options. In addition, the balance between cash and equity will remain roughly equal.
* Stock ownership guidelines and holding requirements will continue to increase in prevalence as companies continue to react to shareholder concerns. The practice of basing guidelines on a multiple of the annual retainer will diminish in favour of a multiple of the annual equity grant.

**1.18 Auditing guidance note - remuneration disclosure** The Australian Auditing and Assurance Standards Board (AuASB) has published an Auditing Guidance Note (August 2005) on the auditing treatment of remuneration disclosures contained in companies' Annual Directors' Reports. The Guidance Note summarises the compliance obligations for remuneration disclosure contained in the [Corporations Amendment Regulations (No 4) 2005 No 160 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86236" \t "Default), and the relevant audit implications. The Guidance Note also contains an example audit report which indicates a method in which the relevant audit obligations may be met.The Guidance Note is available on the [AUASB website](http://www.auasb.gov.au/index.htm%22%20%5Ct%20%22_new). **1.19 Financial services and other economic data** Axiss Australia has published a new report which provides comparative data on Australia's financial services. The report is titled "Australia - A Global Financial Services Centre - Benchmark Report August 2005". Information is provided in the report about matters such as:1. the world's largest economies;2. resilience of economies to economic cycles;3. economic growth averages;4. Australia's real growth value added by industry;5. major financial markets in the Asia-Pacific region;6. market capitalisation of regional stock exchanges;7. share ownership;8. foreign exchange turnover; and9. global corporate governance ratings.Axiss Australia is an agency of the Australia government. It assists financial services companies who are considering establishing or expanding their activities in Australia, provides advice to Government on policy, regulatory and market structure issues, and acts as a conduit between the private and public sectors on matters affecting Australia's development as a global financial services centre.The report is available on the [AXISS website](http://www.axiss.com.au/%22%20%5Ct%20%22_new).**1.20 Need for ongoing economic reform - report** In August 2005 the Business Council of Australia released a report titled "Locking In or Losing Prosperity: Australia’s Choice". The report demonstrates that economic reform has had a major positive impact on the lives and opportunities for average Australians over the past 20 years.It also shows the extent to which average Australians and the community would be better off over the next 20 years, if further reforms were started now to maintain a strong economy for the long term.The research, carried out on behalf of the BCA by economic modellers Access Economics, found that if reforms were made that allowed Australia's economy to grow at 4 per cent per annum during the next 20 years (the average rate which it has grown a year over the last decade), the results would be:* Every Australian would be $74,000 better off in today's dollars by 2025.
* This is on top of the $83,000 in increased wealth that has flowed to the average Australian as a direct result of economic reforms since 1983.
* The economy would be 40 per cent bigger than it would otherwise be.
* Australia would be the 3rd most prosperous nation in the world.
* The Federal Government would have more than $80 billion in extra revenue – enough to fund Australia's new spending needs to meet the demands of an ageing population, or alternatively, taxes could be cut by 30 per cent.
* Without workplace reform undertaken since 1983, unemployment in Australia would have been 8.1 per cent compared to 5.8 per cent in 2003-04. This put an extra 315,000 people in jobs as a result of these reforms.

The report also says that unless future reforms are carried out to keep the economy strong and competitive, Australia could slip to 18th in the league ladder of developed countries, the same place it occupied in 1983 when Australia's economy was at an historic low.It is argued in the report that locking in prosperity for the long term would require an extension of reforms in areas such as workplace relations, tax, infrastructure, business regulation and immigration that Australia had put in place over the past 20 years.The report is available on the [BCA website](http://www.bca.com.au/content.asp?newsID=98702" \t "_new). |
| **2. Recent ASIC Developments** |
| **2.1 Delivery of ASIC's financial services refinements projects**On 12 September 2005, the Australian Securities and Investments Commission (ASIC) released a progress report on the eight projects it is undertaking as part of the Australian Government's Refinements to Financial Services Regulation issued on 2 May 2005. When the Australian Government released the FSR refinements paper, ASIC said that it aimed to have most of its projects finished, or where public consultation was needed, consultation completed, by the end of September 2005, see [information release [IR 05-22]](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR%2B05-22%2BASIC%2Bprovides%2Bdetails%2Bon%2Bfinancial%2Bservices%2Brefinement%2Bprojects?openDocument" \t "_new) ASIC provides details on Financial Services Refinements Projects issued on 12 May. ASIC states that it has met all its delivery deadlines for August and is on schedule with the project plan so far. ASIC's remaining FSR refinements projects are on track to be completed as scheduled, and in the coming months ASIC will release: * a policy statement on non-cash payment facilities and any accompanying relief (scheduled for September);
* its final position on authorisation requirements for distributors of general insurance products (scheduled for October);
* relief and/or guidance to reduce unnecessary repetition of the general advice warning in an ongoing relationship (scheduled for November); and
* relief and/or guidance for providers of on-line calculators other than superannuation calculators (scheduled for November).

**2.2 ASIC continues relief to allow responsible entities to invest in asset-backed securities** On 7 September 2005, the Australian Securities Investment Commission (ASIC) announced it will continue existing class order relief allowing responsible entities of registered managed investment schemes to invest scheme property in asset-backed securities that involve an unregistered managed investment scheme, found in paragraph 2 of 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. This relief was due to expire on 30 September 2005 and has been extended on an ongoing basis at this stage.Asset-backed securities are developed through the securitisation process. Assets that are not readily marketable are grouped in a pool of assets and converted into securities that are more easily traded (i.e. the assets are securitised into asset-backed securities). Investors receive payments generated from the pool of assets.Class order CO98/55 is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new).**2.3 Transaction fee disclosure** On 7 September 2005, the Australian Securities and Investments Commission (ASIC) reported on disclosure of transaction fees by banks, building societies and credit unions.The report ['Good transaction fee disclosure – an ASIC report'](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=good_fee_disclosure_report_pdf" \t "_new), follows the release of ASIC's Guide to 'Good Transaction Fee Disclosure for Bank, Building Society and Credit Union Deposit and Payments Products (Transaction Accounts)' issued in June 2002. The ASIC guide sets out principles of good disclosure for the five key areas where ASIC believes transaction fee disclosure is particularly important. These are: * when a consumer is selecting a product or product provider;
* when changes are made to the level of fees or to the details around when, why or how they are charged;
* when a statement is received;
* when a consumer is actively seeking information; and
* immediately prior to making a transaction.

The ASIC report reveals that improvements have been made to the information on fees in statements to consumers. Better fee disclosure on statements was the most popular reform identified by ASIC's consumer research.The report also considers the issue of 'real time' disclosure of fees, that is, where fee information is given to consumers immediately before they make a transaction.Most institutions reported to ASIC little or no progress towards real time disclosure, in particular in relation to ATM transaction. ASIC accepts that this situation is primarily because they are awaiting the outcome of Payments System reforms, overseen by the Reserve Bank of Australia, before committing to their own systems changes.Better disclosure also means that consumers are likely to be less surprised about fees that can apply when certain payments and payment instructions are dishonoured. A copy of 'Good transaction fee disclosure – an ASIC report' is available from the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new) or by calling the ASIC Infoline on 1300 300 630.**2.4 Auditor independence** On 6 September 2005, the Australian Securities and Investment Commission (ASIC) made an exemption to the auditor's independence declaration provisions in the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) under Class Order [CO 05/910](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co05-910_pdf" \t "_new) Auditor's independence declaration – exemption. The auditor's independence declaration is a declaration made by an auditor to its audit client disclosing any contraventions of the auditor independence requirements of the Act or of any applicable code of professional conduct. The declaration must be included in the directors' report, which forms part of the annual financial reporting to members. This is a new requirement introduced as part of the CLERP 9 reform process. The exemption will excuse an auditor from making a declaration if there are any contraventions under s324CE(2), s324CF(2) or s324CG(2) of the Act. This exemption will apply provided the auditor had reasonable grounds to believe that it had in place, at the time of the contravention, a quality control system that provided reasonable assurance that the auditor would comply with the auditor independence requirements. An auditor will still be required to make a written statement to its audit client disclosing any contraventions of the other auditor independence requirements. The class order commences on the date it is registered under the [Legislative Instruments Act 2003](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74901" \t "Default).The class order is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new).**2.5 ASIC revises practice in relation to beneficial tracing notices** On 5 September 2005, the Australian Securities and Investments Commission (ASIC) announced that it has revised its practice on releasing information provided to it in response to beneficial tracing notices.ASIC can issue notices to obtain information about the beneficial, or ultimate, owner of shares in a listed company. ASIC may issue a beneficial tracing notice on request, for example, by a shareholder in a company. ASIC will now generally provide information received in response to a beneficial tracing notice to the company. ASIC will not disclose the identity of the person who requested ASIC to issue the beneficial tracing notice.The revised practice reflects legislative amendments to the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) arising from the [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "Default). A company will be required to include in the register information that ASIC provides to it within two business days after the day on which it receives the information. The company is not required to include in the register any analysis of the information. Nor is the company required to reformat the information within a register entry. However, searchers of the register must be able to locate particular entries. The company must ensure that separate entries are able to be distinguished and are logically organised (e.g. in order of receipt). For example, the company may maintain an index or search function that identifies separate entries by their date and by the persons to whom they relate.Under s672A of the Act, ASIC or a listed company can issue a beneficial tracing notice requiring a member of the company to disclose details about persons who have a beneficial interest in voting shares held by the member. ASIC or the company can serve a further notice on a person named in a response to a previous notice. A person can request ASIC to issue a beneficial tracing notice to one or more holders of securities of a company. ASIC must exercise its power if requested by a shareholder, unless it would be unreasonable to do so. ASIC's policy regarding the exercise of its power to issue a notice is set out in Policy Statement 86 Beneficial ownership notices.Section 672DA of the Act requires a listed company to maintain a register of information regarding beneficial interests in its voting shares that it receives after 1 January 2005. This obligation applies whether the information is received in response to a beneficial tracing notice issued by the company or by ASIC.Where ASIC issues a beneficial tracing notice, paragraph 672C(a) of the Act permits ASIC to pass to the company information that it receives in response.**2.6 ASIC example Statement of Advice** On 31 August 2005, the Australian Securities and Investments Commission (ASIC) published an [example Statement of Advice](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=Example_SOA_guide_pdf" \t "_new) (SOA) illustrating its interpretation of clear, concise and effective advice and disclosure in a specific financial advice scenario.The example SOA is one of the eight projects ASIC is doing as part of the Federal Government's Proposals Paper: Refinements to Financial Services Regulation issued on 2 May 2005.The example SOA was developed on the basis of a hypothetical financial planning scenario developed in consultation with financial planning experts. It deals with personal advice about personal insurance, investing in managed funds and basic deposit products. ASIC is looking to industry to produce other example SOAs in specific areas such as advice on establishing a share portfolio, a 'whole of life' financial plan and an SOA focused on superannuation issues. ASIC might release further example SOAs, depending on the extent to which industry engages in this process. The example SOA provides some important insights into what ASIC thinks is important in SOAs. These are: * length – the example SOA is only 12 pages long;
* there are no 'weasel words' (i.e. lengthy disclaimers and exclusions);
* it is written in simple, plain English;
* there is adequate disclosure of conflicts, fees and commissions; and
* there is a clear explanation of the scope and limitations of the advice.

The example SOA has been released with a guide that explains how and why ASIC developed the example SOA. The guide: * sets out the purpose of the example SOA (Section 1);
* outlines the framework in which the SOA was developed (Section 2); and
* explains why certain information has been included, or not included (Section 3).

ASIC's example SOA does not include information about other products or strategies that were considered by the adviser, but were not ultimately recommended to the clients. The Government intends to amend the [Corporations Regulations 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) to clarify that such information does not have to be included in an SOA: see refinement proposal 2.2. Prior to the amendment, ASIC does not expect:* advisers to include this information in their SOAs: see Information Release [IR 05-28] ASIC compliance guidance on the FSR refinement proposals and fees template requirements (3 June 2005); or
* Australian financial service licensees to report failure to include this information in an SOA as part of their breach reporting obligations.

A copy of the guide is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new).**2.7 ASIC consults on proposal to reduce repetition of the general advice warning** On 31 August 2005, the Australian Securities and Investments Commission (ASIC) released a consultation paper inviting comment on proposed relief that would reduce the need for Australian financial services licensees, and their representatives, to repeat the general advice warning to retail clients who have heard it before. Under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) a general advice warning must be given when general advice is provided to a retail client.The consultation paper has been issued as part of one of ASIC's projects implementing the Australian Government's proposals paper Refinements to Financial Services Regulation (2 May 2005). The consultation paper is the second step in implementing Refinement Proposal 5.1 on general advice warnings. The first step was the guidance issued in [ASIC QFS 157](http://www.asic.gov.au/ASIC/asic.nsf/ASIC%2BFSR%2BFAQ%2BDisplayW?ReadForm&unid=70E285F51C8FF019CA2570430011E5E0" \t "_new) Do I need to follow the exact wording in the Corporations Act when I give a general advice warning?The relief proposal in the consultation paper aims to reduce the repetition of the general advice warning while minimising consumer confusion about what kind of advice they are getting.The relief proposal permits the adviser to give a short reminder to a retail client who has heard the general advice warning before (instead of giving the general advice warning). However, if the retail client doesn’t understand the reminder then the adviser cannot rely on the relief and must give the general advice warning.A copy of the consultation paper is available from the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new) or by calling the ASIC Infoline on 1300 300 630.**2.8 ASIC revises guidance on training standards for advisers on basic deposit products and related non-cash payment products** On 31 August 2005, the Australian Securities and Investments Commission (ASIC) released an updated [Policy Statement 146 Licensing: Training of financial product advisers](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps146_pdf" \t "_new) [PS 146]. The policy statement sets out minimum training standards for people providing financial product advice to retail clients.The update revises guidance on the training requirements for advisers on basic deposit products and related non-cash payment products (BDPs). The guidance has been provided in completion of one of ASIC's projects implementing the Australian Government's proposals paper Refinements to Financial Services Regulation (2 May 2005). In particular, the update makes it clear that: * it is no longer mandatory for training courses for advisers on BDPs to cover the 'generic knowledge' requirements contained in PS 146;
* training on BDPs need only cover the particular 'specialist' knowledge and 'skill' requirements in PS 146 that are relevant to the adviser’s activities; and
* there might be situations where continuing training is not necessary for all persons who advise on BDPs. The licensee will first need to consider whether continuing training is required. It may be that there is no need if, for instance, the products have not changed.

If advisers provide financial product advice on other products, in addition to BDPs, they will have to comply fully with the PS 146 requirements for those other products.ASIC has also taken the opportunity to update PS 146 by removing references that are no longer current. The [amended PS 146](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps146_pdf" \t "_new) [PS 146] is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new). Copies can also be obtained by calling the ASIC Infoline on 1300 300 630.**2.9 ASIC grants relief for advertising by product issuers** On 31 August 2005, the Australian Securities and Investments Commission (ASIC) announced relief for product issuers who provide general financial product advice in advertisements. This relief is provided in [Class Order [CO 05/835]](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co05-835_pdf" \t "_new).The relief completes one of ASIC's projects implementing the Australian Government's proposals paper Refinements to Financial Services Regulation (2 May 2005). Class Order [CO 05/835] creates consistency between these requirements where product issuers provide general financial product advice in advertising in the media and on billboards or posters.The effect of [CO 05/835] is that no Financial Services Guide or general advice warning will be required where product issuers give general financial product advice in advertisements in the media or on billboards or posters. Instead, product issuers need only: * include a statement in their advertisement that a person should consider whether the financial product is appropriate for them; and
* comply with the advertising disclosure requirements in s1018A or s734 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (as applicable to the kind of offer document).

This relief is ASIC's response to Refinement Proposal 5.2.A copy of the Class Order 05/835 is available from the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new) or by calling the ASIC Infoline on 1300 300 630. |
| **3. Recent Takeovers Panel Developments** |
| **3.1 Glencore International AG v Takeovers Panel** By Bruce Dyer, Special Counsel, Blake Dawson Waldron (Blake Dawson Waldron advised Centennial Coal, the applicant in the Austral 02 Panel proceedings)In Glencore International AG v Takeovers Panel [2005] FCA 1290 Emmett J upheld, in part, the first challenge to a decision of the Takeovers Panel since it was reconstituted by the CLERP Reforms more than 5 years ago. Emmett J expressed a provisional view that the powers of the Panel are not constitutionally invalid, but set aside the declaration and orders of the Review Panel in Austral 02R as affected by "jurisdictional error".The Review Panel's decision in Austral 02R was discussed in Corporate Law Bulletin No 95, July 2005. Briefly, the Review Panel concluded that unacceptable circumstances existed as a result of Glencore's failure to disclose to the market, from 22 March 2005 until 4 and 5 April 2005, the fact that the combination of Glencore's holding of Austral shares and the swap exposure agreed to be provided under certain cash-settled equity swaps entered into by Glencore exceeded 5% of Austral shares. The Review Panel varied the decision of the Initial Panel and substituted orders which included an order requiring Glencore to make an offer to sell Austral shares to each person who sold Austral shares on ASX during the relevant period.Glencore commenced proceedings in the High Court on 27 July 2005 seeking judicial review of the Review Panel's decision under s75(v) of the Constitution commencement of proceedings in the Federal Court being precluded by s659B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) since Centennial's bid for Austral had not closed). On 29 July 2005 Heydon J granted a stay of the relevant orders and remitted the matter to the Federal Court. Glencore then amended its application to add a challenge to the constitutional validity of the Panel's powers, giving notice of a constitutional matter to the various Attorneys-General as required under s78B of the [Judiciary Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "Default). The matter was heard before Emmett J on 22 and 23 August and judgment was given on 14 September 2005.**(a) Need for precise finding re "effect" of circumstances**Emmett J held, in effect, that the Review Panel had not made the findings it needed to make before making a declaration. The Panel has power to make a declaration under s657A(2)(a) if it appears to the Panel that circumstances are unacceptable having regard to the effect of the circumstances on:(i) the control, or potential control, of the company or another company; or (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company.Emmett J said it is a precondition to making a declaration under s657A(2)(a) that the Panel make a finding that the relevant circumstances will have some effect of that kind (I refer to this below as the "requisite effect"). His Honour accepted that the Review Panel had purported to conclude that there was the requisite effect but found that the Panel did not make a finding as to just what that effect was. It was not enough for the Review Panel to find that the market was not aware that the swaps had reduced the shares available to be traded or accepted into the bid, or that shareholders may have made different decisions had there been disclosure of that. Rather Emmett J considered that the Panel needed to make a determination of "just what effect the non-disclosure had on control, or the acquisition of a substantial interest" (at [44]). His Honour considered that the failure to do this constituted jurisdictional error.As I will explain below, it is not easy to understand exactly why this amounted to a jurisdictional error. That is unfortunate as the issue is important in determining the significance of the decision for the Panel going forward. The purpose of the concept of jurisdictional error is to distinguish errors which justify intervention by a reviewing court from those that do not. It might be thought that Parliament intended the Panel to have a wide jurisdiction (in the exercise of which the Panel can make what a court may regard as errors) since that is the only way of achieving the objective, stated in s659AA, of making the Panel the main forum for resolving takeover disputes.Some of Emmett J's comments might be thought to suggest that his Honour treated the existence of the requisite effect as a "jurisdictional fact" which must actually exist in order for the Panel to have jurisdiction. The reference to a "precondition" suggests a jurisdictional fact, however his Honour speaks of the "finding" being the precondition rather than the existence of the fact. If the requisite effect was a jurisdictional fact its existence could only be finally determined by the court, which would itself decide whether the fact existed at the relevant time. Emmett J made no attempt to determine whether the requisite effect actually existed. It follows that his Honour could not have been treating the requisite effect as a jurisdictional fact.If the requisite effect is not a jurisdictional fact, the Review Panel's error must have arisen from the manner in which it determined whether the requisite effect existed. Emmett J appears to have considered that the Review Panel's reasons were inadequate in that they should have set out precisely what the relevant "effect" was. It is unlikely, however, that any such inadequacy of reasons would in itself constitute a jurisdictional error. As McHugh J has observed:"Jurisdiction is the authority to decide. It is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision." (Re MIMIA; Ex p Palme (2003) 216 CLR 212 at 227)The High Court has repeatedly warned against over-zealous scrutiny of reasons on judicial review (see eg MIEA v Wu (1996) 185 CLR 259 at 272). That principle is particularly important in the case of specialist tribunals, such as the Panel, since the court's knowledge or experience may be more limited than that of both the tribunal and the likely audience for the tribunal's reasons.It follows that the fact that the Panel "concluded that there was an effect without saying what the effect was" is probably not the jurisdictional error but rather a pointer to the nature of the error. It appears that Emmett J's real concern may have been that the Panel failed to have regard (as required by s657A(2)(a)) to the requisite effect because it misunderstood what effect was required on a proper construction of s657A(2)(a). Emmett J must have considered that the requisite effect involved (at the very least) something more than the Review Panel's finding of non-disclosure during a takeover bid in circumstances where market participants may otherwise have made different decisions about trading in the target shares or accepting the bid. It is possible his Honour had in mind that the Panel needed to be satisfied that disclosure would (rather than may) have resulted in different decisions in respect of a sufficient number of shares to constitute a substantial interest or to affect control or potential control. That would be quite a narrow interpretation of the meaning of "effect". A broader interpretation might allow that there is an "effect" on the acquisition of a substantial interest if the interest is acquired in circumstances where one party has not had access to information that should have been disclosed. However, Emmett J did not directly address the meaning of "effect" or suggest that the Panel misinterpreted that term. That suggests that his Honour thought there was a more fundamental error, for example, that the lack of any attempt by the Panel to "determine what different decisions would have been, or were likely to have been, made by …market participants" (paragraph [25]) meant that the Panel had stopped short of considering "effect" and had regard only to possible or potential effect. Even so, the characterisation of the Panel's approach as concerned with possible or potential effect assumes some definition of effect. On the broader interpretation suggested above, the fact of non-disclosure at a time when a substantial interest has been acquired would in itself constitute a sufficient effect on that acquisition. If that were the case, the fact that the Panel also discussed the possible effect of the non-disclosure on decisions of market participants, without attempting to determine what decisions they would be likely to make, would not result in jurisdictional error.It may be questioned whether a narrow interpretation of the effect required under s657A(2)(a) will permit the Panel to regulate takeover activity in an effective manner. Take, for example, a case where the Panel considers that there is inadequate disclosure in a bidder's statement which arguably contravenes s636. If s636 is contravened the Panel could make a declaration under s657A(2)(b), but the Panel may be understandably reluctant to do so if the breach is only arguable. In such circumstances, the narrow interpretation of "effect" described above would mean that the Panel could only make a declaration if satisfied that the non-disclosure resulted in different decisions in respect of a sufficient number of shares to constitute a substantial interest or to affect control or potential control. In the case of cash bids, in particular, it may be a rare thing for the Panel to be satisfied of that, making it difficult for the Panel to correct inadequate disclosure in the absence of a clear contravention of chapters 6 to 6C. **(b) Balancing exercise in making orders** Emmett J also adopted a narrow interpretation of s657D(2)(a), which allows the Panel to make any order it thinks appropriate to protect the rights or interests of any person affected by the circumstances. His Honour commented that while the Review Panel's orders were "purportedly" made to protect the rights and interests of persons affected by the non-disclosure, its orders "applied indiscriminately to any person who sold shares on ASX during the relevant period, irrespective of whether any such person would have taken any different course had the relevant disclosure been made". This implies that a person's interests would not be affected, or would not warrant protection, unless the disclosure would have resulted in that person taking a different course. A broader interpretation might accept that a person's interests are affected, and should be protected, where non-disclosure has denied that person the opportunity of considering the relevant information before selling. It may be questioned whether Emmett J's narrow interpretation of s657D(2)(a) will allow the Panel to make orders that adequately uphold the purposes in s602(a) and (b)(iii). Emmett J's interpretation of procedural requirements in s657D(1) may also give rise to some difficulties. Section 657D(1) requires the Panel to give "each person to whom a proposed order relates" the opportunity to make submissions. Emmett J held that persons who sold shares on ASX before disclosure of Glencore's derivatives were persons to whom the Panel's orders related. The Panel's order that Glencore offer to sell Austral shares to such persons referred to those persons as a class, and gave them entitlements, but did not require them to do anything. Emmett J suggested that it was open to the Panel to issue a media release inviting submissions from those persons about any adverse effect they suffered and the orders that should be made. It appears that this procedure may often be required in future, since the Panel's orders frequently refer to classes of persons and give them entitlements (such as the right to receive further disclosure). If so, that will inevitably increase the time it takes for the Panel to decide matters. Emmett J also concluded that the Panel needed to engage in a balancing exercise in making orders, weighing the object of protecting rights or interests of persons affected by the circumstances against the prejudice to any person that would flow from making an order. Emmett J considered that, in the circumstances, this required identification of persons whose rights or interests were affected by the non-disclosure of Glencore's equity swaps. It was not enough for the Panel simply to assume that those who sold shares on ASX during the relevant period were adversely affected.**(c) Willingness to intervene** Emmett J referred to the "clear policy" evinced by the privative clause in s659B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and commented that the Court should be slow to interfere with a decision of the Panel where the market is "significantly volatile by reason of the currency of takeover offers". His Honour thought that unlikely in Austral's case, since Centennial already held more than 85% of the company. It follows that the courts may be more reluctant to intervene in circumstances where control has not passed.**(d) Constitutional validity**Emmett J expressed brief "provisional views" rejecting Glencore's challenge to the constitutional validity of the Panel's powers. His Honour held that the Review Panel's decisions did not involve any exercise of judicial power to adjudicate a dispute about existing rights and obligations. Rather, the Review Panel was determining what legal rights and obligations should be created. Of course, Emmett J's conclusion on this issue will not prevent the argument being raised again in another challenge. The inclusion of a constitutional challenge in any future challenge to a decision of the Panel is likely to increase the time it takes to determine the matter, since a constitutional argument requires that the various Attorneys-General be given notice and the opportunity to intervene.**(e) Implications for the future**I suggest that the significance of Glencore v Takeovers Panel for the effectiveness of the Panel going forward will depend mainly on 3 factors.The first is the extent to which the decision encourages other challenges. The effectiveness of the Panel is hardly likely to be impaired by one challenge every 5 years. It seems likely, however, that the rate of challenge will increase. Some may have been dissuaded in the past because they did not wish to be the first to challenge the Panel. The fact that Glencore's challenge succeeded, together with Emmett J's narrow reading of some of the provisions concerning the Panel's jurisdiction and powers, may encourage those aggrieved by Panel decisions in future to be more optimistic in assessing their prospects.The second factor is the efficiency of the courts in resolving future challenges. Takeover disputes need to be resolved quickly to prevent delay caused by litigation affecting the outcome. The CLERP reforms made the Panel the main forum for resolving takeover disputes in order to limit the scope for delay and the incentive for "tactical litigation". If the courts are too slow in resolving future challenges to Panel decisions, that aim will be frustrated. It is unfortunate, in this respect, that Glencore's constitutional challenge was not determined by the full bench of the High Court so as to prevent it causing additional delay in a future challenge. It is also worth noting that the privative clause in s659B effectively increased the time it took to determine Glencore's challenge by about a week (due to the need for the High Court to remit the matter to the Federal Court).The third factor concerns the effect of the decision on the Panel's approach to its role. The Panel will now be more conscious of the prospect of judicial scrutiny. It would be a pity if that undermines the Panel's commercial approach, which has generally been welcomed by the market. As discussed above, the decision suggests that the Panel's jurisdiction and power to make orders may be more limited than many have previously assumed to be the case. Accordingly, it may be desirable to consider whether legislative amendments are required to ensure that the Panel is adequately equipped to perform its role.The full text of the judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/september/2005%20fca%201290.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/september/2005%20fca%201290.htm%22%20%5Ct%20%22_new)  |
| **4. Recent Corporate Law Decisions** |
| **4.1 Is a sale agreement authorised and binding?**(By Megan Esson, Blake Dawson Waldron)Sunburst Properties Pty Ltd (In liq) v Agwater Pty Ltd [2005] SASC 335, Supreme Court of South Australia, Gray J, 2 September 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/september/2005sasc335.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/september/2005sasc335.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The proceedings concerned an action brought by Sunburst Properties Pty Ltd (In liq) (Sunburst) against Agwater Pty Ltd (Agwater) and several individuals who were at one time or another directors or advisors to either of the companies which belonged to the Garrett Group. The second defendant was a director of Agwater, and together with his wife, the third defendant, who was a director of Sunburst, was trustee for the Andrew Garrett Family Trusts (1) and (2) (AGFT(1), (2)). The fourth defendant was advisor to the second defendant and at one stage was a director of Sunburst and Agwater. The fifth and sixth defendants were directors of Agwater, and the seventh was a company in the Garrett Group. Sunburst and Agwater entered into a joint-sale agreement for the sale of vineyards, a pipeline and associated water licences (water infrastructure) to a third party. The issue of contention between the parties was whether the sale agreement was authorised and binding on the vendor company. Sunburst sought relief to proceed with the joint-sale on their own and Agwater's behalf. Agwater and others challenged the validity of the agreement, arguing that it had been entered into without authorisation and was not binding on the company due to a series of events and transactions purported to have occurred after its execution.Gray J found that the second defendant lacked credibility as a witness, and that his testimony was largely inconsistent. His Honour was therefore unwilling to accept much of his evidence regarding the alleged events and transactions and held that they were 'illusory, void or voidable' and therefore did not affect the enforceability of the joint-sale agreement. His Honour held that the joint-sale agreement was authorised and binding on Agwater. Further that the second and fourth defendants had breached their director's duties in relation to Agwater during a period in which it was insolvent or approaching insolvency. **(b) Facts**The facts of the case were in dispute by the parties. The following summary is based on the chronology of events outlined by Gray J.In April 2002, Alexandrina Water Pty Ltd, a member of the Garrett Group, sold to Sunburst the Bulka vineyards located in Langhorne Creek, and to Agwater the water infrastructure. The National Australia Bank (NAB) supplied finance by way of a bill facility. The NAB required mortgage debenture security which included a fixed charge over the plaintiff's marketable securities, including Sunburst's share in Agwater. The debenture prohibited Sunburst from dealing with or disposing of any assets covered by the charge.In July of the same year, Sunburst advanced approximately $2.5 million to Agwater to enable the latter to pay for the water infrastructure. The result was that Agwater became indebted to Sunburst, and Sunburst became the sole shareholder in Agwater.During the 2002 / 2003 financial year the Garrett interests sought a purchaser for the pipeline, however, their attempts were unsuccessful. In February 2003, the water licences were transferred to Sunburst, and Agwater's loan from Sunburst was adjusted to reflect this. In June 2003, the second and fourth defendants resigned from the board of Sunburst. One month later administrators were appointed to Sunburst, who found the company had been trading at a loss for the last financial year. On 5 November 2003, Agwater and Sunburst signed a joint-sale agreement for the sale of the vineyards and the water infrastructure, with the proceeds to be divided between the two. A series of events and purported transactions then followed according to the second defendant. They were as follows:* the second and fourth defendants consented to act as directors of Agwater and notification was provided to ASIC;
* minutes were prepared by either the second or fourth defendant of a meeting at which the fifth and sixth defendants were allegedly removed from Agwater's board;
* a further meeting of the directors of Agwater was alleged to have taken place, however Gray J did not accept this;
* the fourth defendant then adjusted the management accounts for the companies in the Garrett Group which were in liquidation with the aim of eliminating inter-company loans and representing AGFT as one of Agwater's creditors;
* ASIC was notified that the fifth and sixth defendants had ceased to be directors of Agwater; and
* the second and fourth directors executed documents purporting to record: a transfer of Sunburst's share in Agwater to AGFT; an assignment of Agwater's debt to Sunburst to AGFT; the issue of 200,000 shares in Agwater to the seventh defendant; the granting of an unregistered then a registered charge by Agwater to the seventh defendant; and the sale of the pipeline from Agwater to the seventh defendant.

In February 2004, the parties to the joint-sale agreement entered into a contract with Mr Paech to sell to him the vineyards and pipelines. This agreement was still treated 'on foot' by the parties at the time the case was heard.**(c) Decision** **(i) Agwater's shareholding**Gray J held the fifth defendant had held 10 shares, with the intention that they be transferred to the plaintiff. In fact, only one had been properly transferred, therefore the other 9 were held beneficilly by the fifth defendant for Sunburst. In addition, his Honour found there had been no sale or agreement to transfer Sunburst's only share in Agwater to AGFT.**(ii) Directors**In respect to the fifth defendant, Gray J found that he had continuously been a director of Agwater, despite submissions made by the second defendant. Further, that any minutes of a meeting purporting to record the resignation of the fifth defendant as a director of Agwater were a concoction. His Honour found that the second and fourth defendants had resigned as directors of Agwater on 2 July 2003 and 30 June 2003 respectively.**(iii) Purported transactions**Gray J found that the second defendant, with the aim of frustrating the sale of the pipeline, and removing it from the assets available to Garrett Group's creditors had purported to:* transfer ownership of Agwater from Sunburst to AGFT(1) then AGFT(2);
* falsely record the fifth defendant's resignation as a director of Agwater;
* create a loan to the seventh defendant and convert this to shares;
* assign Agwater's debt to AGFT(2) then to the seventh defendant;
* create an unregistered and a registered charge in the seventh defendant's favour; and
* cause Agwater to sell the seventh defendant the pipeline.

Gray J found each transaction had 'not occurred, [were] void ab initio as being fraudulent, or alternatively voidable as a result of being entered into in breach of director's duties'.**(iv) Breach of duty**At the time of the purported assignment of both Sunburst's share in Agwater and Agwater's debt to AGFT, the second and fourth defendants were directors of the plaintiff. As such, to the extent that either of these transactions were valid, Gray J found they were both voidable, resulting from the breach of the second and fourth defendants' duties to the company.His Honour discussed the well established principle that when a company is nearing or is in insolvency, the interests which a director must take into account in exercising its duty of care to a company, are those of the creditors (citing Walker v Wimborne (1976) 137 CLR 1). Gray J held that where a director removes assets from a company so that it is no longer available to pay debts owing to its creditors, they breach their duty.His Honour found that neither the second or fourth defendants had given their 'independent consideration' to the purported assignments. The second defendant in particular had viewed the Garrett Group companies as one entity and the plaintiff and Agwater as 'mere manifestations' of AGFT(1). Gray J held that the second defendant had failed to observe his duty to assess each purported transaction from the viewpoint of each company. Gray J referred to Pennycuick J's objective formulation in Charterbridge Corp Ltd v Lloyds Bank Ltd [1970] Ch 62 of the test for determining whether a director has entered into a transaction for the benefit of a separate entity. However, he did not attempt to reconcile this with the statement of Mason J in Walker v Wimborne that it is a 'fundamental' principle of law that each company is a separate legal entity and as such a director should consider its interests alone in determining whether to engage in particular conduct. His Honour did, however, note that both the second and fourth defendants would have failed the reasonable person test if applied.His Honour found that if the sale of the pipeline had been effected, Agwater would have been able to discharge its debt to Sunburst in turn enabling Sunburst to discharge or reduce its own liabilities. The second and fourth defendants had a duty to keep Sunburst's assets 'intact for the benefit of the creditors', which they had failed to do by virtue of purporting to transfer the debt and share. In addition, Gray J held that the second defendant had breached his duty to avoid a conflict of personal interest and duty by being a beneficiary of AGFT(1) whilst a director of Sunburst.Thus Sunburst could to elect to avoid the purported share transfer and assignment of debt.**(v) Statutory assumptions**His Honour held it was unnecessary based on the above findings to determine whether Sunburst and its receivers and managers were entitled to make the statutory assumptions under section 129 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (the Act) in regard to the fifth and sixth defendants. However, had he been called upon to do so, he would have found in favour of such a right.Gray J stated that section 128(4) of the Act 'places a burden on the company to establish the person's subjective knowledge or suspicion that the section 129 assumptions relied on were incorrect'. Therefore, the fact that a person's suspicions should have been aroused is not enough to disentitle them from relying on the statutory assumptions in section 129.His Honour found that the administrator had conducted a company search for Agwater which showed that the fifth and sixth defendants were directors. They were therefore entitled to assume that the fifth and sixth defendants had been duly appointed and had authority to exercise the powers customarily exercised by a director. Further, that they were acting in the best interests of Agwater, and therefore properly performing their duties by entering into the joint-sale agreement and that the document had been duly executed.**(vi) Conclusion**The plaintiff was entitled to the relief sought, being to proceed with the joint-sale.**4.2 Acquisitions of relevant interests in group companies and pre-emptive rights provisions in constitutional documents** (By Joshua Crane, Freehills)Coopers Brewery Ltd v Lion Nathan Australia Pty Ltd [2005] SASC 334, Supreme Court of South Australia, Perry J, 2 September 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/september/2005sasc334.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/september/2005sasc334.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/september/2005sasc334.htm%22%20%5Ct%20%22_new)**(a) Summary**The case concerned whether the acquisition of 45 per cent of the voting shares in Lion Nathan Ltd ("Lion Nathan") by Kirin Brewery Company Ltd ("Kirin") amounted to a deemed acquisition of more than 40 per cent of the voting shares in the defendant, Lion Nathan Australia Pty Ltd.The Memorandum of Association of the plaintiff, Coopers Brewery Ltd, provided that the consent of the defendant was required in relation to any amendment to provisions conferring a third ranking pre-emptive right of purchase of its shares upon the defendant in the plaintiff's Articles of Association. The requirement of consent ceased to exist if any person acquired a relevant interest (as that term is defined in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new)) in 40 per cent or more of the voting shares of the defendant.Perry J held that Kirin had acquired a relevant interest in 45 per cent of Lion Nathan and, consequently, had acquired a relevant interest in more than 40 per cent of the defendant.**(b) Facts** The defendant was a registered proprietary company, and a wholly owned subsidiary of Lion Nathan.Articles 38 to 54 of the plaintiff's Articles of Association provided the defendant with a third ranking pre-emptive right of purchase (behind other members and members' relatives and Australian Mutual Provident Society) upon the proposed sale of shares by an existing member.Regulation 6 of the plaintiff's Memorandum of Association provided that a special resolution:* altering or omitting articles 38 to 54 of the plaintiff's Articles of Association; or
* purporting to amend or delete any article in a manner that is inconsistent with the rights granted to the defendant, did not have any effect unless the consent of the defendant was obtained. This requirement was entrenched by regulation 7.

Regulation 8 provided that regulations 6 and 7 ceased to have effect on a change in control (as defined in article 44 of the Articles of Association) of the defendant.Finally, article 44 of the plaintiff's Articles of Association (in the context of changes in the control of members) provided that "'Change in Control' means any transfer of any shares or other equity interest in a member or in any entity that directly or indirectly controls or influences the member or any reconstruction, amalgamation or reorganisation of a member or any entity that directly or indirectly controls or influences the member if, after such transaction, there would be a change in the person having the power, a change in the majority of such persons who, acting together, have such power or, without limiting the generality of the foregoing, if any person acquires a relevant interest (as that term is defined in the Corporations Law) in 40 per cent or more of the voting shares of the member".In April 1998, Bankers Trust New Zealand Nominees Limited ("BT") acquired, as nominees of Kirin, 246,454,275 ordinary shares in Lion Nathan, equating to 45 per cent of Lion Nathan's issued shares capital. Four new directors, being nominees of Kirin, were subsequently appointed to the board of Lion Nathan. The appointments brought the total number of directors of Lion Nathan to ten.The plaintiff argued that the acquisition by BT on behalf of Kirin gave rise to a deemed acquisition of greater than 40 per cent of the voting shares in the defendant and, as a result, the plaintiff was able to revoke the articles (38 to 45) conferring the pre-emptive right of purchase upon the defendant.**(c) Decision**Counsel for the plaintiff sought to focus on the second limb of article 44 which provided that a change in control occurred where "any person acquires a relevant interest (as that term is defined in the Corporations Law) in 40 per cent or more of the voting shares of the member". The court held that, in the context of regulation 8, this limb did not actually require the defendant to be a member of the plaintiff and the words "of the member" could effectively be disregarded.The key issue to be determined by Perry J was whether, in April 1998, Kirin had "acquired a relevant interest in more than 40 per cent of the issued share capital of Lion Nathan within the meaning of article 44 of the plaintiff's Articles of Association, and if so, whether there had been a change in control of the defendant within the meaning of regulation 8 of the plaintiff’s Memorandum or Association".The term "relevant interest" is defined in Division 5 (except section 44) of the Corporations Act, and specifically in section 31. Section 31 provides that "a person who has the power to vote in respect of a voting share in a body corporate has a relevant interest in the share". In reliance on Division 5, the court held that Kirin had acquired a relevant interest in Lion Nathan.In respect of whether the acquisition amounted to a change in control in the defendant, counsel for the plaintiff sought to rely on deeming provisions in sections 32 and 33 of the Corporations Act.Section 32 provides that, where a body corporate has a power to vote in respect of or dispose of a share, a person is deemed for the purposes of Division 5 to have in relation to the share the same power as the body has if:* the body is, or its directors are, under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the persons in relation to the power to vote; or
* the person has a controlling interest in the body.

Section 33 provides that, where a body corporate has the power to vote in respect of or dispose of a share, a person is deemed for the purposes of Division 5 to have in relation to the share the same power as the body has if: * the person has;
* an associate has;
* associates of the person have;
* the person and an associate or associates of the person together have;

power to vote in respect of not less than the prescribed percentage of the voting shares in the body.The court held that, by virtue of sections 32 and 33, Kirin was deemed to have the same power as Lion Nathan to vote in respect of and power to dispose of the defendant's shares and, consequently, there had been an acquisition of a relevant interest and a change of control in the defendant.As a result, the plaintiff was free to revoke the requirement of consent in regulations 6 and 7 of their Memorandum of Association.**4.3 Breach of provisions and replaceable rules in the Corporations Act accompanied by other misconduct** (By Yvette So, Mallesons Stephen Jaques)Liwszyc v Smolarek [2005] WASC 199, Supreme Court of Western Australia, Hasluck J, 2 September 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/september/2005wasc0199.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/september/2005wasc0199.htm%22%20%5Ct%20%22_new)or [http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The case is a useful illustration of where the court will, before trial of the matter, grant orders in the nature of a "mandatory" injunction pursuant to its powers under section 1324 of the [Corporations Act (2001)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act"). In this case, there were various findings that there were serious issues to be tried as to whether the first defendant's non- compliance with the Act was accompanied by an improper purpose. Hasluck J held that the balance of convenience favoured such orders to protect the investments of various shareholders in circumstances where damages would not be an adequate remedy. **(b) Facts**The plaintiffs, David Liwszyc and Gheorghe Duta, and the first defendant, Hanna Smolarak, were directors Eznut Pty Ltd. Each held shares in the company together with other investors, Smolarek being the majority shareholder.Areas of disagreement emerged between the plaintiffs and the first defendant. The first defendant issued a notice of general meeting for 27 May 2005 to approve the removal of Liwszyc as a director and the appointment of the first defendant's daughter as a director. On or about 5 May 2005, the first defendant purported to transfer to her daughter 1000 shares in the company. On the 9 May 2005, the first defendant was appointed secretary. On 24 May 2005 (that is, three days prior to the scheduled general meeting), the first defendant's daughter was appointed a director.The only persons present at the 27 May 2005 general meeting were the first defendant and her daughter. The resolutions were passed on the assumption that a quorum was present constituted by the first defendant and her daughter as shareholders of the company. The first defendant held proxies and as chair, elected to vote the undirected proxies.After the general meeting, the first defendant also lodged the necessary forms ceasing Duta's directorship on the basis that his appointment was subject to confirmation by resolution within two months which never occurred.The plaintiffs argued that they had been excluded from participating in these decisions and that the first defendant acted in breach of her fiduciary duties, the replaceable rules in the Act (as the company did not have an operative constitution) and her statutory duties under the Act. The plaintiffs sought the following orders pending the trial of the matter:* plaintiffs be reinstated as directors;
* second defendant be restrained and an injunction granted prohibiting her from acting as director;
* appointment of the first defendant as secretary be set aside;
* first defendant take all steps and sign all documents necessary to effect the above orders; and
* other related orders.

The defendants opposed these orders on the basis that as directors, they should be at liberty to proceed with the management of the company’s affairs.**(c) Decision**In considering whether to grant the orders sought, Hasluck J referred to the following legal principles:* procedural irregularities including absence of a quorum or a deficiency of notice are not invalidated unless substantial injustice has been or may be caused (section 1322 of the Act);
* where conduct contravenes or would contravene the Act, the Court may grant an injunction on such terms as it sees fit (section 1324 of the Act);
* an interim injunction may be granted where, in the opinion of the Court, it is desirable to do so (section 1324(4) of the Act); and
* in deciding whether an injunction is desirable, the court must find there is a serious issue to be tried (Castlemaine v Tooheys Ltd v South Australia (1986) 161) and the balance of convenience favours the granting of the injunction.

**(i) Appointment of the first defendant's daughter as a director**Hasluck J held that the appointment of the first defendant's daughter as a director three days before the general meeting clearly did not include participation by the other directors. Also the first defendant's decision to transfer shares to her daughter excluded involvement by the other directors, Liwszyc and Duta, by not giving them an opportunity to seek information about the transfer or to refuse to register the transfer before an attempt was made to exercise voting power associated with the shares being transferred. This is despite the replaceable rule in section 1072G of the Act which says that directors of a proprietary company may refuse to register a transfer of shares in the company for any reason. Hasluck J found that there were serious issues to be tried as to whether the steps taken by the first defendant (ie in transferring the shares and appointing her daughter as a director) were accompanied by an improper purpose and a breach of her fiduciary and contractual duties to other members of the company.Also, as the transfer of shares had not been effected prior to the meeting in accordance with section 1072F of the Act (ie the transfer of the shares was not registered until 28 May 2005, the day after the general meeting), Hasluck J held that a quorum was not present and the resolution appointing the first defendant’s daughter as director may be invalid and ineffective.Although the absence of a quorum and the failure to provide an opportunity for others to participate in the meeting may not be of themselves contraventions of the Act (section 135(3)), Hasluck J concluded that an arguable case had been demonstrated that these were accompanied by other misconduct which would amount to a contravention under the Act, and may warrant injunctive relief.**(ii) Removal of Liwszyc as a director**Hasluck J questioned whether the resolution for Liwszyc's removal was made in good faith in addition to the absence of a quorum, and whether the proxies were received in sufficient time to be effective which would affect the validity of the resolution removing Liwszyc as director. Again Hasluck J was concerned that non-compliance with the replaceable rules and provisions under the Act were accompanied by an improper purpose which may amount to a contravention under the Act.**(iii) Removal of Duta as a director**The evidence showed that Duta had been acting as a director of the company for a considerable time without any question as to the validity of his appointment. Hasluck J said that at the very least, Duta was acting as a de facto director in accordance with sections 9 and 201M(1) of the Act and by seeking to remove Duta by unilateral action to pursue her own self-interest, this may also amount to a contravention under the Act.Even if Duta's appointment as a director had not been confirmed by resolution, Hasluck J suggested that such an irregularity this may be affected by the remedial provisions of the Act.**(iv) Appointment of the first defendant as secretary**The first defendant contravened section 204D by effecting her own appointment as secretary and not obtaining the consent of the other directors.**(v) Relief**Hasluck J found that the balance of convenience favoured the orders sought by the plaintiffs and the granting of the injunction, on the basis that if the defendants assumed control of the company the investments of shareholders would be put at risk. **4.4 Directors' right of access to documents when company in receivership** (By Chris Skordas, Phillips Fox)Boulos v Carter; Re TARBS World TV Australia Pty Ltd [2005] NSWSC 891, New South Wales Supreme Court, Barrett J, 2 September 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/september/2005nswsc891.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/september/2005nswsc891.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**An application was brought by Magdi Boulos and Regina Boulos ('the plaintiffs') seeking an order that they be allowed to inspect the books and financial records relating to all transactions entered into by Mr Brown and Mr Carter ('the defendants'), as receivers and managers of TARBS World TV Australia Pty Ltd ('the Company').His Honour Justice Barrett dismissed the application with costs and held that the books and records sought by the plaintiffs had already been provided or offered by the defendants. **(b) Facts**The plaintiffs were the directors of the Company. On 2 July 2004 the defendants were appointed as receivers and managers of the Company by PanAmSat Corporation ('PanAmSat'), in exercise of a power of appointment under a debenture created by the Company in favour of PanAmSat. On 4 May 2005 the plaintiffs requested 'copies of contracts and transactions that have been entered into of sales of assets and/or otherwise since 2 July 2004'. The defendants replied on 11 May 2005 seeking the plaintiffs' reasons for the request. The defendants relayed their concerns of the possibility of the plaintiffs disclosing commercially sensitive information of the Company to United Broadcasting International Pty Limited ('UBI'), a competitor of PanAmSat's customers, of which one of the plaintiffs was the sole director and sole shareholder. The plaintiffs responded on 11 May 2005 asserting a legal entitlement to the documents sought. The plaintiffs' solicitor wrote to the defendants on 26 May 2005, repeating the request made by the plaintiffs on 4 May 2005, and submitting that a director need not give reasons for wishing to inspect company books and records. The defendants' solicitor replied on 27 May 2005, stating that the defendants had legitimate concerns that the plaintiffs were requesting the information for the improper purpose of disclosing it to UBI. Subsequently, the defendants acknowledged that the plaintiffs wished to see the documents solely in their capacity as directors of the Company, and submitted that if the plaintiffs signed a confidentiality undertaking the documents sought would be made available. However the defendants restricted the offer to 'financial records' of the Company.The plaintiffs stated that they were not obliged to sign any confidentiality undertaking and asserted rights under section 421(1)(d) and section 198F of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act') and the general law. The plaintiffs nevertheless invited the defendants to submit a confidentiality undertaking for their consideration by 30 May 2005. The plaintiffs filed the application to the Court on 2 June 2005, after the defendants failed to provide the plaintiffs with a confidentiality undertaking. The defendants wrote to the plaintiffs on 3 June 2005, stating that the decision to commence proceedings was 'premature and unhelpful'. The confidentiality undertaking was provided to the plaintiffs for their consideration on 4 June 2005. The plaintiffs refused to sign, once again asserting their rights to inspect the documents sought, and stated that they were aware of their fiduciary and statutory duties to the Company and the liability they may face in the event that they breach those duties. The defendants replied on 8 June 2005, offering on a without admission basis the documents sought by the plaintiffs, whether characterised as financial records or not, upon receipt of an executed confidentiality undertaking. The plaintiffs again refused to sign an undertaking. On 17 June 2005 the defendants offered to provide the plaintiffs with copies of the documents sought despite the plaintiffs not executing a confidentiality undertaking, and provided those documents on 21 June 2005. The documents included an Asset Sale Agreement and Deed of Assignment of Registered Trademarks between the Company and PanAmSat, which the defendants stated were the only major transactions entered into since their appointment as receivers and managers of the Company. The defendants offered documentation regarding several minor asset sales. The defendants also provided a document entitled 'Accounts of Receipts and Payments' and offered to answer any questions in relation to the Accounts. The plaintiffs replied that the documents provided were not sufficient and submitted a list of documents to the defendants. The plaintiffs requested that those documents, along with any other documentation in regards to the two major transactions, be made available for inspection. The defendants responded that they were willing to consider any reasonable request. However they stated that they would not provide access to one particular category identified by the plaintiffs, which in the defendants' view essentially encompassed all documents generated by them and their solicitors during the course of the receivership. **(c) Decision** The plaintiffs based their claim on the following statutory provisions: * Section 1303 of the Act, which allows the Court to make an order compelling inspection of books where a person has refused to provide access in contravention of the Act;
* Section 198F of the Act, which allows a director to inspect the books of a company (other than its financial records) for the purposes of a legal proceeding to which the director is a party or that the director proposes in good faith to bring;
* Section 290 of the Act, which states that a director has a right of access to the financial records of the company; and
* Section 421(1)(d) of the Act, which requires a 'controller' of property of a corporation to keep financial records that correctly record and explain all transactions entered into by the controller. Section 421(2) provides that a director may inspect records kept by a controller for the purposes of section 421(1)(d).

His Honour held that the plaintiffs were not entitled to rely on section 198F of the Act. In his Honour's opinion, although the plaintiffs claimed that they contemplated bringing a derivative action under Part 2F.1A of the Act (for breach of duty by the receivers in relation to the exercise of the power of sale), they had not shown sufficient evidence that they 'propose in good faith to bring' such an action. In relation to section 290 of the Act, his Honour noted that the defendants had not refused access to the financial records of the Company. However the defendants had made the point that the documents actually sought went beyond 'financial records'. His Honour held that 'contracts and transactions' are not financial records, even though the effects of contracts and transactions will inevitably be reflected in 'financial records'.His Honour stated that the defendants, as receivers and managers of the Company, are within the definition of 'controller' for the purposes of section 421 of the Act and were therefore required to keep 'financial records' which correctly record and explain sales of company property. Again, his Honour noted that the defendants had not refused access to the financial records of the Company.The plaintiffs also relied upon the right of access at general law. His Honour noted that under general law principles, directors have a right to inspect documents for the purpose of enabling the director to perform the functions and discharge the duties of the office of director. His Honour held that the general rule is modified where the company is in receivership, such that a director may not exercise his or her right of access in a way that would prejudice the due process and completion of the receivership. Further, his Honour noted that the right of access only applies to documents in the receivers' possession that belong to the company. Documents prepared by or on behalf of the receiver to better enable him or her to discharge his or her duties, belong to the receiver and as such are not within a directors' general law right of access. His Honour concluded that the defendants had complied with their duties to provide access to the documents. According to his Honour, there was no reason to doubt the defendants' submission that the two agreements represented the only major transactions entered into by them since their appointment as receivers and managers of the Company. Further, the actual contracts were the documents that 'correctly record and explain' the transactions. In his Honour's opinion, there was no other document which could record and explain the transaction as effectually as the written contract itself. Therefore, as the plaintiffs already had access to the documents to which they were entitled, his Honour dismissed the plaintiffs’ claim with costs.**4.5 Joint venture company wound up due to the oppressive conduct of majority shareholders** (by Sabrina Ng and Felicity Harrison, Corrs Chambers Westgarth)Maine v Chelia [2005] NSWSC 860, Supreme Court of New South Wales, Equity Division, Young CJ, 29 August 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc860.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc860.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The case involved an oppression suit under section 232 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) between shareholders in a company called Digital Messaging Solutions Pty Ltd (DMS). The plaintiffs claimed that the affairs of DMS were conducted by Mr Chelia (first defendant) and Mr Arulampalam (second defendant) in a manner contrary to the interests of the members of the company as a whole and oppressively and unfairly against the interests of Anthony Maine (first plaintiff), who was removed from his position as director of DMS and had his employment with DMS terminated. The defendants admitted that they removed Anthony Maine from his position as director of DMS but argued that he was lawfully so removed. They argued that although they made important commercial decisions in relation to DMS without advising Anthony Maine, they were not obliged to seek his views. They further claimed that they had proper grounds to refuse to pay any consultancy fees that were not paid to Anthony Maine.The plaintiffs sought restitutionary relief and submitted that a demerger should be granted so that they could receive their assets back. They submitted that if a demerger was too difficult, that they be granted an option to buy the majority shares. The defendants argued that an order should enable them to buy the minority shares. Both parties were opposed to DMS being wound up. Nevertheless, Young CJ ordered a winding up as he did not consider that any of the other remedies were appropriate.**(b) Facts**DMS was the corporate vehicle for a joint venture between Peter Maine and Anthony Maine and Mr Chelia and his associates. Anthony Maine and Peter Maine were minority shareholders in DMS, holding 4,500 shares of the 10,000 shares issued in DMS via a company called Newsnet (second plaintiff). The remainder of the shares were held by Mr Chelia, Mr Arulampalam and companies that they were associated with.A heads of agreement between the Maines and Mr Chelia was entered into on 15 September 2004. The heads of agreement was superseded by a joint venture deed. Over time, the joint venture relationship became problematic. Reasons provided for the breakdown in the relationship differed between the parties. The plaintiffs' main arguments for why the relationship broke down were:* that Anthony Maine was removed as director and excluded from the business premises;
* that the majority shareholders made important commercial decisions in relation to DMS without consulting the plaintiffs;
* that the defendants were using DMS to process a business of the defendants, Jardine Thompson Pty Ltd; and
* that in relation to Jardine Thompson Pty Ltd, the defendants were using DMS facilities for what they deemed illegal purposes, breaching both copyright from Telstra and the [Spam Act 2003](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74784" \t "Default).

The defendants, in response, claimed that Anthony Maine was removed as a director because of his inappropriate behaviour around staff, citing as examples of this his offensive language and a nude picture that he circulated around the office. Anthony Maine also offended Mr Chelia by a comment he made against the Tamil Tigers, an organisation to which Mr Chelia belongs. The defendants further also claimed that Mr Chelia did not meet his production targets.**(c) Decision**Chief Justice Young noted that in oppression cases it is important to look at both the legal rights of the parties and the equitable restraints that might exist upon the exercise of those legal rights. His Honour found that the joint venture deed defined the parties' legal rights and that the earlier heads of agreement was also relevant in showing the expectations of the parties. His Honour was of the opinion that both sides contributed to the demise of the joint venture relationship. In particular, he took into account how offensive Anthony Maine's conduct would have been to persons of Indian and Sri Lankan decent and also the reasonable suspicions the Maines had that Jardine Thompson Pty Ltd was using DMS for its own benefit. However, he held that the defendants misread the situation in exploiting their legal rights to the fullest without regarding any legitimate expectations the plaintiff may have had in the joint venture.His Honour held that the plaintiffs had clearly made out a case for oppression under sections 232 and 233 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). He held that the defendants were principally in fault as they used their legal rights to benefit themselves and exclude the minority from any significant part in the business so that it was no longer a joint venture business. An interesting aspect in Young CJ's decision was the determination of an appropriate order. Despite both parties resisting a winding up, Young CJ held that it was the most appropriate order in the circumstances, where there was clearly animosity between the shareholders. Young CJ considered the submission by the plaintiffs for a demerger. He noted that there was no precedent for such an order and also the considerable problems that would arise in dividing up the assets of DMS.Chief Justice Young rejected the standard type of order in an oppression case; that the majority would buy out the minority at a fair price. He supported his decision by stating that in the circumstances the main fault lay with the defendants and therefore such an order would be inequitable as the persons at fault would be rewarded with all the assets. He also noted that there was difficulty in fixing a fair price.**4.6 Member approval unable to unilaterally effect the transfer in an incorporated entity’s place of registration** (By Michael Linke, Freehills)ASIC v Medical Defence Association of Western Australia Inc [2005] FCAFC 173, Federal Court of Australia, Full Court, Finn, Emmett and Conti JJ, 25 August 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/august/2005fcafc173.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/august/2005fcafc173.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The case was an appeal by ASIC to the Full Court of the Federal Court, against the declarative orders of the trial judge which effectively compelled ASIC to accept an application to register an association already incorporated in Western Australia, as a company under the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Corporations Act'). ASIC's objection was based upon a failure to comply with the relevant procedural requirements for this type of application under the Corporations Act. However, underlying this was a deeper concern that associations formed under the laws of a particular State or Territory ought not be afforded the capacity to unilaterally excuse themselves from the need to comply with the requirements of that particular regulatory scheme.Setting aside the orders of the trial judge and upholding ASIC's appeal, the Full Court acknowledged the ensuing dangers if an incorporated association was allowed to transfer place of incorporation without 'positive' authorisation from an instrumentality or law of the relevant State or Territory where it was previously registered.**(b) Facts** The Medical Defence Association ('the MDA'), a body corporate incorporated under the Associations Incorporation Act 1987 (WA) ('the WA Associations Act'), sought to become registered as a company limited by guarantee pursuant to Part 5B.1 of the Corporations Act. When ASIC rejected the MDA's application, the MDA sought a declaration as to the effect of section 601BC(8) of the Corporations Act, arguing that:* accompanying evidence, under the law of the relevant body corporate's place of origin, that the transfer of the body's incorporation was authorised was not an essential precondition to ASIC accepting the MDA’s application; and
* consequently express authorisation from an instrumentality or law of the relevant State or Territory was not required in order for the transfer to be validly effected.

In contrast, ASIC submitted that by reason of the absence of any provisions in the WA Associations Act authorising the transfer of the place of origin of an association incorporated under that Act, it was not empowered to register any such transfer or accept the MDA's application. Nor, ASIC argued, was the MDA's suggested construction of the relevant legislative provisions supported by either common law principles or the legislative history of those provisions.Part 5B.1 of the Corporations Act (consisting of sections 601BA to 601BS inclusive) deals with the registration as a company of a body corporate that already exists but is not a company. In particular, section 601BC(8) of the Corporations Act provides:'The application must be accompanied by evidence that under the law of the body’s place of origin:(d) the transfer of the body's incorporation is authorised; (e) the body has complied with the requirements (if any) of that law for the transfer of its incorporation; and(f) if those requirements do not include consent to the transfer by the members of the body – the members:(i) have consented to the transfer by a resolution that has been passed at a meeting by at least 75% of the votes cast by members entitled to vote on the resolution and(ii) were given at least 21 days notice of the meeting or the proposed resolution.'Significantly, and unlike equivalent legislation in certain other States and Territories, the WA Associations Act is silent with respect to what is required in order for a transfer of incorporation to the Corporations Act to be effected.Accepting the MDA's reasoning, the trial judge concluded that such a transfer of incorporation could be, and was, implicitly authorised by the Western Australian legislation. While accepting that section 601BC(8) did impose mandatory obligations on the MDA to provide evidence that the transfer was authorised, her Honour was satisfied that this evidence could take the form of member approval. As noted by Conti J on appeal, her Honour considered that the term 'authorised' within section 601BC(8)(d) necessarily implied 'authority of the members of the relevant association'.**(c) Decision** The members of the Full Court delivered 3 separate judgements. While Finn J agreed with the conclusions of the others, both Emmett and Conti JJ undertook their own individual analysis. After detailed consideration of the legislative background to section 601BC(8), both reached the conclusion that the trial judge's construction of this particular provision, together with its resulting broader effect, could not be sustained.Acknowledging that section 601BC(8)(d) was silent as to whom the transfer of the body's incorporation needed to be authorised by, both Emmett and Conti JJ concluded that this authorisation must necessarily be 'positively' provided by the law of the State of Western Australia, and not merely by the members of the MDA. In reaching this conclusion, both judges placed particular reliance on the fact that any finding to the contrary would have resulted in no practical significance being placed upon the legislature’s use of the word 'must' in relation to section 601BC(8)(d). Other factors bearing upon the Full Court's decision to grant the appeal included:* the inconsistency between the implications of the MDA's and trial judge's construction of sections 601BC(8)(d) and (e) – that is, not requiring de-registration within the body's original place of origin – and the express use of the term 'transfer' within those sections;
* if de-registration is not effected, the potential difficulties likely to arise if it became necessary to resolve conflict between inconsistent provisions of competing regulatory regimes; and
* the existence of established common law authority to the effect that, where a purported change of the place of incorporation has occurred, the common law conflict of law principle will nevertheless only recognise that transfer if it was permitted by both the original and new place of incorporation: Banco de Bilbao v Sancha [1938] 2 KB 177 at 194-195.

Emmett and Conti JJ also both contrasted the absence of any mechanism for obtaining legislative authorisation of such a transfer under the WA Associations Act, against the conditional ministerial approval expressly required in order to effect a transfer in place of registration under NSW's [Associations Incorporation Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3727" \t "Default). In doing so, it seems both judges signalled the inability of ASIC to accept future applications from associations incorporated under the WA Associations Act, until such time as legislative reforms are implemented so as to provide a mechanism for obtaining the requisite legislative authorisation.**4.7 Confirmation that special benefits and forcible taking premiums are not used to determine the fair value of minority shares in compulsory acquisitions** (By Sarah Le Breton, Mallesons Stephen Jaques)Winpar Holdings Limited v Austrim Nylex Limited [2005] VSCA 211, Supreme Court of Victoria, Court of Appeal, Charles, Buchannan and Eames, JJ A, 25 August 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/august/2005vsca211.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2005/august/2005vsca211.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The Court upheld the decision of Warren J at first instance concluding that Austrim Nylex Limited ("Austrim") had offered fair value for the National Consolidated Limited ("NCL") minority shares and approving the compulsory acquisition.**(b) Facts** The plaintiff (now the respondent) Austrim, made an offer to acquire compulsorily the remaining minority units in NCL, in which Austrim held over 90 per cent of the issued shares.Austrim sought Court approval for the compulsory acquisition under section 664F(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), the ("Act"). At first instance the Court approved the compulsory acquisition.The defendants (eleven of the twenty minority shareholders), appealed on the following basis: (a) fair value under section 667C should include:(i) a premium either for forcible taking or gaining 100 per cent control, and to this extent allowances should be made for synergies to be achieved by the transaction;(ii) the value of special benefits to the compulsory acquirer that will flow from the transaction; and(b) the constitutional validity of Part 6A.2 of the Act was also challenged on the basis that it provides for acquisitions on terms that are unjust.**(c) Decision** The appeal was unanimously dismissed.The Court accepted the views of Warren J at first instance and upheld her Honour's interpretation that fair value under section 667C is to be determined by an assessment of the value of the company as a whole. Section 667C does not require the expert to take into account any special value that 100 per cent ownership may achieve because the associated factors do not form part of the company as a whole. Such special benefits will only ever exist after the transaction has taken place. Her Honour found that the relevant time for determining fair value is at the time the compulsory acquisition notice is issued.The decisions of Pauls v Dwyer (2001) 19 ACLC 959, Energex Limited v Elkington 47 ACSR 422 and Capricorn Diamonds (2002) VR 61 were followed and applied in the following findings:* that fair value under section 667C should not include a premium for forcible taking or gaining 100 per cent control;
* that it is impermissible in determining fair value to make any allowance for synergies to be achieved by the acquisition; and
* that it is impermissible in determining fair value to take into account special benefits deriving from full ownership.

The Court further relied upon the decisions in Energex v Elkington and Pauls Limited v Dwyer to reject the appellants' challenge to the constitutionality of Part 6A.2 of the Act. The Court upheld the view that Part 6A.2 does not provide for acquisition on terms which are other than just, and that section 1350 of the Act constitutes an ultimate safeguard against any invalidity of Part 6A.2.**4.8 Ineffective directors: To wind up or not to wind up? That is the just and equitable question** (Bronwyn Thomas, Blake Dawson Waldron)The Official Trustee in Bankruptcy v Buffier [2005] NSWSC 839, New South Wales Supreme Court, Campbell J, 25 August 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc839.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc839.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**The plaintiff, the Official Trustee in Bankruptcy (the "Official Trustee"), applied to the court to have the second defendant, James Court & Associates Pty Ltd ("JC & A Pty Ltd"), wound up as permitted under s 461(k) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), on the basis that it would be just and equitable to do so. The plaintiff argued that the winding up was justified on the basis that the current and previous directors had not been validly appointed and as such, the company was devoid of an effective management structure. In the alternative, it was argued that the actions of the current director meant that the sole shareholder had no confidence in the management of the company. The court upheld both grounds of argument and ordered that the operations of JC & A Pty Ltd be wound up. **(b) Facts** JC & A Pty Ltd was incorporated in Queensland on 29 June 1994 and until recently, Brian Leslie Joseph Buffier ("Mr B Buffier") held all the issued share capital in JC & A Pty Ltd. Mr B Buffier was the subject of a sequestration order on 28 February 2000 and consequently, the Official Trustee in Bankruptcy (the "Official Trustee") became trustee of his estate. On 29 June 2005, White J directed that Mr B Buffier register the Official Trustee as holder of the issued share capital in JC & A Pty Ltd, and the order was duly complied with. Mr Martyn and Mr Gibson were both directors of JC & A Pty Ltd from 21 April 1995 to 11 April 2001. Upon their resignation on 11 April 2001 they purported to appoint Mr B Buffier as the sole director and secretary of JC & A Pty Ltd. However, Mr B Buffier had been declared bankrupt in February 2000 (and was to remain an undischarged bankrupt until 1 February 2006). In addition, ASIC had issued a prohibition order against him on 27 January 1999, which restricted Mr B Buffier from being appointed a company director for a period of five years. On 31 October 2001, Mr B Buffier (presumably) purported to appoint Mr Laughlin as a director of JC & A Pty Ltd, and on 1 December 2003, resigned his "directorship". An ASIC search revealed that on that same day, Mr Service was appointed as a director of JC & A Pty Ltd, however no evidence was tendered to the court of how, or by whom, either appointment was made. Between 8 October 2001 and 17 September 2004, Mr B Buffier effected a number of commercial transactions, ostensibly on the behalf of JC & A Pty Ltd and was assisted in his dealings, on at least one occasion, by Mr Service.The Official Trustee, as the sole shareholder of JC & A Pty Ltd, made an application to the court to have the company wound up pursuant to s 461(k) of the Act, the just and equitable ground. The Official Trustee argued that the winding up was justified on the basis that Mr B Buffier, Mr Laughlin and Mr Service had not been validly appointed as directors and therefore the company lacked an effective management structure. In the alternative it was argued that as a sole shareholder, the Official Trustee had no confidence in the ability of the current director and secretary, Mr Service, to continue to manage the company.**(c) Decision** **(i) Validity of appointment of Mr B Buffier**Campbell J held that as Mr B Buffier was an undischarged bankrupt he was prohibited from managing a corporation under s 206B(3) of the Act. Consequently, Mr B Buffier had not been validly appointed as a director of JC & A Pty Ltd in April 2001.**(ii) Validity of appointment under s 201M**Counsel for JC & A Pty Ltd sought to argue that, even if Mr B Buffier had not been validly appointed as a director, the subsequent appointments of Mr Laughlin and Mr Service were valid by virtue of the operation of s 201M of the Act which provides that "an act done by a director is effective even if their appointment, or the continuance of their appointment, is invalid because the company or director did not comply with the company's constitution (if any) or any provision of this [Act]". Counsel submitted that Mr B Buffier was a "director" by virtue of the extended definition of what constitutes "director" in s 9 (b)(i) and (ii) of the Corporations Act. Counsel argued that the fact that Mr B Buffier had acted in the capacity of a director was sufficient to classify him as such for the purposes of s 201M. The court rejected this argument on the basis that s 201M only applies to those acts which "must be performed by a director to be effective". As no evidence was presented to the court as to how either Mr Laughlin or Mr Service were, or were required to be, appointed, the court was not prepared to assume that such appointments were required to be made by a director, or by extension that Mr B Buffier was the "director" who purported to make those appointments. Therefore, it was held that s 201M did not operate to validate the appointment of either individual.**(iii) Validity of appointment under s 201F**Alternatively, counsel for JC & A Pty Ltd submitted that the operation of s 201F of the Act, which provides that "the director of a proprietary company who is its only director and only shareholder may appoint another director by recording the appointment and signing the record", was sufficient to cure the defective appointments. Whilst the court accepted that Mr B Buffier was the sole shareholder at the relevant time (as opposed to the Official Trustee), it did not accept that the extended definition of "director" as outlined above, applied to s 201F. In this context, the circumstances were such that a "contrary intention appear[ed]" which was sufficient to displace the operation of b(i) and b(ii). Consequently, Mr B Buffier was not a "director" for the purposes of s 201F, and the section could not operate to validate the appointments. Campbell J held that subsection b(ii), which classifies an individual as a director if "the directors of the company…are accustomed to act in accordance with the [individual's] instructions or wishes", "proceeds on the assumption that there are directors of a company, who are different people to the person in accordance with whose instructions or wishes they are accustomed to act". In this case, as Mr B Buffier was the only individual making decisions about the company, the subsection was inapplicable.In relation to b(i), Campbell J made the point that it was inconceivable that this subsection would apply to s 201F when one read the definition in the context of s 201F(3). Section 201F(3) applies where an individual, who is the sole shareholder and director of a company, becomes disqualified from his directorship by reason of bankruptcy. Upon disqualification, the trustee in bankruptcy may appoint a person as the director of the company. Campbell J contended, "I cannot conceive that in that situation Parliament intended that, not only would the trustee have power to appoint a replacement director but as well the person who had become bankrupt could, by flouting the disqualification in s 206B(3) come to acquire the capacity also to appoint his own replacement". On that basis, Campbell J held that "[as] JC & A Pty Ltd is not subject to any valid internal management, and the sole shareholder wishes to have the company wound up, a clear case for winding up the company on the just and equitable ground is made out". Importantly, Campbell J noted that whilst this fact situation fell into a well established just and equitable "category", the power of the court to wind up companies under this ground was not confined to a number of "pre-existing categories".**(iv) Loss of confidence in the ability of Mr Service to manage the company**In the alternative, counsel for the Official Trustee argued that the court would be justified in winding up the company on the basis that it was just and equitable to do so, given that the sole shareholder had no confidence in the management of the company. In considering whether there were sufficient factual circumstances for this ground to be made out, Campbell J noted previous case law which clearly establishes that "winding up on the just and equitable ground can occur where there are serious grounds for lack of confidence in the directors of companies in the conduct and management of the affairs of the company…its clientele, or its shareholders". Campbell J held that the recent commercial dealings undertaken on behalf of the company did not appear calculated to further the interests of the company. As such, the Official Trustee, as the sole shareholder, was justified in his lack of confidence in the management of the company and it was held by the court that this was also an appropriate situation in which to wind up the company on the just and equitable ground. Orders to that effect, were made accordingly.**4.9 Stapled security merger – consideration of Gambotto and other principles** (By Alex Chernishev, solicitor, Clayton Utz)Australand Holdings Limited [2005] NSWSC 835, New South Wales Supreme Court, Barrett J, 18 August 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc835.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2005/august/2005nswsc835.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case involved a merger proposal involving stapling of units of two managed investment schemes to existing stapled securities each consisting of a share in a company and a unit in a managed investment scheme. The company involved in the proposed merger sought an order under section 411(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that a meeting of its ordinary members be convened for the purpose of considering the scheme of arrangement proposed to be made between that company and its ordinary shareholders. At the same time, the responsible entities of the three managed investment schemes involved in the proposed merger sought judicial advice under section 63 of the [Trustee Act 1925 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default) to the effect that each responsible entity was justified in convening a meeting of members of each particular scheme for the purpose of considering resolutions in order to bring the resolution into effect. The court questioned whether the Gambotto principle, dealing with fraud on the minority, applied to the expropriation of units of a unit trust or managed investment scheme as distinct from shares in a company. The court considered that, even if the Gambotto principle was capable of applying in the context of unit trusts or managed investment schemes, the facts of this case indicated that the expropriation of units was not a fraud on the minority. Firstly, the court found the Gambotto principle did not apply as there was no discrimination in this case: the affected group as a whole would decide by way of special resolution under section 601GC whether to decline or succumb to the expropriation. Secondly, the Gambotto principle was inapplicable as the mechanism adopted for the expropriation of units in this proposed merger indicated there was no fraud on the minority. The court left it open as to whether it was possible or permissible for a trustee of one trust to contract with itself as trustee of another trust. Lastly, the court held that even though a stapled security may itself be quoted on a financial market, a unit or interest in a managed investment scheme that makes up a part of that stapled security cannot be subject to "quotation", and thus is not "quoted on a prescribed financial market" for the purposes of section 253F. **(b) Facts**The proposed merger would involve stapling units of two managed investment schemes to an existing stapled security. The existing stapled security consisted of a share in a company, Australand Holdings Limited ("AHL"), and a unit of a managed investment scheme, the Australand Property Trust ("APT"). Units were "stapled" together in such a way that a share in the company and a unit of the trust together constitute a tradable commodity and neither component could be separately traded. Australand Wholesale Property Trust No 4 ("AWPT4") and Australand Wholesale Property Trust No 5 ("AWPT5") were the two managed investment schemes that were the subject of the proposed merger with the stapled security. The responsible entity of both AWPT4 and AWPT5 was Australand Wholesale Investment Limited ("AWIL"). Hence, if the merger were to proceed the stapled security would have four components - a share in AHL and units in APT, AWPT4 and AWPT5. In this case, AWPT4 and AWPT5 both had existing unit holders. Hence an essential part of the proposal involved the compulsory buyout by AWIL, as responsible entity of both trusts, of all the existing units of each trust. In order to implement this buyout AWIL agreed to put special resolutions to the unit holders of AWPT4 and AWPT5 under section 601GC which, if passed, would require every pre-existing unit holder of AWPT4 and AWPT5 to submit to the redemption of the holder's units in return for a specified cash price. Hence, unit holders of AWPT4 and AWPT5 would have to pass the necessary resolutions in order for the trusts to participate in the merger. **(c) Decision**The court made an order under section 411(1) convening a meeting of shareholders to consider the proposed merger. The court also gave judicial advice to the trustees of the three trusts to the effect that they are justified in progressing the matter to a point where it was submitted to unit holders for consideration. The court stressed that at this first stage it would not decline the orders sought unless there was some feature which clearly precluded a positive result if the matter were to come back to it for further approval.**(i) Does the Gambotto principle apply?**In this case, AWIL was obliged as responsible entity of both AWPT4 and AWPT5 to put into effect procedures made available by the constitution of each of AWPT4 and AWPT5 to require every pre-existing holder of units of AWPT4 and AWPT5 to submit to redemption of the holder's units in return for a specific cash price. The court acknowledged that this had the hallmarks of a compulsory acquisition at the level of AWPT4 and AWPT5. As a result, the court considered whether the principle regarding compulsory acquisition set out by the High Court in Gambotto v WCP Limited (1995) 182 CLR 432 was applicable. In Gambotto it was held that the exercise of the power to alter the constitution of a company to allow a majority shareholder to compel sale to it of the shares of the minority is only permitted if the power is exercised for a proper purpose (ie, to secure the company from significant harm or detriment) and the exercise of the power is not oppressive of minority shareholders.The court referred to Cachia v Westpac Financial Services Ltd (2000) 170 ALR 65 in which Hely J expressed the view that the Gambotto principle was a principle of company law and did not extend to interests under a unit trust. As such, the court questioned whether the Gambotto principle applied to the expropriation of units in a unit trust or managed investment scheme as distinct from shares in a company.The court stated that even if the Gambotto principle were to apply to unit trusts and managed investment schemes there were two factors in this case which indicated the inapplicability of the Gambotto principle. The first factor was that on the facts of this case there was no discrimination in which a pre-existing and distinct majority was using its power to dispense with or dispossess a minority. In this case, the decision makers with respect to the expropriation of units of AWPT4 and AWPT5 were in each case the general body of unit holders who would decide the matter by way of a special resolution under section 601GC. The second factor which suggested that the Gambotto principle was not applicable was the mechanism by which this expropriation was to be conducted. In this case, even if the unit holders did pass the necessary resolutions the responsible entity of AWPT4 and AWPT5 would have to approach the court a second time for judicial advice. That step of seeking judicial advice was incorporated into the proposals in the form of a condition in such a way that, unless positive advice was given to the responsible entity of AWPT4 and AWPT5 at that point, the scheme of arrangement under section 411 would not take effect and therefore the proposal would not go ahead. Ultimately, the court stated that it did not have to come to any final or conclusive view on the Gambotto matters at this stage in proceedings. The court held that the merger proposal as it affected AWPT4 and AWPT5 appeared sufficiently cogent and unexceptionable to allow it to go to the meeting of the members of those trusts for decision. **(ii) Whether a trustee of one trust can contract with itself as a trustee of another trust**In order to implement this merger proposal the responsible entity for AWPT4 was to contract with the responsible entity of AWPT5. Since AWIL was the responsible entity of both AWPT4 and AWPT5 the issue arose as to whether this was permissible. The court, having regard to the authority of Gulland v Federal Commissioner of Taxation (1983) 72 FLR 362, expressed the tentative view that it is possible and permissible for a trustee of one trust to contract with itself as trustee of another trust, subject to the issues of conflict of duty and interest. However, the court did not come to a conclusive view in regards to this question as there were other parties in this proposed merger and hence other stapling deeds which would survive even if the stapling deeds between AWPT4 and AWPT5 were invalid. **(iii) Voting rights attached to the existing securities**The third issue addressed by the court was the valuation of the managed investment scheme component of a stapled security under section 253F of the Corporations Act (i.e. the valuation of units in the APT). This issue was relevant as the voting strength of members of a managed investment scheme is determined by the valuation of their interests. In this case, the court held that, even though the stapled security was quoted on a financial market, units in APT were not in themselves quoted securities. This was due to the fact that units in APT could not be subject to quotation separate from the APT/AHL stapled security. As a result units in APT were not "quoted on a prescribed financial market" for the purposes of 253F. The court therefore decided that the default mechanism in paragraph (c) of section 253F should be taken to apply when valuing the APT units forming part of the existing stapled security. Hence, the APT units should be valued at the amount the responsible entity determines in writing to be the price that a willing but not anxious buyer would pay for the units if they were sold on the business day immediately before the day on which the poll was taken.**4.10 Injunction granted to prevent a solicitor from acting** (By Simon Martin, Phillips Fox)Alpha Wealth Financial Services Pty Ltd v Frankland Rover Olive Company Ltd [2005] WASC 189, Supreme Court of Western Australia, Hasluck J, 18 August 2005 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/august/2005wasc189.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2005/august/2005wasc189.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**Mr Martin Bennett ('Bennett') as legal advisor to the plaintiffs was previously involved as a legal advisor and a director of Southern Wine Corporation Ltd ('SWC') which carried on a managed investment scheme ('the Scheme'). The plaintiffs were all members of the Scheme. Over a period of several years SWC sought capital contributions from the Scheme's members so that the Scheme could continue to operate. SWC was then replaced by Frankland River Olive Company Ltd ('the defendant') and a dispute arose over whether these payments were lawfully payable. Bennett then proceeded to represent members of SWC in this dispute. The defendant successfully obtained an injunction preventing Bennett from representing the members of the Scheme.**(b) Facts**The defendant applied for an injunction restraining the plaintiffs from retaining Bennett and Bennett & Co (the law firm with which Bennett was associated) from continuing to act for the plaintiffs. Bennett was formerly a director of SWC which carried on the Scheme, known as Preston Vale Managed Investment Scheme. Bennett & Co were involved in the preparation of the legal documents for the establishment and continued operation of this Scheme. In mid-2002, Bennett in his capacity as Chairman of SWC, issued a letter to SWC's members in respect of a meeting to consider a resolution to require the making of additional financial contributions to the Scheme to prevent the Scheme from being wound up. However, the resolutions were not passed and on 30 July 2002 administrators were appointed to SWC. On or about 23 January 2003, Mr Bennett as a director of SWC called another meeting of members seeking additional contributions. On 28 February 2003 liquidators were appointed to SWC. A meeting of Scheme members was held on 21 July 2003 and further resolutions were passed increasing the licence and management fees payable by members of the Scheme and for the replacement of SWC by the defendant as the new responsible entity of the Scheme. The defendant then applied for an injunction restraining the plaintiffs from retaining Bennett and Bennett and Co from acting for the plaintiffs over a dispute regarding the payment of fees which were levied to the Scheme's members by SWC while Bennett was a director.**(c) Decision** The defendant submitted that Bennett's actions as a director of SWC in attempting to gain approval from members for additional contributions showed that he was aware of the financial difficulties the Scheme was facing. To then act for those plaintiff members who were seeking the return of these additional contributions was, it was argued, subversive to the interests of justice. The defendant submitted that the question for the Court was whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice required Bennett and Bennett & Co to be restrained from continuing to act for the plaintiffs. The defendant argued that is important that public confidence in the judicial process be maintained and that not only must justice be done, but it must be seen to be done. The general right of the plaintiffs to be represented by the solicitor of their choice must give way to the overriding principle of preserving the integrity of the judicial process.The defendant further contended that a reasonably informed member of the public would find it subversive to the administration of justice that a person who helped set up the Scheme was now acting for clients who were seeking to potentially destroy the Scheme. Such an observer would conclude that by reason of Bennett's personal involvement as director of SWC and his involvement in the preparation of legal documents for the Scheme, he and Bennett & Co should not be permitted to continue to act for the plaintiffs. Further, the defendant argued that Bennett as a director of and legal adviser to the former responsible entity owed continuing fiduciary duties to the Scheme and this should prevent him being able to act for several plaintiff members whose action was arguably hostile towards the interests of the current members of the Scheme as a whole.The Court noted that the Scheme's constituent documents made provision for payment of additional fees by its members and Bennett had played an active role both as a director and as a legal adviser in the imposition of such fees. His Honour also noted that case law demonstrated that Bennett had an overriding duty of loyalty to the Scheme's members. His Honour was of the opinion that a lawyer appearing to 'change sides' is subversive to the requirement that justice be seen to be done. In this particular situation, a reasonable observer would principally be influenced by various factors including:* the fact that the Scheme allowed for the recovery of additional fees from members;
* the Scheme remained essentially the same;
* Bennett was associated with SWC when it formed a view that it was necessary to raise additional fees from members;
* Bennett then assisted a faction within the Scheme to take steps to prevent recovery of those fees, which if successful could prejudice the future of the entire Scheme.

His Honour held that Bennett and Bennett & Co as advisors were previously intimately connected with the Scheme and now ought not play any part in any attempt to obstruct its operations, including the recovery of additional fees. Further, Bennett was placed in an untenable position of conflict and therefore ought not to be allowed to take a hostile position in relation to the continuance of the Scheme. In addition, an informed observer would conclude that Bennett and his law firm should not be allowed to assist a case which might frustrate or have the appearance of frustrating the Scheme which he and his law firm helped create.Accordingly his Honour granted a restraining order to prevent Bennett and his law firm from continuing to act for the plaintiffs.**4.11 Meaning of liquidator's responsibility to deal with proof of debt within 28 days** (By Justin Fox and David Baird, Corrs Chambers Westgarth)Starmaker (No 51) Pty Ltd v Mawson KLM Holdings Pty Ltd [2005] SASC 313, Supreme Court of South Australia, Layton J, 17 August 2005The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/august/2005sasc313.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/august/2005sasc313.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This was an appeal from a decision of a Master of the South Australian Supreme Court rejecting a direction sought by Starmaker (No 51) Pty Ltd ("Starmaker") that the liquidator of Mawson KLM Holdings Pty Ltd ("Mawson") admit Starmaker’s proof of debt.Starmaker sought (among other things), to set aside the liquidator's decision to reject Starmaker's proof of debt, on the basis that the liquidator failed to make that decision within 28 days after Starmaker's written request, as the liquidator is required to do under regulation 5.6.53(1) of the [Corporations Regulations 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) ("Regulations").The court found that a failure by a liquidator to either admit, reject or require further evidence in support of a proof of debt within the time frame permitted by regulation 5.6.53, will not render a subsequent decision invalid or limit the liquidator’s jurisdiction to make that decision.**(b) Facts**Starmaker obtained an order for costs against Mawson. Mawson was subsequently wound up on the application of Starmaker. Starmaker then lodged a proof of debt for the amount of costs and requested that the liquidator deal with the proof of debt within 28 days pursuant to regulation 5.6.53(1)(a). The liquidator did not deal with the proof of debt within 28 days and Starmaker subsequently filed an application with the Court to have the proof of debt admitted (pursuant to regulation 5.6.53(2) of the Regulations). The liquidator later rejected the proof of debt, on the grounds that Starmaker was indebted to Mawson for a sum far exceeding the amount claimed by Starmaker in its proof of debt (but yet to be quantified). That issue was the subject of separate proceedings.**(c) Decision**Regulations 5.6.53(1) and (2) provide as follows:(1) A liquidator must, within: (a) 28 days after receiving a request in writing from a creditor to do so; or (b) if ASIC allows — any further period in writing;(c) admit all or part of the formal proof of debt or claim submitted by the creditor; (d) reject all or part of the formal proof of debt or claim; or (e) require further evidence in support of it. (2) If the liquidator does not deal with a request under sub regulation (1) in accordance with that sub regulation, the creditor who submitted the proof may apply to the court for a decision in respect of it.Counsel for Starmaker argued that since the liquidator failed to deal with the proof of debt filed by Starmaker within 28 days, the liquidator’s subsequent rejection of the proof of debt was invalid. Specifically, Starmaker argued that pursuant to sub regulation (2), if a liquidator failed to comply with its duties, it was then for the Court alone to make the decision in relation to the proof of debt and the liquidator no longer has jurisdiction to do so.Layton J did not find support for these propositions in the authorities and held that neither the Act nor the rules prevent the liquidator subsequently, either admitting, rejecting or requiring further evidence in support of the formal proof of debt. Layton J held that Starmaker's suggested interpretation of the Regulations would produce absurd results in that under such interpretation, a liquidator could not admit a proof of debt after the 28 days had elapsed (as such a decision could, on Starmaker's argument, only be made by a court).Her Honour held that the court's jurisdiction is only to make a decision where the liquidator has failed to do so. If the liquidator makes a decision (even after the 28 day period), the Court cannot provide a useful primary remedy, as the decision in relation to the Notice of Dispute has been made.Layton J noted that if a liquidator happens to make a determination after an application by a creditor under sub regulation 5.6.53(2), there is the potential for an order for costs. The creditor may also appeal to the Court against a rejection by the liquidator pursuant to regulation 5.6.54 (even if such rejection is made late and not in accordance with sub regulation (1)). |
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