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The next issue will be published in February 2005. I would like to take this opportunity to thank the supporters of the Bulletin - ASIC, ASX and, in particular, our sponsoring law firms listed above. I wish all of our readers an enjoyable holiday season.Professor Ian RamsayEditor |
| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Compliance with ASX corporate governance guidelines** Corporate Australia is struggling to come to grips with the ASX Corporate Governance Council’s guidelines (ASXCGCG), a new survey released on 16 December 2004 of the Top 200 companies has found, with only two per centof respondents believing that the guidelines will improve their organisation’s performance even though complying with them has increased costs by an average of 11 per cent. More worrying perhaps is that 20 per cent of companies chose to comply rather than explain a departure from any of the recommendations, even though they believed their original practice was preferable. According to Chartered Secretaries Australia’s (CSA) survey, while 43 per cent of respondents believe that the guidelines will improve their governance standards 57 per cent do not believe that the guidelines will improve their organisation’s performance. A further 47 per cent think they could ‘possibly’ improve performance. 60 per cent of respondents were concerned that a ‘why not’ explanation could attract unfavourable public commentary or investor reaction while an overwhelming 96 per cent are concerned that so-called corporate governance experts may adopt a checklistapproach to assessing responses to the ASXCGCG. The survey is on the [CSA website](http://www.csaust.com/%22%20%5Ct%20%22_new).**1.2 US Accounting Board proposes rules concerning independence, tax services and contingent fees** On 14 December 2004, the US Public Company Accounting Oversight Board voted unanimously to propose for public comment certain ethics and independence rules concerning independence, tax services, and contingent fees. **(a) Background** Section 103(a) of the [Sarbanes-Oxley Act of 2002](http://www.pcaobus.org/About_Us/Sarbanes_Oxley_Act_of_2002.pdf%22%20%5Ct%20%22_new) directs the Board to establish "ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports." Moreover, Section 103(b) of the Act directs the Board to establish rules on auditor independence "as may be necessary or appropriate in the public interest or for the protection of investors to implement or as authorized under Title II of the Act." In early 2003, the Securities and Exchange Commission adopted new independence rules in order to implement Title II of the Act. Neither the Act nor the SEC's 2003 independence rules prohibit tax services, as long as the services are pre-approved by the company's audit committee and do not fall into one of the categories of expressly prohibited services. Since the SEC issued its new rules, two types of tax services have raised serious questions from investors, auditors, regulators, and others relating to the ethics and independence of accounting firms that provide both auditing and tax services. First, the Internal Revenue Service and the U.S. Department of Justice have brought a number of cases against accounting firms in connection with those firms' marketing of tax shelter products and, specifically, those firms' alleged failures to register or comply with list maintenance requirements relating to, their tax shelter products. In addition, in November 2003 the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs held hearings on tax shelters in which the sub-committee elicited testimony that described certain potentially abusive tax shelter products marketed through cold-call selling techniques by accounting firms and others. Second, audit firms have been criticized for providing tax services including tax shelter products to senior executives of public company audit clients. Some have questioned whether an auditor's provision of such services could lead to conflicts of interest. Over the last year, the Board has evaluated whether an auditor's provision of tax services or any class of tax services to an audit client impairs the auditor's independence from that audit client in fact or appearance. As part of this evaluation, the Board held a public roundtable discussion with individuals representing a variety of viewpoints including investors, auditors, managers of public companies, governmental officials and others. A transcript of the roundtable is available on the Board's website at: [http://www.pcaobus.org/News\_and\_Events/News/2004-12-14.asp](http://www.pcaobus.org/News_and_Events/News/2004-12-14.asp%22%20%5Ct%20%22_new) **(b) Proposed ethics and independence rules** The Board’s proposed rules fall into three areas. First, the proposed rules would identify three circumstances in which the provision of tax services impairs an auditor's independence:          Proposed Rule 3521 would treat registered public accounting firms as not independent of their audit clients if they enter into contingent fee arrangements with those clients.          Proposed Rule 3522(a) and (b) would treat a registered public accounting firm as not independent from an audit client if the firm provides services related to planning or opining on the tax consequences of a transaction that is a listed or confidential transaction under Treasury regulations. In addition, proposed Rule 3522(c) includes a provision that would treat a registered public accounting firm as not independent if the firm provides services related to planning or opining on a transaction that is based on an aggressive interpretation of applicable tax laws and regulations.          Proposed Rule 3523 would set a new requirement to treat a registered public accounting firm as not independent if the firm provides tax services to officers in a financial reporting oversight role of an audit client.Second, the proposed rules would further implement the Act's pre-approval requirement by strengthening the auditor's responsibilities in connection with seeking audit committee pre-approval of tax services. Specifically, proposed Rule 3524 would require a registered public accounting firm that seeks such pre-approval to supply the audit committee with certain information; discuss with the audit committee the potential effects of the services on the firm's independence, and to document the substance of that discussion. Third, the rules lay a foundation for the Board's independence rules. Specifically, proposed Rule 3502 would codify, in an ethics rule, the principle that persons associated with a registered public accounting firm should not cause the firm to violate relevant laws, rules, and professional standards due to an act or omission the person knew or should have known would contribute to such violation. Proposed Rule 3520 would include a general obligation requiring registered public accounting firms to be independent of their audit clients throughout the audit and professional engagement period. Finally, the proposed rules also include several definitions that would be integral to the operation of the rules. **(c) Other tax services**The Board’s rule-making release discusses other types of tax services that the Board’s proposed rules would not prohibit, along with the Board's reasoning with respect to these services. These services include routine tax return preparation and tax compliance, general tax planning and advice, international assignment tax services and employee personal tax services. The Board will consider comments before adopting the rules and will submit the proposals to the SEC for approval pursuant to Section 107 of the Act. The proposals are available on the [Board's website](http://www.pcaobus.org/%22%20%5Ct%20%22_new).**1.3 Strengthened standard for professional independence of Australian auditors**As a result of changes under CLERP 9 and the completion of the exposure draft for the revisedProfessional Statement F1 – Professional Independence*,* requirements for audit independence have changed according to a media release issued by CPA Australia on 10 December 2004.  Proposed changes to the statement have been approved by the Board Professional Standards Committee and the revised Professional Statement F1 will be effective from 1 January 2005.The new requirements include:         Reduction in the time period for rotation of lead engagement and  audit review partners from seven to five years.          Written independence declaration by the auditor for each half and full year financial report.          Additional restrictions on the financial interests, loans and borrowings between a firm / partner / member of the audit team, their immediate family and audit clients.          Limitation of consultancy arrangements.          Limitation on auditors being employed by audit clientsThe revised Professional Statement F1 provides guidelines on how to identify, assess and manage risk to professional independence, specifically in the provision of assurance services. It also addresses where members are obliged to reject and cease engagement with clients.Members of CPA Australia and the ICCA are required to comply with Professional Statement F1. The standard, tailored to reflect Australian community expectations, is based on the standard agreed in November 2001 by representatives of 120 nations who make up the International Federation of Accountants (IFAC).These measures not only strengthen existing guidelines and reflect international best practices, they also take the lead on the implementation of a number of key recommendations outlined in the Ramsay Report on Independence of Australian Company Auditors.For further information on Professional Statement F1 visit the CPA website at:[http://www.cpaaustralia.com.au/cps/rde/xchg/cpa/hs.xsl/1017\_12091\_ENA\_HTML.htm](http://www.cpaaustralia.com.au/cps/rde/xchg/cpa/hs.xsl/1017_12091_ENA_HTML.htm%22%20%5Ct%20%22_new) **1.4 ABI publishes updated version of guidelines on executive remuneration**On 7 December 2004 the Association of British Insurers (ABI) published an updated version of its guidelines on executive remuneration.  Reviewed annually, the guidelines are part of a series of initiatives developed to help ABI members in their corporate governance work, including responsible exercise of their voting rights. The newly revised guidelines take into account developments over the past year, as well as the forthcoming introduction of new International Accounting Standards.  The effect of the main amendments is to introduce:         A clarification of the view that chairmen should not receive share incentives geared to performance of the share price.         A call for greater transparency with regard to bonuses.         Measures to discourage windfall payments to executives on change of control of a company.         A recommendation that companies accrue dividends on long term incentive plans, which would be paid to the recipients once the shares involved vest.        A recommendation that companies publish in advance the approach they will take to adjusting performance hurdles after the introduction of new accounting standards, which may make reporting earnings more volatile.Further information is available on the [ABI website](http://www.abi.org.uk" \t "_new).**1.5 Task force of Securities Regulators from major markets agrees on Code of Conduct Fundamentals for Credit Rating Agencies**On 3 December 2004 a Chairmen’s Task Force of the Technical Committee of the International Organization of Securities Commissions (IOSCO) completed deliberations on a code of conduct for credit rating agencies. Called the “Fundamentals of a Code of Conduct for Credit Rating Agencies,” the IOSCO document describes provisions that rating agencies should incorporate into their own codes of conduct to deal with issues such as how rating agencies should avoid or mitigate potential conflicts of interest, improve the transparency of the ratings process, and protect their integrity and independence while dealing fairly with issuers, investors and other market participants. The CRA Code Fundamentals are designed to be used by rating agencies of all sizes and business models, operating in all jurisdictions. The Task Force believes that the Code Fundamentals offer a global, converged approach to addressing a range of issues of concern to investors, issuers, governments and rating agencies alike.At the heart of the Code Fundamentals is a disclosure mechanism to monitor compliance. Rating agencies must disclose how they implement the various provisions of the Code Fundamentals. This approach offers a degree of necessary flexibility to rating agencies, which vary considerably in size, business model, and development of the markets in which they operate. The Task Force expects CRAs to give full effect to the Code Fundamentals. At the same time, investors, issuers, regulators and other market participants will be able to assess in each case whether a given rating agency has implemented the Code Fundamentals to their satisfaction, and react accordingly. The Task Force believes this approach will help advance investor protection and the fairness and transparency of global capital markets while fostering competition among rating agencies.The IOSCO Technical Committee plans to publish the Code Fundamentals shortly once its constituent members formally approve the document. The Task Force developed the Code Fundamentals in consultation with the Basel Committee of Banking Supervisors and the International Association of Insurance Supervisors, as banking, securities and insurance regulators in a number of countries use credit ratings in certain aspects of financial regulation. On 6 October 2004 the Task Force published a consultation paper which sought comment from the public on an earlier draft of the Code Fundamentals. IOSCO received 39 comment letters from issuers, rating agencies, industry associations, financial institutions and individual investors from around the world. The CRA Code Fundamentals were developed out of IOSCO’s Principles Regarding the Activities of Credit Rating Agencies that the organization published in October 2003. These Principles described the broad objectives that regulators, rating agencies and other market participants should pursue in order to promote the quality and integrity of the rating process, counter possible conflicts of interest and protect the confidentiality of certain types of information. The Code Fundamentals, by contrast, offer specific measures that credit rating agencies should adopt to achieve the objectives laid out in the CRA Principles.Copies of the IOSCO CRA Principles Regarding the Activities of Credit Rating Agencies and the IOSCO Report on the Activities of Credit Rating Agencies (which describes what rating agencies do and the regulatory issues that arise out of their activities) can be found on IOSCO’s website at:[http://www.iosco.org/pubdocs/pdf/IOSCOPD151.pdf](http://www.iosco.org/pubdocs/pdf/IOSCOPD151.pdf%22%20%5Ct%20%22_new)Copies of the comments the Task Force received in response to its November consultation report and the consultation report itself can be found on IOSCO’s website at: [http://www.iosco.org/pubdocs/pdf/IOSCOPD177.pdf](http://www.iosco.org/pubdocs/pdf/IOSCOPD177.pdf%22%20%5Ct%20%22_new)**1.6 Review of the UK Financial Services and Markets Act 2000**On 2 December 2004 the UK Financial Secretary Mr Stephen Timms MP, announced the outcome of the Government's review of the Financial Services and Markets Act 2000 (FSMA) following its first two years of operation. The key results of the review are:          the Treasury will introduce a package of deregulatory reforms reducing the scope of FSMA. This should lead to more people being encouraged to save enough for retirement and more people being helped to manage their personal debt problems better;          other reforms should reduce a range of regulatory burdens on the financial services industry, increasing competition, and reducing costs. These reforms should also help small, innovative and potentially high-growth firms to attract the funding they need;          the Office of Fair Trading has assessed the impact of FSMA on competition. This assessment concluded that FSMA is likely to have had a positive effect on competition by improving how markets in the financial sector work, and that there are no indications of areas where FSMA itself might have had a significant adverse impact on competition;          the Financial Ombudsman Service will benefit from a range of developments. These relate to the treatment of cases with wider implications, the introduction of more transparency, and the treatment of cases which are passed from the Ombudsman to the FSA to take regulatory action; and          the FSA will complete a package of improvements which will reduce compliance burdens placed on the financial services industry. Measures include making the FSA handbook more user-friendly, improving the provision of FSA guidance, reducing consultation burdens, and rolling-out improved cost-benefit analysis.Further information is available on the HMT public website at: [http://www.hm-treasury.gov.uk/consultations\_and\_legislation/fsma\_twoyrrev/consult\_fsma2yrev\_index.cfm](http://www.hm-treasury.gov.uk/consultations_and_legislation/fsma_twoyrrev/consult_fsma2yrev_index.cfm%22%20%5Ct%20%22_new) **1.7 Survey of first time adoption of ASX Corporate Governance Council Principles**Companies balancing at 30 June 2004 recently became the first group subject to the Australian Stock Exchange (ASX) amended listing rule 4.10.3. Listing rule 4.10.3 requires companies to benchmark their corporate governance practices against the Corporate Governance Council's (CGC) Principles of Good Corporate Governance and Best Practice Recommendations (Recommendations).Ernst & Young have reviewed the corporate governance statements of the top 200 companies balancing at 30 June 2004 to:         Gain an insight into the nature and depth of disclosure made in accordance with the new listing rule.         Identify any trends in relation to particular Recommendations that companies are adhering to and those that companies have chosen not to adopt and the reasons given for non-compliance.         Consider the extent to which the resultant disclosures achieve the stated aims of the CGC.Whilst the new disclosure regime is essentially an ‘if not why not’ regime the CGC does require a number of specific disclosures to be made and Ernst & Young have investigated the extent to which companies have complied with these mandatory disclosures.There are 121 top 200 companies with a 30 June balance date. Of those companies nine had not made their corporate governance statement publicly available at the time of the study and as such the results are based on the 112 companies whose governance statements were available.For those 112 companies whose governance statement was available:         27 (24%) did not make all of the mandatory disclosures         6 (5%) provided a ‘minimalist’ statement         13 (12%) provided details about the CEO/CFO attestation given to the board, beyond just stating that attestation was received.The full report is available at:[http://www.ey.com/global/download.nsf/Australia/AABS\_ASX\_Survey\_Dec\_04/$file/ASX%20Survey.pdf](http://www.ey.com/global/download.nsf/Australia/AABS_ASX_Survey_Dec_04/%24file/ASX%20Survey.pdf%22%20%5Ct%20%22_new)**1.8 CESR consults on potential regulatory approaches for credit rating agencies**The Committee of European Securities Regulators (CESR) published on 30 November 2004, a consultation paper which discusses the issue of how to deal with credit rating agencies in a regulatory context within Europe. In particular, whether there are any market failures and whether there is a need for the introduction of some sort of recognition and/or regulation of rating agencies as these are generally not regulated in Europe today. CESR must provide its advice to the European Commission by 1st of April 2005, which will then assess the need, or not, for introducing European legislation or other solutions in this field.The paper analyses a potential set of rules of conduct that might apply to rating agencies and, in particular, considers the various potential conflicts of interests that might arise as well as the fair presentation and methodologies of rating agencies, staff requirements and the relationship between issuers and credit rating agencies.Amongst the various potential conflicts of interest which CESR discusses, a number arise in the context of the relationship between issuers and credit rating agencies. For example, ratings agencies are often remunerated by the issuers they rate and sometimes provide the issuer with ancillary services.CESR discusses a number of transparency requirements that could be placed on rating agencies. For example, one might require ratings agencies to disclose and explain the key elements underlying the rating and to provide an explanation of the assumptions on which the rating is based and the factors to which the rating of this issuer is most susceptible to change.A further key aspect of the consultation paper is the analysis on how credit rating agencies and issuers might effectively work within the requirements of the Market Abuse Directive, in relation to the handling of confidential and market sensitive information.Finally the consultation paper explores the various ways one could approach the issues put forward by the European Commission and considers the impact this might have on competition in this sector.In particular, it indicates the following policy options which exist, namely, either to:         leave it to the market itself to self regulate on the basis of codes of conduct that are developed by the market participants (drawing on standards established by IOSCO and others);         have some third party assess compliance with the above mentioned codes;         draw on the Basel II recognition process for using rating for capital adequacy and to assess the behaviour of rating agencies; and          put in place a formal registration mechanism and potentially, to establish ongoing supervision, either on a national or EU-wide level where credit rating agencies would be assessed by European securities regulators on an ongoing basis.For further details on the press release please visit the [CESR website](http://www.cesr-eu.org/%22%20%5Ct%20%22_new).**1.9 Confidence in corporate reporting survey**On 30 November 2004 CPA Australia released its 2004 “Confidence in corporate reporting survey”. The following is a summary:**(a) Corporate governance**         Directors’ accountability – most investors and analysts don’t believe they have adequate means to hold boards accountable.          Lack of confidence in appointment and removal of directors from the board – Almost half of the investors and 40 per cent of the total public surveyed said they don’t have confidence in the process.          Support for board performance reviews – Overwhelming agreement among the public (90 per cent), shareholders (90 per cent), analysts (96 per cent), auditors (98 per cent) and CPAs (95 per cent) that boards should be appraised on their performance.          Greater confidence in non-executive directors – shareholders (48 per cent), financial analysts (45 per cent) and auditors (68 per cent) agreed that non-executive directors are more likely to ‘do the right thing’ by shareholders than executive directors.**(b) Levels of confidence**         Overall levels of confidence in capital markets have remained the same compared with one year ago.          The biggest increase in confidence was in relation to the Australian share market. The three main reasons for this were market turnaround, greater stability in the economy and better returns.          The majority of all groups surveyed said their confidence in major corporations had remained the same compared with one year ago. The business community (analysts, auditors, CEOs, CFOs and directors) showed greater increases in confidence than the public.          Decreases in confidence were most apparent for overseas share markets. The main reasons given for this were the war in Iraq, global instability, and increases in oil prices. **(c) Regulatory reform**         The vast majority believe regulatory reforms introduced recently will lift confidence in investment decision-making.(i) Reforms such as CLERP 9 and the ASX Corporate Governance Council Guidelines will improve confidence in making investment decisions:         **Active shareholders** 83%         **Financial analysts** 81%         **CEOs, CFOs, directors** 83%         **Auditors** 88%(ii) New additional disclosures in the Directors’ Report will improve confidence in making investment decisions:         **Active shareholders** 79%         **Financial analysts** 63%         **CEOs, CFOs, directors** 71%         **Auditors** 72%  (iii) The adoption of International Financial Reporting Standards (IFRS) will improve confidence in making investment decisions:**         Active shareholders** 71%         **Financial analysts** 61%**         CEOs, CFOs, directors** 69%         **Auditors** 66%**(d) Executive remuneration** The majority of the public (75 per cent) and analysts (87 per cent) believe executive remuneration should be performance based as opposed to a fixed amount, with most saying it should make up 30 to 48 per cent of the total remuneration package.**(e) Annual report**         More than two thirds of the public with an interest in the share market said they have looked at an Australian company annual report in the last 12 months – of these, almost 80 per cent found it useful.          Concise or full annual report? – Investors looked mostly at concise reports, analysts and auditors looked at full reports.(i) Looked at annual report of Australian company:**         Public with share market interest** 67%**         Financial analysts 60%**         **Directors, CEOs, CFOs** 61%         **Company auditors** 66% (ii) Found it useful:  **         Public with share market interest** 78%**         Financial analysts 86%**         **Directors, CEOs, CFOs** 93%          **Company auditors** 91%**(f) Investment decision-making**         Investors depend most on finance and business media and the annual report to make investment decisions.          45 per cent of investors say they rely on annual reports to some degree when making an investment decision, and 26 per cent to a great degree, while 43 per cent say they rely on finance and business media to some degree, and 31 per cent to a great degree.           Results show that investors also relied on investor newsletters and analyst reports 40 per cent to some degree and 26 per cent to a great degree. Other sources were financial planners, the ASX website and company websites.          All groups rely least on company websites to make investment decisions.**(g) Auditor independence and auditor opinion**         Majority of the public and even greater numbers of business professionals are confident that auditors are independent of the company.          60 per cent of investors and 74 per cent of analysts said they are quite or very confident in auditor independence.          Uncertainty about what the auditor opinion relates to within the annual report, with only 45 per cent correctly saying that it relates to the financial statements, notes to the accounts and the directors’ declaration.**(h) Factors that influence investment decisions**The survey looked at the extent to which various factors influence investment decision-making. Options provided were business strategy, past financial performance, corporate governance policies, executive and Board remuneration, outlook for industry sector, management, company Board members, company chief executive, ratings by agencies, media coverage, discussions at the annual general meeting, financial planners and corporate social responsibility.         Outlook for industry sector, management and past financial performance were the top factors said to influence decision making ‘a lot’.          Among shareholders, outlook for industry sector was thought to have the most influence, followed by management and past financial performance (43 per cent). Financial analysts also believe management (70 per cent) and outlook for industry sector (56 per cent) had the most influence on investment decision-making, followed by business strategy (50 per cent).          Discussions at the AGM were not thought to have ‘a lot’ of influence on decision making across all groups surveyed.**(i) The AGM**         Only 20 per cent of shareholders attended an AGM in the last 12 months.          Shareholders weren’t sure whether they were confident exercising their rights at the AGM – 43 per cent said the were, 43 per cent said they weren’t. Of the business community surveyed the majority agreed that shareholders can be confident exercising their rights at an AGM – financial analysts (53 per cent), auditors (52 per cent) and CEOs, CFOs and directors (59 per cent).**(j) Factors influencing integrity of business leaders**         Personal ethics, business culture that emphasises integrity and threat of large penalties are the key factors thought to influence business leader integrity among investors and analysts.          Investors and analysts rated personal ethics as the main influential factor for business leader integrity, while the public rated the threat of large penalties highest.          Company auditors, directors, CFOs and CEOs thought business culture emphasising integrity has the greatest influence over integrity of business leaders.Other factors were peer opinion, remuneration package, membership of a professional body like CPA Australia and whistleblower protection:         70 per cent of investors, the public, analysts and auditors said they believe membership of a professional body such as CPA Australia influence the integrity of a business leader to some degree.**(k) Confidence in the integrity of business leaders**         The survey looked at levels of confidence in the integrity of nine functions: business analysts, company auditors, company management including CFOs, company regulators, CEOs, business media, company directors, company lawyers, and financial planners.          The public had the most confidence in the integrity of business media with 52 per cent quite confident and 16 per cent very confident, followed by financial planners with 50 percent of the total public quite confident in the integrity of financial planners and 14 per cent very confident.          The public and investors were slightly less confident in the integrity of company management with 41 per cent quite confident and only seven per cent very confident, and company lawyers with 32 per cent quite confident and six per cent very confident.**(l) Satisfaction with information sources**Those who said a particular source influenced them a lot when making an investment decision were asked about satisfaction levels. Satisfaction with information sources relied on a lot found that 81 per cent were satisfied with financial planners. This included:          73 per cent of active shareholders were satisfied          80 per cent of passive shareholders were satisfied          95 per cent of analysts were satisfied          73 per cent of CPAs (CEOs, CFOs and Directors) were satisfied          67 per cent of auditors were satisfied**(m) Confidence in information sources**When it came to confidence in information sources when considering an investment, of the seven options provided, active investors said they had the most confidence in a financial planner (29 per cent) and investor newsletters and analyst reports (29 per cent). Other options were annual reports, company websites, general finance and business media, and the ASX website. Financial analysts (37 per cent) said they had most confidence in investor newsletters and analyst reports, as well as financial planners (31 per cent).**(n) About the survey**The survey was commissioned by CPA Australia and undertaken by Worthington DiMarzio in mid October 2004. The survey sample comprised 300 members of the public, including 162 who hold an interest in the share market, as well as 150 financial analysts, advisers and stockbrokers. The views of 200 chief executives, chief financial officers and directors and 50 internal and external auditors from CPA Australia’s membership were also captured.**1.10 Future Australian corporate law reform proposals**On 29 November 2004, the Australian Department of the Treasury released the Government’s list of planned regulatory reforms. In the area of corporate law reform, the proposed reforms include:**(a) Corporations Amendment Bill 2004** This Bill is in response to the Parliamentary Joint Statutory Committee on Corporations and Securities (PJSC) Report on matters arising from the [Company Law Review Act 1998](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5793" \t "default) and various Companies and Securities Advisory Committee reports. The Exposure Draft Bill included provisions to:         remove the provision which allows a single director of a listed company to call a meeting of members (Section 249CA);          remove the 100-member rule from Section 249D of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act). Recommended by the PJSC report and by the Companies and Securities Advisory Committee (CASAC) - now the Corporations and Markets Advisory Committee (CAMAC) - in its June 2000 report ‘Shareholders’ Participation in the Modern Listed Public Company’. Also recommended by the PJSC in its June 2004 report on [CLERP (Audit Reform and Corporate Disclosure) Bill 2003](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=74342" \t "default);         remove the requirement for companies to disclose information reported to overseas exchanges (Section 323DA); and         amend the requirements relating to the disclosure of proxy votes (subsection 250J (1A)).The Government is considering the submissions received and a revised Bill is being finalised. It is likely that the revised Bill will be exposed again for public consultation.**(b)** **ASIC - Enforcement Powers Bill**The Bill will provide the Australian Securities and Investments Commission (ASIC) with consistent information-gathering, investigative and enforcement powers to enable it to efficiently fulfil its market integrity and consumer protection roles, improve the efficiency and effectiveness of various information-gathering, investigative and enforcement powers, and make minor and technical amendments and remove drafting errors. The Bill will make consequential amendments to ASIC powers conferred under the [Australian Securities and Investments Commission Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default), Corporations Act 2001, [Superannuation Industry (Supervision) Act 1993](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "default), [Retirement Savings Accounts Act 1997](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6652" \t "default), [Life Insurance Act 1995](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6638" \t "default), [Insurance Contracts Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6416" \t "default) and [Mutual Assistance in Business Regulation Act 1992](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7798" \t "default). The Bill is expected to be ready for public consultation in the first half of 2005.**(c)** **Corporations Amendment Regulations** These proposed regulations relate to implementation of single fee disclosure to support superannuation choice of fund measures and other miscellaneous matters. The [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default), established within the Corporations Act 2001, is an improved regulatory regime for the financial services industry, which include harmonised licensing, disclosure and conduct regime for financial service providers. The proposed regulations contain a number of technical amendments that will refine the operation of certain elements of the Financial Services Reform Act 2001 as well as supporting the choice of fund disclosure package. It is expected that amendments will be made by March 2005.Further information on regulatory reforms proposed for 2005 is available on the [Treasury website](http://www.treasury.gov.au/%22%20%5Ct%20%22_new).**1.11 UK Board issues draft standard on the operating and financial review**Following a UK Government announcement on 25 November 2004 (see Item 1.13 below), the Accounting Standards Board (ASB) issued on 29 November 2004 an exposure draft of a Reporting Standard (RED 1) on the Operating and Financial Review (OFR).  Under the Government proposals, quoted companies will be required to prepare a statutory OFR for the first time for financial years beginning on or after 1 April 2005. The Government has also announced that it intends to specify the ASB in legislation as the body to make the standards for the OFR.  Regulations giving legal effect to the proposals will be laid before Parliament in the next two months.The proposals in the RED build on the requirements of the forthcoming Regulations and the ASB’s existing 2003 statement of best practice on the OFR, which is already used by many companies. The proposals involve a principles-based standard which, in particular, makes clear that the OFR is to reflect the directors’ view of the business.  The objective is to assist investors to assess the strategies adopted and the potential for those strategies to succeed.  The information in the OFR will be useful to both investors and other users.They also provide a basic framework for directors to apply in order to meet the requirements of the Regulations.  It is for the directors to consider how best to use this framework to structure the OFR, given the particular circumstances of the entity.Although following a framework approach, the ASB is conscious that some guidance would be useful to directors and it has accordingly prepared some draft Implementation Guidance to accompany the draft Reporting Standard. The Guidance sets out some illustrations and suggestions of specific content and related key performance indicators that might be included in an OFR, especially on the particular matters referred to in the Regulations.For further information visit the ASB’s website at: [http://www.frc.org.uk/asb](http://www.frc.org.uk/asb%22%20%5Ct%20%22_new).**1.12 Simplified prospectus for UK fund investors** On 26 November 2004 the UK Financial Services Authority opened for consultation its proposed approach for implementing European requirements on product information for collective investment schemes such as Unit Trusts and OEICs. The proposals set out requirements for a new document that will be known as the Simplified Prospectus. EU rules require this document to be offered to anyone who wants to invest in a collective investment scheme. The FSA's proposals build on the existing UK approach to investment product information - the Key Features document – by adding some new information requirements to meet EU standards. These new information requirements include:          a 'Total Expense Ratio' (TER) figure showing the costs and charges of the fund. The figure will not take account of front-end charges, exit costs or certain fund expenses such as dealing costs;          a 'Portfolio Turnover Rate' (PTR) figure, to reflect the volume of dealing within the fund; and         the historic performance of each UCITS showing up to ten years' annual returns.The consultation will close on 28 January 2005 and the FSA expects to make the new rules to come into force on 1 March 2005 with a transitional period until September 2005. Further information is available on the FSA website at: [http://www.fsa.gov.uk/pubs/press/2004/101.html](http://www.fsa.gov.uk/pubs/press/2004/101.html%22%20%5Ct%20%22_new)**1.13 UK government announcement on the operating and performance review**On 25 November 2004 the UK Trade and Industry Secretary Patricia Hewitt made an announcement relating to the new Operating and Financial Review (OFR). The OFR is intended to improve the quality, usefulness and relevance of information provided by quoted companies, helping shareholders get a better understanding of a quoted company's business and future prospects. Ms Hewitt's Parliamentary announcement set out the following key changes:         Directors will be expected to exercise the same level of care in relation to the OFR as required under the common law. As is the case for financial accounts, directors will be expected to apply 'due care, skill and diligence' in preparation of this new narrative report.         Auditors will be required to state in their reports whether the information given in the OFR is consistent with a company's accounts as well as whether any other matters that came to their attention in the performance of their functions as auditors of the company were inconsistent with information directors have given in the OFR.         To allow time for the business, assurance and enforcement communities to prepare for the OFR and to review the new reporting standard being developed by the Accounting Standards Board (ASB), the commencement date for the Regulations will be changed to financial years beginning on or after 1 April 2005.         Where shareholders have agreed to receive summary financial statements, there will be no requirement for the full OFR to be sent, and shareholders will be notified of the availability of the OFR on the company website.         Potential duplication of reporting requirements occasioned by the introduction of the EU Modernisation Directive will be avoided.         The existing administrative enforcement regime in relation to defective accounts will be extended to cover defective OFRs and Directors' Reports as well. The FRRP will review the OFR in response to third party enquiries and in relation to possible omissions or mis-statements. The FRRP's administrative enforcement role will begin one year after the Regulations come into effect and apply to OFRs and Directors' Reports for financial years beginning on or after 1 April 2006.For more information please go to: [http://www.wired-gov.net/](http://www.wired-gov.net/%22%20%5Ct%20%22_new)**1.14 Multinational executives expect compliance costs to increase**More than half of U.S. and European multinational companies (51 percent) will increase compliance spending by an average of 23 percent during the next 12-24 months, according to the PricewaterhouseCoopers' Management Barometer Survey released on 23 November 2004. Despite this sizeable increase, 44 percent of senior executives said their company does not have a clear view of its total compliance spending, although another forty-five percent of the respondents said their company does. However, the survey shows most of the companies which have a clear view of spending do not include remediation costs, penalties, fines, lost revenue and lost management time when tracking. These findings suggest that the ability to accurately track costs and measure value, even by companies with a clear view of the costs involved, is incomplete at best.According to the survey, 59 percent of executives say their compliance programs are "somewhat inefficient" and that aspects can be streamlined, while an additional five percent say their programs are inefficient and their company spends more than it needs to. Only 32 percent consider their compliance programs "very efficient."Forty-ninepercent of U.S. and European multinational companies believe their compliance programs need improvements and 52 percent do not clearly understand the value their company receives from compliance spending.During the next 12-24 months, nearly all respondents (90 percent) plan improvements to their company's compliance efforts. These will include improving risk management, strengthening programs to reduce compliance costs and streamlining cost efficiency. Overall, all companies responding to the survey expect to increase their compliance spending by an average of 9.9 percent during the next 12-24 months.The Barometer found that 26 percent of companies have no formal means of measuring the effectiveness of their compliance efforts. Fifty-nine percent rely on regular audits and reviews and only 27 percent utilize key performance indicators (companies were allowed to have more than one answer). According to the survey, external requirements and regulations account for 74 percent of total compliance costs. U.S. multinationals spend a higher percentage on external requirements than European multinationals (84 percent to 61 percent). European companies spend a higher percentage (39 percent to 16 percent) on internal compliance - including ethics, code of conduct, risk management rules – than do U.S. companies. Overall, surveyed executives estimate that they spend on average about 6.16 percent of their administrative and operations budget for compliance – with spending at product companies slightly higher than service companies – 6.44 percent and 5.62 percent, respectively. U.S. companies spend an average of 5.93 percent versus 6.50 percent in Europe. A comparison of findings from U.S. and European companies shows a few areas with a clear difference:         U.S. executives are more positive than European executives on compliance effectiveness. Forty-four percent of U.S. executives cite need for improvements, versus 55 percent in Europe;         Sarbanes-Oxley clearly dominates compliance spending in the U.S. Sarbanes-Oxley accounts for 54 percent of U.S. costs versus only 12 percent in Europe; and         In the U.S., 48 percent of executives say their company lacks understanding of its total compliance spending versus 38 percent in Europe.Pricewaterhouse Coopers’ Management Barometer is a quarterly survey of top executives in a cross-section of large, multinational businesses. It developed and compiled with assistance from the opinion and economic research firm of BSI Global Research, Inc.Information about Barometer Surveys as well as PDF versions of the U.S. and European findings are available at: [http://www.barometersurveys.com](http://www.barometersurveys.com/%22%20%5Ct%20%22_new).**1.15 Board of director trends – Korn/Ferry study**Complying with the Sarbanes-Oxley Act and other corporate governance legislation has come at a significant cost “both monetary and otherwise” to companies worldwide, according to the 31st Annual Board of Directors Study, released in New York on 22 November 2004 by Korn/Ferry International.The most comprehensive, longest-running survey of its kind in the world, the Board of Directors Study examines opinions and practices found in boardrooms of major corporations throughout the world. The findings are based on the responses of nearly 1,000 board members from 14 nations in the Americas, Asia Pacific, and Europe. This year, the survey population was expanded to include directors of South African companies. Highlights of this year's study include:          Compliance Costs. Virtually all (99 percent) of the U.S. respondents said their boards have complied with Sarbanes-Oxley at an average implementation cost of $5.1 million. Four out of five UK boards (81 percent) reported meeting the general independence rules of the Higgs and Smiths Reports, at an average cost of $1.5 million. Similarly, 81 percent of French companies have spent an average of $910,000 to meet the recommendations of the Bouton Report.         Director Risk. The percentage of the Americas respondents declining board invitations due to increased liability has doubled since Sarbanes-Oxley became law, from 13 percent in 2002 to 29 percent this year. Almost one-third (31 percent) of directors of German boards refused a directorship invitation on this basis, nearly triple the 11 percent who did so last year.         Executive Sessions. Ninety-three percent of Americas respondents said they hold executive sessions during regular meetings that do not include the company's chief executive, an increase from just 41 percent two years ago. Though less common in Europe and Asia Pacific, the percentage of Japanese boards that now meet without the chief executive increased from four percent in 2003 to 27 percent this year. In Germany, the percentage climbed from seven to 24 during the same timeframe, and in France, the percentage went from seven to 19 percent.         Lead Director. Since enactment of Sarbanes-Oxley, the percentage of respondents in the Americas reporting their board has formalized the lead director role has more than doubled, from 32 percent to 80 percent this year. Three-fourths (78 percent) of respondents serving on Australia/New Zealand boards said composition includes a lead director.This year's study also examined trends in director compensation and stock ownership. The average annual retainer and per meeting fee for full-board service awarded to directors of Fortune 1000 organizations was US$56,970, 22 percent above 2003's US$46,640 and 32 percent more than the US$43,306 reported in 2002, the year of the Sarbanes-Oxley Act. The Audit Chair received US$10,317, 27 percent more than awarded last year, while committee members were given an average retainer of US$7,914, a one-year increase of 16 percent. Requiring directors to own stock is a practice with limited support outside of the Americas and France. Four of five (81 percent) respondents serving on French company boards are required to do so, as are two-thirds (65 percent) of their counterparts in the Americas. Of those Americas respondents experiencing a change in director compensation this year, 37 percent stated that restricted stock was added or increased while 10 percent reported stock options were eliminated from the overall package award. The cash component increased for a majority (52 percent). **1.16** **Report on board leadership**The US National Association of Corporate Directors has released the report of its Blue Ribbon Commission on board leadership.The report contains the following recommendations:**(a) Board leadership**1. A leader of the independent directors—by whatever name—should be appointed by, and from, the independent directors of the board. In considering the leadership structure at the time of a transition of CEO/chair, each board should consider all of the options described in this report.2. The respective roles of the company leader (typically the CEO) and the leader of the independent directors (whether non-executive chair or lead director) need to be clarified and put into writing. The roles should be clear to the individuals serving in them, as well as to the board, senior management, and key external parties.3. The leader of the independent directors should possess the appropriate qualities for the role and be someone who is respected by all directors and the company leader.4. Selection of board leaders should be based on performance, and leaders should be evaluated regularly.**(b)** **Leading the work of the board**1. Running effective board meetings requires good facilitation skills—the ability to keep the meeting on track, build consensus, and surface ideas and concerns.2. Directors should receive regular updates between board meetings, particularly when there are lengthy periods between scheduled meetings.3. Board and committee leaders should have regular one-on-one communications with the CEO and other directors, as well as senior managers, outside of board meetings to keep abreast of their perspectives.4. Boards should ensure appropriate leadership, focus, and timing for executive sessions.**(c) Board agendas and information**1. The chair sets the board agenda, working with the corporate secretary or other corporate staff. If the leader of the independent directors is not the chair, the chair should consult with him or her for input. In either case, input from other directors should also be sought.2. It is a useful practice to construct a board agenda for the year ahead (annual calendar) indicating the major issues to be addressed at each meeting, yet providing flexibility to consider other issues as they arise.3. Board agendas should prioritize items, and allocate a greater proportion of the board meeting to discussion time than to presentation time. This requires that directors receive comprehensive yet concise, agenda-focused reading materials in advance of the meeting.4. Meeting information should be appropriate to the board’s role as overseers and enable directors to make necessary decisions. The leader of the independent directors should consult regularly with all of the directors about the quality, quantity, and timeliness of board information and decision-making processes and either make or recommend appropriate changes.5. Board information must cover all the main areas of board oversight, but should focus on the key drivers of business success.6. Each director should be encouraged to broaden his or her perspective on the company and its issues beyond the information that management prepares.7. Board committee chairs should keep the board, as a whole, updated on the issues, work, and recommendations of their committees.**(d) Leading board committees**1. Committee chairs should thoroughly understand the mandate and objectives of their committees and ensure that these are reflected in the committee’s charter, agendas, and accomplishments.2. Committee members should devote the time and effort necessary to learn the subject matter of their committees. Committee chairs, whenever possible, should have prior expertise in this subject matter.3. Where practical, committee chairs and members should be rotated, while providing overlap to prevent loss of expertise or continuity.4. Significant discussion time should be built into committee agendas; to make the best use of that time, committee members need to spend adequate time reviewing materials in advance of the meeting.5. Committee chairs should establish a constructive working relationship with the relevant executives and any external advisors who support the committees in their work.6. Committee chairs need to safeguard their committee’s independence ensuring that, when appropriate, the committee has time for discussion without management and other directors present and that outside advisors report to the committee.**(e) Leading the board through critical events and crises**1. The first decision a board must make when crisis occurs is whether it is appropriate for the CEO to lead the company through the crisis. If he or she is part of the problem or is otherwise compromised or conflicted, someone else often one of the other directors should take a leadership role.2. Whether or not the CEO is leading the company during the crisis, it is the board’s responsibility to maintain effective oversight of how the crisis is being handled, and to either make critical decisions or ensure that they are being made. Boards should consider using a special committee of independent directors for this purpose. When the situation is most critical, the CEO and the board should be in frequent contact.Further information about the report is available at the [NACD website](http://www.nacdonline.org/%22%20%5Ct%20%22_new). |
| **2. Recent ASIC Developments** |
| **2.1 ASIC issues dollar disclosure policy**On 15 December 2004 the Australian Securities and Investments Commission (ASIC) announced how it expects providing entities and product issuers to comply with the dollar disclosure regime. This is set out in a new policy, Policy Statement 182 Dollar Disclosure [PS 182]. ASIC also announced the limited transitional relief it has granted from the dollar disclosure and other related provisions.The dollar disclosure regime requires those who provide personal advice and product issuers to disclose various costs, fees, charges, expenses, benefits and interests as amounts in dollars.The policy statement describes the limited class order relief ASIC has granted, including relief for:    disclosure items contingent on unknown facts and circumstances [CO 04/1430];          costs of derivatives, foreign exchange contracts, general insurance products and life risk insurance products [CO 04/1431];          interest payable on deposit products [CO 04/1432];          non-monetary benefits and interests [CO 04/1433]; and          amounts denominated in a foreign currency [CO 04/1435].A copy of PS 182 can be obtained from the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new) or by contacting the ASIC infoline on 1300 300 630.**2.2 ASIC issues guidance on the provision of tax advice**On 15 December 2004 the Australian Securities and Investments Commission (ASIC) issued guidance about the application of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to people who provide taxation related advice. The guidance is given in the form of answers to two new frequently asked questions:         'Do I need an AFS licence to provide tax advice?' (QFS 149): and          'I am a financial planner. What particular requirements apply to me under the Corporations Act when I give advice about the tax implications of financial products?' (QFS 153).ASIC foreshadowed the issue of this guidance in a joint release with the Australian Tax Office issued in December 2003. ASIC notes the ATO is considering comments on its draft determination, TD 2004/D22: 'Income tax: does paragraph 251L(1)(b) of the [Income Tax Assessment Act 1936](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "default) prevent persons other than registered tax agents from giving advice about a taxation law' that was issued on 30 June 2004.**2.3 ASIC calls for public comment on share buy-back proposal**On 13 December 2004 the Australian Securities and Investments Commission (ASIC) called for comments on its proposal to set a maximum value for small parcels of shares that a company can buy back from its shareholders. This process will assist ASIC in developing its position on buy-back relief under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act). ASIC provides case-by-case relief so that a company can buy back a small parcel of shares from each shareholder without the company obtaining a special resolution approving a selective buy-back, under s257D of the Act. A buy-back is selective if the shareholders are not treated equally. A buy-back of a small parcel is selective primarily because the small parcel represents a different percentage of the holding of each shareholder. Usually, the company buys back small parcels as part of a larger buy-back involving a scale-back mechanism. ASIC proposes to set a maximum value of small parcels for its relief from the requirement to obtain a special resolution approving a buy-back of:    $2000 for shares to be bought back from each participating shareholder including the entire holding of participating shareholders whose holding is less than $2000 (threshold parcel); and    $500 where a participating shareholder's remaining shares are worth less than $500 after the threshold parcel is bought back (residual parcel).ASIC already has relief in place to assist holders of small parcels to increase their holding by dividend reinvestment and shareholder purchase plans. The details of ASIC's proposals are contained in a brief consultation paper. ASIC invites public comment on the consultation paper by 16 February 2005.A copy of the consultation paper is available on [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new) or by calling ASIC's Infoline on 1300 300 630.**2.4 ASIC releases results of unauthorised foreign insurance market campaign**The Australian Securities and Investments Commission (ASIC) released on 6 December 2004 a summary of the results of its campaign on the unauthorised foreign insurance market. An 'unauthorised foreign insurer' is the term generally used for an insurer who carries on a general insurance business outside Australia. Unauthorised foreign insurers are able to offer insurance in Australia. However, they are not regulated by the Australian Prudential Regulation Authority (APRA) and don't need to meet APRA's capital or other requirements. ASIC undertook the campaign in 2003, reviewing the operations of eight Australian general insurance intermediaries who placed business with unauthorised foreign insurers. ASIC was also responding to numerous consumer concerns and complaints relating to unauthorised foreign insurers and intermediaries, including:          the alleged non-payment of claims;          doubts about the adequacy of regulation of some unauthorised foreign insurers (they may not be subject to the same prudential controls as APRA-regulated insurers);          alleged inappropriate sales practices of insurance intermediaries acting on behalf of unauthorised foreign insurers;          concerns about ownership links between intermediaries and the unauthorised foreign insurers; and          alleged difficulties in making complaints or enforcing claims against unauthorised foreign insurers.Between 2001 and 2003, the business provided to Australian clients by unauthorised foreign insurers increased significantly. This was largely because of difficult market conditions that reduced the number of insurers in the Australian market offering professional indemnity and public liability cover. In conducting its campaign ASIC found that the eight intermediaries reviewed placed $145m of premium for general insurance products with nine unauthorised foreign insurers between1 January 2002 and 30 June 2003. At the time the campaign was conducted, the intermediaries reviewed were subject to the[Insurance Agents and Brokers Act 1984](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6415" \t "default) (the IABA), which was repealed when the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) (the FSR Act) came into full effect on 11 March 2004. Most of the business placed with the unauthorised foreign insurers, notably professional indemnity insurance and public liability insurance, is now classified under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) as 'wholesale' business. This means that the intermediaries offering these products to consumers are not subject to the conduct and disclosure requirements introduced by the FSR Act for 'retail' business. Further information can be found on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.5 ASIC campaigns against churning and misselling**On 6 December 2004 the Australian Securities and Investments Commission (ASIC) announced its surveillance campaign to assess how financial advisers are currently complying with new legal obligations relating to advice to switch financial products. These requirements, which came into effect as part of the [Financial Services Reform Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default), have been put in place to discourage misselling and unnecessary churning. ASIC anticipates an increase in adviser recommendations to change superannuation funds once Choice of Fund legislation starts to operate from 1 July 2005 next year.Generally, financial advisers are required to disclose conflicts of interest, adviser remuneration and any limitations that affect their recommendations. The additional obligations for advisers recommending a change of fund include:          comparing a person's existing fund (or funds) with the recommended fund. This involves the adviser becoming familiar with a person's existing superannuation arrangements. If information about these arrangements is not publicly available, then advisers should ask their client to provide the disclosure documents received by them from the fund (or to request them from the fund);          specifically disclosing the costs, loss of benefits and other significant consequences of making a switch. When considering the loss of benefits, advisers should be mindful of both pecuniary and non-pecuniary benefits, including benefits that may only be lost temporarily (such as insurance cover) and benefits that may only be lost in the future (such as the right to a lifetime pension); and          ensuring that any recommendation to change funds is appropriate for the client (taking into account their personal circumstances) and is not misleading.As a further choice initiative, ASIC will also use this campaign opportunity to consider the appropriateness of advice given to establish self-managed superannuation funds.Further information can be found on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.6 ASIC provides guidance on Statements of Advice**As part of its ongoing assistance to Australian financial services licensees in complying with their obligations under the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), the Australian Securities and Investments Commission (ASIC) has provided guidance on Statements of Advice (SOAs), according to a media release on 30 November 2004. The guidance is primarily focused on the requirements for an original SOA. The advice has been released after ASIC reviewed a large number of SOAs provided by industry associations and identified a number of concerns with them. Common content issues in the SOAs reviewed include the failure to:          provide a clear statement of the basis for the advice;          disclose the costs, loss of benefits and other significant consequences when switching financial products; and          provide effective disclosure of remuneration and benefits.The review also found that the presentation of key information in some SOAs could have been improved. In particular, the poorly presented SOAs:          did not contain all key information in the body of the document, but rather relegated some of it to an appendix;          were not tailored to the client and so contained some irrelevant information;          used industry jargon that was not explained; and          repeated content (and therefore added unnecessary length).Further ASIC guidance on SOA disclosure is provided on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.7 ASIC probes insurance broker remuneration**On 24 November 2004, the Australian Securities and Investments Commission (ASIC) announced a campaign examining insurance brokers remuneration practices. The purpose of ASIC's campaign is to establish whether insurance brokers are acting in the best interests of their clients.The law imposes obligations on insurance brokers to disclose to their clients information about remuneration and other benefits received, where those benefits can influence the advice provided to the client. In the case of retail clients, there are specific requirements about information that must be disclosed to clients in a Financial Services Guide and a Statement of Advice.ASIC will obtain information and documents from a selection of insurance brokers and insurance companies over the next month. In addition, ASIC will ask insurance industry bodies to provide it with information about current practices in the Australian insurance industry.ASIC will publicise the findings of this campaign by March 2005, and at that stage will indicate whether further regulatory action is required. Further information is available on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new).**2.8 ASIC approves CPA/ICAA auditing competency standard**On 24 November 2004 the Australian Securities and Investments Commission approved the first auditing competency standard under s1280A(1) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The competency standard was produced by CPA Australia and The Institute of Chartered Accountants in Australia (ICAA).Compliance with an approved auditing competency standard is an alternative method for a person to demonstrate that they have the requisite practical experience to be registered as a registered company auditor in Australia.Further information is available on the [ASIC website](http://www.asic.gov.au/%22%20%5Ct%20%22_new). |
| **3. Recent ASX Developments** |
| **3.1 Amendments to ASX Market Rules**Recent amendments to ASX and ACH Rules effective from 9 December 2004 - 1 Trading Participant/2 Clearing Participants - enable a Trading Participant to use up to 2 Clearing Participants to clear its market transactions for each class of product.**3.2 ASX Market Operator Report** ASX has published "Open Market" - a resource guide for those interested in understanding more about the operations of Australia's capital markets, and in particular about the role of the Australian Stock Exchange. ASX is responsible for operating an exchange that is central to Australia’s national economic wellbeing. This report seeks to outline how ASX fulfils these responsibilities. In a marketplace and an economy undergoing constant, sometimes rapid change, ASX feels it is important to convey to a wide audience its continuing commitment to conducting its operations with integrity - providing an exchange in which all can participate with confidence. An electronic version is available from [http://www.asx.com.au/about/ASXPublications\_AA2.shtm](http://www.asx.com.au/about/ASXPublications_AA2.shtm%22%20%5Ct%20%22_new) |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 General Property Trust: Panel concludes proceedings**On 9 December 2004 the Takeovers Panel announced that it had concluded the proceedings arising from the application from GPT Management Limited as responsible entity of General Property Trust (GPT) dated 3 December 2004 alleging unacceptable circumstances in relation to the off-market takeover bid by Stockland Trust Management Limited as the responsible entity for Stockland Trust for all the ordinary units in GPT. The Panel’s media release TP04/111 provides further details regarding the application.The Panel has accepted an undertaking from Stockland to send a supplementary bidder’s statement with Stockland’s bidder’s statement, in a form approved by the Panel, which addresses the Panel’s concerns in relation to:         basing comparisons within Stockland’s bidder’s statement on the price of Stockland securities immediately before Stockland’s announcement of its takeover offer over a month ago on 5 November 2004 rather than the most recent price of Stockland securities;         basing comparisons within Stockland’s bidder’s statement only on the price of GPT securities immediately before the announcement of a merger proposal made by Lend Lease Corporation over six months ago on 19 May 2004 rather than on the most recent price of GPT securities; and         disclosing the effect of the Stockland offer on the notional Net Tangible Assets backing of GPT securities in the merged entity.The Panel declined GPT’s request that Stockland adjust its “offer value” to reflect the expected Stockland distribution in December which GPT security holders will not receive, but the Panel required Stockland to explain why it is not appropriate to make such an adjustment.Based on the undertaking provided by Stockland, the Panel concluded the proceedings on the basis that it was not necessary to make a declaration of unacceptable circumstances and that no order was required.Further information about the decision is available on the [Panel's website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new). |
| **5. Recent Corporate Law Decisions** |
| **5.1 A separate hearing on penalty should be held in civil penalty proceedings, breaches of directors’ duties and shareholder ratification**(by Chi-Yung Lee, Clayton Utz, Adelaide)William Arthur Forge v Australian Securities and Investment Commission [2004] NSWCA 448, New South Wales Court of Appeal, Handley JA; Santow JA; McColl JA, 7 December 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswca448.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswca448.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 an appeal from declarations under section 1317EA(2) of the former Corporations Law, orders that each appellant be disqualified from managing corporations and pecuniary penalties under section 1317EA(3). There were six appellants; William Arthur Forge ("Mr Forge"), Jozsef Endresz ("Mr Endresz"), Dawn May Endresz ("Mrs Endresz"), Allan Paul Endresz ("Allan Endresz"), Kamanga Holdings Pty Limited ("Kamanga") and Bisoya Pty Limited ("Bisoya") (together, the "appellants"). Between 20 April and 13 November 1998, CTC disbursed $3596,348.90 by eight transactions, relating to payments of management and consultancy fees and the provision of unsecured loans to Kamanga and Bisoya. In April 2001 ASIC brought proceedings against the appellants alleging that, in relation to these transactions, they had contravened section 232(2), (4)and (6) and section 243ZE of the Corporations Law. **(b) Facts** Mr Forge was the sole director and secretary of his private family company, Bisoya. Mr and Mrs Endresz (husband and wife) and their son, Allan Endresz were at different times directors of CTC. Kamanga was a family company of the Endresz family. Mr Forge, a friend of the Endresz family, became a managing director of CTC on 9 September 1994.On 20 April 1998, CTC received from the Commonwealth of Australia $6,000,000 as payment for 60,000 redeemable convertible non-cumulative preference shares. A portion of the received amount was invested in a Commercial Bill Facility; the balance, $3,596,348.90, was disbursed in eight transactions entered into between 20 April and 13 November 1998. These transactions involved retrospective and future payments of management and consultancy fees and the provision of unsecured loans by CTC to Kamanga and Bisoya.**(i) The transactions**The minutes of a meeting of CTC's directors on 20 April 1998 recorded Mr Endresz and Mr Forge as saying that, in view of their common directorships with Kamanga and Bisoya respectively, they would not vote on the matter nor would they be present whilst the board considered the past and future management fees and retainers with respect to Kamanga and Bisoya. It was resolved to accept Kamagna's and Bisoya's past management fees and to execute the Management Retainer with Kamanga and Bisoya. Ernst and Young, CTC's auditors, expressed concerns over the retrospective payments, noting potential breaches of Corporations Law. They referred to section 243H which states a public company must not give a financial benefit to a related party except as permitted by Division 4 or 5. The relevant exceptions are sections 243K and 243N. Referring to the financial performance of CTC, the auditor expressed the view that it was difficult to argue that the remuneration was reasonable.On several occasions, Ernst and Young sought information as to the circumstances surrounding these payments and asked for further information, including the reasonableness of fees paid to Kamanga and Bisoya. Unpersuaded by the responses, Ernst and Young informed the directors of CTC on 4 March 1999 that there was insufficient evidence to form an opinion as to the compliance or otherwise of the transactions with the Corporations Law. Mr Tutt, an expert on the duties and activities of directors, was called upon by ASIC to give evidence. He submitted that: for all the transactions, a careful and diligent director of CTC would not have caused or permitted the payments; a director of CTC, acting honestly in the exercise of his powers and the discharge of the duties, wouldn't have caused or permitted the payments; and the decision by the directors of CTC, to make payments was an improper use of their position.**(ii) ASIC brought proceedings**The proceedings related to the disbursement by CTC of $3,596,348.90 by eight transactions entered into between 20 April and 13 November 1998. These transactions were the retrospective and prospective payment of management and consultancy fees and the provision of unsecured loans to Kamanga and Bisoya.ASIC complained that the transactions had been entered into in breach of section 232(2), (4) and (6) and also section 243ZE(3) of the Corporations Law. In receiving payments arising from the impugned transactions, Kamanga and Bisoya had contravened s 243ZE(2). ASIC sought civil penalty orders in the form of declarations of contraventions.The hearing was in March 2002. By that time, the Corporations Law had been repealed and the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) had come into force. ASIC was successful.Foster AJ:         declared that, pursuant to section 1317EA(2) of the Corporations Law, there were contraventions;         ordered that each appellant be disqualified from managing corporations for periods ranging up to sixteen years;         ordered pecuniary penalties pursuant to section 1317EA(3).The appellants appealed.Main issues raised by the appeal:         whether proceedings were validly continued under the Corporations Act 2001 (Cth);         whether Foster AJ erred in saying that Allan Endresz was an officer of CTC for the purposes of section 232 of Corporations Law;         whether Foster AJ had found the appellants had contravened the Corporations Law on a basis not advanced by ASIC at the trial;         whether Foster AJ erred in finding the appellants had contravened the Corporations Law;         whether these contraventions could be, and were, cured by a purported ratification of the transactions by CTC's shareholders in June 2003; and         whether a Court hearing civil penalty proceedings should hold a separate penalty hearing if it makes declarations of contravention.**(c) Decision**The appeal was dismissed except for the ground in relation to a separate hearing of penalty.**(i) Transitional provisions argument**The primary judge was correct to reject the appellants’ argument that the proceedings were incompetent. The proceedings, commenced pursuant to the Corporations Law, were validly continued by virtue of the transitional provisions of Chapter 10 of the Corporations Act 2001 (Cth).**(ii) “Officer” of a corporation**The primary judge was correct in concluding that for the purposes of section 232 of the Corporations Law, Allan Endresz was an “officer” of CTC. His activities demonstrated he was “concerned in” activities which involved both policy and decision-making related to CTC’s business affairs as a whole. **(iii) Basis of liability**The primary judge’s findings concerning the contraventions of section 232 of the Corporations Law were related to the appellants’ liability as principals, not accessories, which was the basis for which ASIC had contended.**(iv) Contraventions of the Corporations Law**The appellants submitted that Foster AJ should not have admitted Mr Tutt's evidence since it went to the ultimate legal issue. It was stated that if Mr Tutt was being asked to give evidence about the appellants' subjective state of mind, any response would have been inadmissible. However, Mr Tutt was being asked to express an opinion based on the objective facts of each transaction as it applied to a careful director It was held that expert evidence on an ultimate legal issue is admissible. As required to establish that a person was involved in a contravention of section 243ZE(3)(a), it was found that each appellant had knowledge of all the material facts of the transactions. Foster AJ concluded that the transactions had been agreed prior to the relevant meetings.The receipt of the $6,000,000.00 in circumstances where CTC had had no significant income for many years was seen as a golden opportunity for the payment to the director-related entities of Kamanaga and Bisoya of money for the benefit, ultimately of the appellants themselves, and not for the benefit of the company and its shareholders. Consequently, the appellants acted with subjective dishonesty, attracting liability under section 232(2).An objective test was applied in determining whether the appellants had breached the standards of conduct expected of a person in their position. The appellants bore the burden of showing that the primary judge's conclusions should be reversed. The appellants failed to demonstrate any error in Foster AJ's finding that they had breached section 232(4) and (6).Foster AJ was correct in concluding that the appellants had contravened section 232(2), (4) and (6) and section 243EZ(3).**(v) Ratification**The purported ratifications by CTC's shareholders of the contraventions in June 2003 were ineffective because:         it would constitute a fraud on minority or misappropriation of company resources. Ratifying the appellants' wrongful taking of CTC's resources would unfairly prejudice third parties. Furthermore, the shareholders did not exercise their voting power for the benefit of the company as a whole;         ratification resolutions were ineffective to cure breaches of statutory duty;         they were too late in time;          disclosure to CTC's shareholders was inadequate. They were not fully informed either of CTC's rights consequent upon the declarations of contraventions or that the effect of the ratification resolutions would be that CTC would lose both its statutory and equitable rights.**(vi) Penalty*** It was held that a court hearing civil penalty proceedings should, if it makes declarations of contravention, hold a separate hearing on the issue of penalty. Failing to conduct a separate penalty hearing meant that the issue of penalty must be revisited by remitting the matter to the Equity Division.

**5.2 An invalidly appointed director may appoint an administrator**(By Tom Evans, Phillips Fox)Mentha v Colorbus Pty Ltd (in liq) [2004] VSC 486, Supreme Court of Victoria, Mandie J, 30 November 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/november/2004vsc486.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/november/2004vsc486.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 appointment by an invalidly appointed director of an administrator was rendered effective by section 201M(1) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act). In the alternative, the appointment was made valid by an order pursuant to section 1322(4)(a) of the Act.**(b) Facts** Section 201A(1) of the Act provides that a proprietary company must have at least one director. That director must ordinarily reside in Australia.At the time of resolving to appoint an administrator and execute the instrument of appointment, Colorbus Pty Ltd (the Company) had one director, Mr Kintsch, who did not ordinarily reside in Australia. Mr Kintsch was appointed sometime in the month leading up to the appointment of the administrator. His appointment was an attempt to rectify an existing irregularity in the Company's records, there being no director who ordinarily resided in Australia.Prior to their appointment as administrators, members of the firm KordaMentha (KordaMentha) met with Mr Kintsch and the Company's legal representative regarding the possible entry of the Company into voluntary administration. At the meeting, the Company's legal representative disclosed that there was an irregularity with the Company's records, there being no director who ordinarily resided in Australia.Three days after the meeting with KordaMentha, the Company's legal adviser advised KordaMentha that a new director had been appointed to the Company to pass the necessary resolutions to place the Company into voluntary administration. KordaMentha then provided a consent to act as administrators.Subsequent to the appointment of KordaMentha as administrators, a cheque for $122,000 was forwarded from the parent company of the Company to the Company in order to keep the Company trading until the second meeting of creditors, when it was expected that a deed of company arrangement would be proposed by the parent company.The day after appointment as administrators of the Company, KordaMentha were informed that ASIC had rejected the form notifying the appointment of Mr Kintsch as a director. The letter from the ASIC referred to the requirement under section 201A of the Act that the Company have at least one director who resides in Australia.The following day, in accordance with an application from the Deputy Commissioner of Taxation, the Company was wound up, despite the opposition of KordaMentha.KordaMentha sought confirmation or validation of their appointment as administrators for the purpose of recovering appropriate fees and expenses of their purported administration. KordaMentha did not seek to disturb the appointment of the liquidator.**(c) Decision** Mandie J found that the appointment by Mr Kintsch of KordaMentha as administrators was rendered effective by section 201M(1) of the Act. Further, his Honour found that if section 201M(1) did not operate to render effective the appointment of KordaMentha as administrators, then it would be appropriate to make an order validating the appointment of KordaMentha pursuant to section 1322(4)(a).**(i) Section 201M**Section 201M(1) of the Corporations Act 2001 (the Act) provides: 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.Mandie J held that the appointment of Mr Kintsch was invalid because the Company failed to comply with the mandatory requirements of section 201A(1). The appointment continued to be invalid while Mr Kintsch was not ordinarily residing in Australia. The invalidity also arose because of Mr Kintsch's failure to comply with section 201A(1) by accepting the appointment and acting as a director while not ordinarily residing in Australia. The requirements of section 201M(1) being met, the section rendered valid the appointment of KordaMetha as administrator.**(ii) Section 1322(4)(a)**Section 1322(4)(a) of the Act relevantly provides that the court may make:an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation.In accordance with section 1322(6)(a)and (c), the power under section 1322(4)(a) may only be exercised if the court is satisfied that no substantial injustice has been or is likely to be caused to any person, and:(i) the relevant act, matter or thing, or the relevant proceeding is essentially of a procedural nature;(ii) the person or persons concerned in or party to the contravention or failure acted honestly; or(iii) it is just and equitable that the order be made.Mandie J considered that the failure of KordaMentha to seek to substantiate the legal foundation for their appointment could be criticised, but that they acted in good faith and that it was not grossly unreasonable of them to rely on the experience and assurance of the Company's legal adviser. His Honour found that the administrators had advantaged the creditors because the funds secured by KordaMentha from the parent company would not ordinarily have been available for distribution.Mandie J found that in these circumstances it was just and equitable that an order be made pursuant to section 1322(4), that, insofar as necessary, the appointment of KordaMentha (until terminated) was not invalid by reason of any contravention of the Act. Subsequently, KordaMentha became entitled to the appropriate fees and expenses of their administration.**5.3 Unauthorised payment of company debts by third party – misuse of statutory demand procedure**(By Jamie Hodgkinson, Clayton Utz, Perth)Gribbles Pathology (Vic) Pty Ltd v Shandford Investments Pty Ltd [2004] FCA 1466, Federal Court of Australia, Heerey J, 29 November 2004 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1466.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1466.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 Federal Court had to consider the operation of sections 459G, 459H and 459J of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in relation to company A which had served a statutory demand on company B, a member of a consolidated group, for repayment of a series of payments by A to creditors of B and other member companies in the group.**(b) Facts**Gribbles Pathology (Vic) Pty Ltd ("Gribbles Victoria"), applied under section 459G(1) of the Corporations Act 2001(Cth) for an order setting aside a statutory demand served on it by Shandford Investments Pty Ltd ("Shandford").Gribbles Victoria was part of a consolidated group, the holding company of which was Gribbles Group Ltd ("GGL"), an ASX-listed company. The group conducted its affairs on a consolidated basis. The individual members of the group did not generally hold separate board meetings. The group's accounts consolidated all revenue, expenses, assets and liabilities of all members. Payments to external creditors of any member of the group were made by one member, Gribbles Administrative Services Pty Ltd, which then internally allocated expenses to the relevant member of the group.During the relevant times, Mr Wallace Cameron was the Managing Director and Chief Executive Officer of GGL, and controlled 43.05% of the shareholding of GGL. Mr Cameron also controlled Shandford.In November and December 2003, payments totalling $2,729,018.44 were made by Shandford to creditors of 13 members of the group. Of this amount, $1,427,871.84 was paid to trade creditors of Gribbles Victoria. The payments were made without the knowledge of the boards of GGL or Gribbles Victoria. Evidence was presented that Mr Cameron did not disclose at any of the GGL board meetings from October 2003 to December 2003 that the payments had been made by Shandford to Gribbles Victoria's creditors. In August 2004, Shandford served a statutory demand on Gribbles Victoria for $2,850,986.65. Shandford contended that the payments to creditors had constituted a loan made to Gribbles Victoria, and as there were no agreed terms for the loan, the loan was repayable on demand. There was no evidence of any loan agreement.**(c) Decision**There were two grounds on which the statutory demand could be set aside. **(i) "Genuine dispute"**Section 459H(1)(a) of the Act provides that a statutory demand may be set aside if the Court is satisfied that there is "a genuine dispute" about the existence of the debt to which the demand relates. Shandford had made payments to creditors of the whole Group and had made a demand for repayment of the whole amount from Gribbles Victoria and not GGL. The court considered it significant that (a) the Group conducted its affairs on a consolidated basis; and (b) the payments had been made to creditors of 13 members, which made it unlikely that there could be imputed to Shandford an intention to recover against each member rather than GGL itself. These were held to be significant factors in concluding there was a genuine dispute about the existence of the debt demanded from Gribbles Victoria.**(ii) "Some other reason"**Section 459J(1)(b) of the Act provides that a statutory demand may be set aside if the Court is satisfied there is "some other reason" why the demand should be set aside. Mr Cameron had engaged in, prima facie, improper conduct towards the Group and the GGL Board in failing to disclose the payments by Shandford. The reasonable inference was that the transactions were to benefit himself rather than the Group (possibly by artificially driving down GGL's share price and allowing Mr Cameron to purchase the additional 8% of shares he required to obtain control of GGL). The Court held that the discretion in s 459J(1)(b) was wide enough to permit it to prevent the misuse of the statutory demand procedure for an ulterior purpose. Additionally, it was arguable that it was within the equitable jurisdiction of the Court (under s 5(2) [Federal Court of Australia Act 1976 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default)) to prevent the unconscientious use of Shandford's legal rights. **5.4 Funds paid into court as security and pursuant to a court order are not the property of the company paying in for the purpose of section 468 Corporations Act** (Benjamin Goss, Mallesons Stephen Jaques)Pilmer v HIH Casualty & General Insurance Limited (No2) [2004] SASC 389 South Australian Supreme Court, Mullighan J, 26 November 2004 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/november/2004sasc389.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/november/2004sasc389.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 determination by the court of whether funds paid into court by a company which subsequently becomes insolvent are the property of that company for the purposes of section 468(1) and (4) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (‘Act’). In the context of this case, section 468 of the Act regulates the disposition of property of a company made after the commencement of the winding up by the court.The plaintiff contended that the company paying money into court retains no legal or equitable interest in it and therefore the money ceases to be property of the company for the purposes of section 468 of the Act. As such, payment out to the plaintiff would not constitute disposal of property of the company for the purposes of section 468(1) of the Act.The first defendant contended that it was the legal and beneficial owner of the money before payment into the court and upon payment in, while legal ownership passed to the Registrar, the first defendant retained beneficial ownership in the money.The court held that when money is paid into court as security and pursuant to a court order, the party making the payment in does not retain any legal or equitable interest in the money. The money is vested in the Registrar and is to be disbursed in accordance with orders of the court. The funds in the court are not the property of the first defendant for the purposes of section 468(1) and (4) of the Act.**(b) Facts** The plaintiffs (‘NWP’) carried on practice as accountants and arranged a professional indemnity insurance policy through insurance brokers Willis Corroon (‘Willis’) who were the second defendants. The insurance policy was underwritten by various insurers, including the first defendant HIH Casualty and General Insurance Limited (‘HIH’) who provided the primary policy and 24 per cent of the second excess layer of the policy.HIH accepted and discharged its obligations to NWP under the primary policy, but did not accept that it was the insurer with respect to the 24 per cent of the second excess layer of the policy. NWP commenced proceedings against HIH and Willis claiming, inter alia, an order for specific performance of the contract of insurance alleged to exist for the 24 per cent of the second excess layer of the policy and damages for refusal to meet that indemnity. The Supreme Court of South Australia found in favour of NWP and HIH was ordered to pay the full 24 per cent of the second excess layer of the policy into court pending the outcome of ongoing professional negligence litigation between NWP and Duke Group Limited (‘Duke’). The Registrar was directed to invest that sum in the common fund pursuant to the [Supreme Court Rules 1987 (SA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=55083" \t "default). HIH satisfied the order by part payment on 19 December 2000 and the balance on 2 January 2001.On 27 August 2001 the Supreme Court of New South Wales ordered that HIH be wound up and appointed liquidators. The parties agreed that the Supreme Court of South Australia should decide whether funds paid into the court by HIH are the ‘property of HIH’ for the purposes of section 468(1) and (4) of the Act. If the court held that those funds were the property of HIH, it was asked to resolve a series of other questions dealing with the application of section 468 of the Act to the property.In the context of this case, section 468(1) of the Act provides that any disposition of property of the company, other than an exempt disposition (as defined by subsection 2), made after the commencement of the winding up is void unless the court orders otherwise. Section 468(4) of the Act provides that any attachment, sequestration, distress or execution put in force against the property of the company after the commencement of the winding up by the court is void.NWP contended that the funds in court were not the ‘property of HIH’ within the meaning of section 468 of the Act. This submission was based on a line of authority commencing with the decision of Vaughan Williams J in In Re Gordon; Ex Parte Navalchand [1897] 2 QB 516 (‘Gordon’) and confirmed in W A Sherratt Ltd v John Bromley (Church Stretton) Ltd [1985] 1 QB 1038 (‘Sherratt’). This line of cases establishes that when money is paid into court, the party making the payment does not retain any legal or equitable interest in the money and such an interest is acquired only at the time the court makes an order for payment.NWP further contended that there is no disposal of property of a company within the meaning of section 468(1) of the Act where there is a dealing by someone other than the company who has the right to say how the property is dealt with. Therefore, a direction of the court for payment out to NWP would not constitute disposal of property of HIH within the meaning of section 468(1) of the Act.HIH claimed that it was the legal and beneficial owner of the money before it was paid into court. Upon payment into court, legal ownership passed to the Registrar and while HIH lost control of the money it retained beneficial ownership. As section 468(1) of the Act is concerned with beneficial interest in property and as HIH did not lose beneficial interest in the money paid into court, it retained ownership within the meaning of section 468(1) of the Act. HIH also submitted that it could only have lost property rights in the money if it intended to dispose of its interest in the money and it did not have such an intention.Other submissions made by HIH included:         that the legislative scheme established by Part 5.4B of the Act assists in the construction of section 468 as to the meaning of the property of the company;         that it is unsafe to act on authority deriving from a decision of an English court earlier than 1933 because of the effect that changes in the court rules had on payments into court; and         that the payment in order was a Mareva injunction which cannot alter the interests of a party in property.**(c) Decision** Mullighan J held that the funds paid into court by HIH were not the property of HIH for the purposes of section 468 (1) and (4) of the Act. In concluding that the funds were not the property of HIH his Honour did not consider it necessary to answer the other questions posed in relation to the application of section 468 of the Act to the property.His Honour noted that the relevant provisions of the [Supreme Court Act 1935 (SA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28891" \t "default) and the [Supreme Court Rules 1987 (SA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=55083" \t "default) provide that money paid into court vests in the Registrar who is the legal owner of the money. It follows that when HIH paid the money into court, it ceased to be the legal owner of the money. Mullighan J accepted the line of authority commencing with the decision in Gordon and confirmed in Sherratt as applying to the facts of this case, such that when HIH paid money into court it did not retain any legal or equitable interest in the money. The money is vested in the Registrar and is to be disbursed in accordance with the decision of the court. The money paid into court does provide security to the party who is to benefit in accordance with the decision of the court as to payment out and that party is in the nature of a secured creditor. For that reason HIH is not free to deal with the money unless the court so decided when making an order for payment out.NWP also succeeded on their submission that there is no disposal of property of the company when there is dealing by someone other than the company who has the right to say how the property is to be dealt with. Mullighan J observed that section 468(1) of the Act applies only in respect of property in which the company has a beneficial interest in the sense of an interest which would be available in the winding up and to the extent of that interest. As his Honour concluded that HIH had no legal or beneficial interest in the money held by the Registrar there could be no disposition of property of HIH in the context of section 468(1) of the Act where the court directs the Registrar to pay the money out to NWP.Mullighan J rejected the HIH submission that in interpreting section 468(1) of the Act the court must consider a party’s intention to part with interest in money. In none of the cases reviewed was an intention to part with the legal and beneficial interest in property the basis of the decision. Further, his Honour did not accept that HIH did not intend to part with property in the money, observing that HIH complied with the payment order in the knowledge that at least part of the money would be used to indemnify NWP in their ongoing legal proceedings with Duke.Mullighan J also rejected the other submissions made by HIH.**5.5 Inside information and alleged insider trading** (By Wendy Ng, Articled Clerk, Freehills)Rivkin Financial Services Limited v Sofcom Limited [2004] FCA 1538, Federal Court of Australia, Emmett J, 26 November 2004The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1538.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1538.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 dealings in the shares of Rivkin Financial Services Limited (‘Company’) by Alan Davis (‘Davis’), Alan Davis Group Pty Ltd (‘Davis Group’), Farooq Khan (‘Khan’), Sofcom Limited (‘Sofcom’), Fast Scout Limited (‘Fast Scout’) and Altera Capital Limited (‘Altera’).The Company alleged that Sofcom, Fast Scout and Altera (together, ‘Khan Companies’) acquired the Company’s shares in breach of section 1043A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (‘Act’). The Khan Companies cross claimed that there were various contraventions of the insider trading provisions of the Act by the Company, Davis Group, Network Limited (‘Network’) and Cole Kablow Superannuation Pty Ltd (‘Cole Kablow’).The Company also claimed that the Khan Companies’ request to convene a general meeting was invalid.**(b) Facts**Khan is the managing director and executive chairman of the Khan Companies. In May 2004, Christopher Ryan, Sofcom’s corporate advisor, began a series of discussions with Jordan Rivkin, a director of the Company, on behalf of Khan with a view to building a 20% shareholding in the Company. However, Jordan Rivkin began negotiations with Davis. During the course of negotiations, Davis also expressed a desire to invest in Network.On 17 June 2004, Rene Rivkin’s shares in the Company were sold to Davis Group and Davis was appointed as director and Chief Executive Officer on 21 June 2004.During the period from 22 to 29 June 2004, the Khan Companies bought 4,908,471 shares in the Company on the ASX. This was greater than 5% of the Company’s shares. A memorandum of understanding was also signed between the Khan Companies that they would exercise their shares in one bloc.On 30 June 2004, Sofcom made an ASX announcement that it had, along with its associates, acquired more than 5% of the Company’s shares and that it wanted to request a shareholders meeting to remove Davis and Shannon Rivkin as directors and appoint its nominees as directors.On 5 July 2004, Sofcom delivered a request under s249D of the Act to hold a general meeting. However, the Company announced on 31 July 2004 that the request was invalid because the Khan Companies did not hold over 5% of the Company’s shares. This was because Network and Cole Kablow had become shareholders in the meantime and reduced the Khan Companies’ shareholdings to just under 5%.On 2 July 2004, the Company had entered into a Mutual Subscription Agreement and Loan Agreement under which the Company issued shares to Network and Network issued shares to the Company. Cole Kablow also became shareholders in the Company that day. Although a share application had been sent to the Share Registrar on 2 July 2004, it was not processed until 5 July 2004, and the Company’s members’ register did not show Network and Cole Kablow as shareholders until then. When this delay was found out by the Company, it requested the Registrar amend the register to show Network and Cole Kablow as shareholders on 2 July 2004.**(c) Decision**Both the claims and cross claims were dismissed.**(i)   Relevant law**Section 1042A of the Act defines ‘inside information’ to mean:(a) the information is not generally available; and(b) “if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.”**(ii) Insider trading by the Khan Companies**Emmett J found that the Khan Companies possessed information that was not generally available. The information was the intention of the Khan Companies to acquire at least 5% of the Company’s shares and request a shareholders’ meeting to obtain control of the board. The Khan Companies argued that the information was generally available because its purchase of shares was recorded on SEATS. Emmett J disagreed, stating that the orders placed on SEATS did not amount to 5% nor was it generally known that an order placed by Khan’s broker was on behalf of the companies associated with Khan.However, Emmett J found that the information would not, and would not be likely to, influence persons who commonly acquire relevant financial products in deciding whether or not to acquire or dispose of shares in the Company. Emmett J looked to the effect of the purchase on the market. Even though the Khan Companies had purchased a not insignificant number of the Company’s shares, the purchase of shares appeared to have no appreciable effect on the Company’s share price. In addition, the announcement of the identity of the purchase and the intention to request a shareholders’ meeting also did not appear to have an appreciable effect on the market.**(iii) Insider trading by the Davis Group, Cole Kablow and Network** The Khan Companies claimed that:         Davis Group had the purpose or intention that it would take steps to control the board;         Davis had told the Coles that Davis intended to obtain a substantial holding in Network; and         Davis Group, Cole Kablow and Network intended to dilute the shareholding of the Khan Companies, prevent the Khan Companies from convening a general meeting and prevent the appointment of nominees of the Khan Companies to the board of the Company.Emmett J found that none of these entities possessed inside information because the companies were simply negotiating the sale of shares. In addition, the mere fact that Davis and the Coles had discussed the possibility of an investment in Network of an unspecified amount on unspecified terms was insignificant in the market.**(iv) Request to convene general meeting**The Company also claimed that Sofcom’s request to convene a general meeting under section 249D of the Act was invalid because the Khan Companies did not have at least 5% of the votes of the Company’s shares. Section 249D provides that a company must call a meeting on the request members who hold at least 5% of the votes in the company. The percentage of votes that members hold is determined at midnight before the request is given to the company.The issue in this case was the Registrar’s delay in the recording Network and Cole Kablow’s shares in the Company. Emmett J stated that the allotment of shares simply constitutes a binding contract under which the company is bound to complete the allotment and the person is bound to take the shares – it does not make the person who agrees to take the shares a member immediately. It is the allotment, entry into the register and sealing and delivery of certificates that are the matters of fact that normally constitute the issue of shares and considered as a form of property.The register of members requires entry in the register of the date when the directors approve or direct an allotment of shares. Where the register has been changed in a way that was the clear result of a mistake, it is open for the directors to direct that the register be rectified. When the directors correct such an error, the correction may be taken to operate retrospectively.If the failure to make an entry was a mistake then the register may be changed as if an erroneous entry was made. However, where there is a mere failure to make an entry on the register, notwithstanding that it was intended that the entry should have been made, this does not mean that there has been a mistake and that the subsequent entry operates retrospectively.Emmett J found that the effect of the entry into the Mutual Subscription Agreement was that there was a binding unconditional contract between the Company, Network and Cole Kablow and that, as between themselves, Network and Cole Kablow were members of the Company from 2 July 2004. However, as at midnight between 4 and 5 July 2004, as Network and Cole Kablow were not on the recorded on the register as members, they were not members of the Company for the purposes of the Act.**(iv)     Minor issue: oppressive conduct**The Khan Companies based their claim on three grounds:         the issue of shares in the Company to Network and Cole Kablow on 2 July 2004 was improvident;         the directors who participated in the transaction had an impugned purpose; and         failure by the Company to call a general meeting after notice was given under s249D of the Act was unfair to the Khan Companies.The court dismissed these claims as their was insufficient evidence led by the Khan Companies.**5.6 The construction of assignment clauses in joint venture agreements**(By Naomi Gingold, Phillips Fox)Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL (Receivers and Managers Appointed) (Administrators Appointed) [2004] VSC 477, Supreme Court of Victoria, Hollingworth J, 23 November 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/november/2004vsc477.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/november/2004vsc477.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/index.html](http://cclsr.law.unimelb.edu.au/judgments/index.html%22%20%5Ct%20%22_new)**(a) Summary**This case concerned a joint venture agreement between Esso Australia Resources Pty Ltd ('Esso'), Southern Pacific Petroleum ('SPP') and Central Pacific Minerals ('CPM'). After SPP and CPM went into administration, the creditors of SPP approved a deed of company arrangement under which SPP would assign its interest in the joint venture. Esso argued that this agreement was in contravention of the joint venture agreement and that Esso's prior consent to the assignment was required. Esso relied on various arguments in relation to the construction of the assignment clauses as well as implied duties of co-operation and good faith. Hollingworth J rejected Esso's arguments and thus dismissed Esso's claim for injunctive relief. **(b) Facts** The Rundle Joint Venture Agreement ('JVA') established an unincorporated joint venture between Esso, SPP and CPM in relation to the mining and processing of minerals. When SPP and CPM were put in the hands of administrators, an offer was made for SPP's joint venture interests by John Browning, as agent for SPV, a public company yet to be incorporated. A majority of SPP creditors approved a Deed of Company Arrangement (DOCA). The DOCA would allow SPP to be replaced by SPV. It also provided that SPP would do all things necessary to ensure that SPV was a subsidiary of SPP at all relevant times. The JVA required Esso's consent in relation to an assignment of interests except where the assignment was to a 'Related Corporation.' The relevant assignment provision of the JVA is clause 24 which provides that:         "Each Participant shall have the right to assign all or part of its Interest to a Related Corporation without the consent of the other Participant, subject only to the Related Corporation's assumption of the assignor's obligations under the various agreements relating to the Joint Venture and the assignor guaranteeing the performance of the Related Corporation. Such guarantee will not cease merely because the assignee ceases to be a Related Corporation." (24.01(a).         "Subject to this article each Participant may with the prior written consent of the other, which shall not be unreasonably withheld, assign all or part of its Interest to a third party" (24.01(b)).**(c) Decision** In attempting to establish that the DOCA breached the JVA, Esso proposed two alternative arguments. Esso claimed that a failure to seek its consent to the assignment breached clause 24 of the JVA. In the alternative, Esso contended that, while SPP's behaviour did not breach a literal construction of the JVA clause, it did breach implied duties that underscored the contract.**(i) Construction of clause 24** In response to Esso's argument that the DOCA breached a literal interpretation of clause 24 of the JVA, Hollingworth J undertook a detailed examination of the construction of the assignment clause.First, her Honour noted that the JVA was a commercial agreement entered into by substantial companies which were capable of looking after their own commercial interests. Hollingworth J rejected Esso's argument that the 'Related Corporation' provision was an exception to a general rule which required Esso's consent. Her Honour found that there was no indication that the clause was intended to operate as a general rule with exceptions, but rather that clauses 24.01(a) and 24.02(b) were two distinct clauses. Hollingworth J's judgment also examined whether SPP was a 'Related Corporation'. Clause 1.01 of the JVA defined a 'Related Corporation' as having "the same meaning as ascribed to that term by section 5(1) of the Companies Act 1981…". Section 5(1) of the [Companies Act 1981](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7358" \t "default) (Cth) referred to sub-section 7(5) which provides that:“Where a corporation-(a)        is the holding company of another corporation;(b)        is a subsidiary of another corporation; or(c)        is a subsidiary of the holding company of another corporation,that first-mentioned corporation and that other corporation shall, for the purposes of this Act, be deemed to be related to each other".Sub-section 7(1)(a)(i) is also relevant and provides that, for the purposes of the Act, a corporation shall be deemed to be a subsidiary of another corporation if that other corporation controls the composition of the board of directors of the first mentioned corporation. Esso attempted to establish that this broad definition of subsidiary in the Companies Act 1981 did not apply. Rather, it argued that the court should apply the natural and narrower definition of the term 'subsidiary' which implies a degree of ownership over the relevant company. Hollingworth J noted that there was no justification for employing the natural meaning of the term 'subsidiary' as the parties explicitly incorporated the statutory meaning in the JVA. As SPP would control the composition of SPV's board, SPV was deemed to be a 'subsidiary' and subsequently a 'Related Corporation' within the meaning of the JVA. This was despite the fact that SPP would not be a shareholder of SPV. Hollingworth J further rejected Esso's argument that once SPP was wound up, it would no longer be a Related Corporation of SPV and hence the requirements of clause 24.01(a) were not satisfied. This was on the basis that clause 24.01(a) explicitly contemplated that the assignee might cease to be a 'Related Corporation.' Esso also argued that clause 24 must be construed in a way that protects the rights of the non-assigning party to determine with whom it will be in a contractual relationship. However, Hollingworth J held that a change in ownership was permitted under the JVA. Therefore, Hollingworth J rejected Esso's construction of the assignment clause and even contemplated other corporate structures which would bypass Esso's consent. The examples Hollingworth J noted were that SPV could become SPP's parent company or that SPP could assign its interest to a wholly owned subsidiary before selling the subsidiary to a third party. Hollingworth J therefore concluded that the proposed assignment was permitted under a proper construction of clause 24.01(a) and hence Esso's consent to the assignment was not required.**(ii) Implied duties** Hollingworth J rejected Esso's arguments which sought to establish that, even if SPP complied with the assignment provisions in clause 24, various duties underscoring the JVA were breached. Hollingworth J quickly dismissed Esso's argument that such an assignment breached a conflict of interests provision. The 'conflict of interest' provision was to be read subject to other terms in the agreement.Esso further claimed that there is an implied term in the JVA that each participant would do everything necessary to ensure that the other party would have the benefit of the agreement. Hollingworth J dismissed this argument by noting that the present dispute was not analogous to the leading cases on this matter. Her Honour also queried the plausibility of prohibiting SPP from exercising its contractual rights to assign its interests so that Esso could have the benefit of other assignment-related provisions.Finally, Esso contended that SPP had cynically resorted to "the black letter" and evaded the spirit of the contract by structuring the transaction to purposely avoid obtaining Esso's consent. In doing so, Esso proposed that SPP had breached an implied duty of good faith. Hollingworth noted that there may be some circumstances in the JVA in which the parties must exercise their rights under an implied duty of good faith. However, clause 24.01(a) was not an example of such a clause. Her Honour therefore held that there was no lack of good faith in SPP acting to promote its own interests consistent with the basis upon which it entered the contract.**(d) Orders**Hollingworth J therefore proposed to make the declaration that the proposed assignment contained in the DOCA was permitted by the JVA.**5.7 Are promissory notes “securities” or “interests in managed investment schemes”?**(By Peter Henley, Mallesons Stephen Jaques)Australian Securities & Investments Commission v Emu Brewery Mezzanine Limited [2004] WASC 241, Supreme Court of Western Australia, Simmonds J, 19 November 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/november/2004wasc0241.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2004/november/2004wasc0241.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 consolidated two proceedings brought by the Australian Securities and Investments Commission (“ASIC”) seeking declaratory and other relief against two special purpose vehicles (“SPVs”) of the Westpoint Group, Emu Brewery Mezzanine Limited (“Emu Brewery”) and Bayshore Mezzanine Pty Limited (“Bayshore”). Those subsidiaries had issued Information Memoranda inviting investors to apply for an issue of promissory notes (“Notes”) with a minimum face value of $50,000. The matter was brought as two cases stated on agreed facts. The questions raised by the case stated involved three key issues, which Simmonds J determined as follows:         Were the Notes “securities” within the meaning of section 761A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“Act”), and hence was the offering required to comply with Chapter 6D of the Act? No.         Were the Notes an “interest in a managed investment scheme” within the meaning of Chapter 5C of the Act, and as a result required to comply with that Chapter? Yes (as to the first part; the second part was not determined).         In relation to Emu Brewery only, was the Information Memorandum “false, misleading or deceptive” within the meaning of sections 12DA of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) (“ASIC Act”) in relation to certain representations regarding the structure and financing arrangement of the development proposal? No.**(b) Facts** The Westpoint Group was developing two sites (the former Emu Brewery in Perth, and the Bayshore site in Port Melbourne) for residential, retail and office accommodation (“Project”). The Project was to be funded externally as follows:         the major lender would provide funds to the corporate trustee of each development, taking as security a first-ranking charge over the assets of the trustee and a first-ranking mortgage over the development property; and         Emu Brewery and Bayshore would seek investment from third-party lenders under the Information Memoranda, and on-lend the funds obtained to their respective trustees in return for second-ranking charge over the assets of the trustee and a second-ranking mortgage over the development property.Emu Brewery and Bayshore were also beneficiaries of separate guarantees from an upstream member of the Westpoint Group. The Information Memoranda issued by Emu Brewery and Bayshore were, aside from some aspects not relevant to these proceedings, essentially identical. Each contained a “Promissory Note Application Form” which included a sample Note. The Notes were expressed to be non-negotiable, non-transferable and with a minimum face value of $50,000, and when issued would carry an issue date and number. **(c) Decision** **(i) Promissory notes and debentures**The parties agreed the applicable part of the definition of “securities” — if any — was that under section 761A(b), which refers to “a debenture of a body”. ASIC raised two arguments in favour of the Notes being a security:         the Information Memoranda contained an implied undertaking by the relevant SPV to repay money lent by investors which was in addition to any undertaking to pay under the Notes; or, alternatively         the Notes did not fall within the paragraph (d) exclusion for “an undertaking to pay money under a promissory note that has a face value of at least $50,000” in the definition of “debenture of a body” in section 9 of the Act.After reviewing the authorities on the correct test for determining whether the Information Memoranda contained any implied “promissory obligations” in relation to the repayment of money, Simmonds J found that the only “unambiguously contractual language” used in the Information Memoranda on this point was in relation to the Notes offer, which contained express provisions for offer and acceptance in the provisions of the application process for the Notes.In relation to the definition of “promissory note”, despite that term not being defined in the Act, Simmonds J found that the underlying intention of paragraph (d) was to exclude banking and other commercial transactions involving dealings in debt of a sort for which the protective provisions in Ch 6D (requiring disclosure documents) and Ch 2L (requiring a trust deed and a trustee) are not required. Based on recent authority from Queensland (Gore v Octachim Wise Ltd[1995] 2 Qd R 242), ASIC raised questions as to the uncertainty of some terms of the Notes, particularly regarding early repayment rights, and the identification of the sum requiring repayment at a “fixed future time”. Among other submissions directed towards the nature and characteristics of negotiable instruments, ASIC argued that this uncertainty meant that the Notes did not have the characteristics of the instruments which were to be excluded from the protection of the Act. However, Simmonds J did not find himself bound by that authority, and preferred instead the line of reasoning followed by the dissenting judgment of Ormerod J in Williamson v Rider [1963] 1 QB 89, finding that the Note was not payable on a contingency, but on the occurrence of an event for which the time of occurrence was not certain (in this case, the finalisation of the Project). The Notes hence fell within the in paragraph (d) exception. **(ii) Promissory notes and “interests in managed investment scheme”**To determine whether the Notes were interests in a scheme, Simmonds J considered:         whether the Project was a “scheme” within the meaning of the Act;         whether the investors’ contributions were made in order “to acquire rights to benefits” from the scheme; and         whether the contributions were “pooled” or “used in a common enterprise”.Simmonds J easily found that the Project was a “scheme”, based on the structured arrangements for financing and the encouragement for investment in the Notes. Further, because:          “benefits” carry a broad meaning under section 9 of the Act, and do not need to be cash payments; and          “rights” did not necessarily mean legally enforceable rights, a sufficient linkage existed between investors and the scheme. It could be said that the Notes were acquired to obtain rights to benefits from the scheme though an investment which carried reduced risks by virtue, among other things, of its financing arrangements. Simmonds J also found that the funds raised through the Notes could properly be said to be pooled to “produce financial benefits or benefits consisting of rights or interests in property, for the people (the members) who hold an interest in the scheme, and that rather than simply being pooled for the purpose of on-lending by the SPVs, the funds were also pooled to produce these financial benefits for the Noteholders. These findings meant that the issue of Notes was an offer of interests in a managed investment scheme, which scheme would need to be registered under section 601ED(2) of the Act. However, despite that determination, as the cases stated did not address relevant exceptions to the registration requirement, no declaratory orders requiring registration issue were made by the Court. **(iii) Misleading and deceptive conduct**ASIC argued that the Information Memoranda had certain risk-mitigation language which made representations that certain aspects of the Project (the nature of the SPVs, the financing arrangements involved and the independence of the boards of directors of each SPV) had “contractual significance”, and that those arrangements would be regarded by the audience of the Information Memoranda as promissory obligations on which they could rely in making the investment decisions. However, after a review of the authorities on construing the promissory or contractual significance of statements (including those in relation to section 51A of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default), which his Honour held were applicable to section 12BB of the ASIC Act) and an analysis of the language actually used in the Information Memoranda, Simmonds J determined that the representations were not promises of contractual significance. This was due to the way in which those statements were expressed: for example, that certain arrangements, such as the financing arrangements, “will” occur; or that Emu Brewery “has an independent board of directors”, rather than that Emu Brewery would at all times maintain an independent board of directors. **5.8 Right to inspect financial records confirmed as an essential power of directors**(By Sheree Siow, Corrs Chambers Westgarth)Lei, in the matter of Tai-Ao Aluminium (Australia) Pty Ltd v Cordukes [2004] FCA 1488, Federal Court of Australia, Finkelstein J, 11 November 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1488.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1488.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/index.html](http://cclsr.law.unimelb.edu.au/judgments/index.html%22%20%5Ct%20%22_new)**(a) Summary**This case considered the nature of a director’s right to inspect a company’s financial records under section 290 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).The court confirmed that the right of inspection is essential to the proper performance of a director’s duties. Finkelstein J suggested that in recognition of the essential nature of those rights, a court would not ordinarily restrain a director from inspecting a company’s financial records.The right of inspection in section 290 is not, however, an unqualified power. A director might therefore be restrained from inspecting the records of a company if there is evidence that the director intends to do so for a corrupt or improper purpose. Finkelstein J’s approach suggests that there will need to be substantial evidence of such an improper purpose before the court will intervene to prevent inspection and that mere suspicion of an improper purpose is insufficient.**(b) Facts** Mr Lei was a director of Tai-Ao Aluminium (Australia) Pty Ltd. He was also a substantial shareholder in the parent company, which was incorporated in Hong Kong, Tai-Ao Aluminium Group Limited. He had presented a petition to the High Court of the Hong Kong Special Administrative Region Court of First Instance for the Hong Kong company to be wound up. Mr Lei had never exercised his right to inspect books and records and had never attended a directors’ meeting of the Australian company. However, on 31 October 2004, Mr Lei went to the company’s Melbourne office to inspect the company books and records. Similarly, on 4 November 2004, he went to the company’s Sydney office to inspect further documents. He was met at the Sydney office by Mr Cordukes who was another director of the Australian company. Mr Cordukes refused to allow Mr Lei access to the documents and told Mr Lei that he would need a court order to get access.Mr Lei issued an application seeking orders for access and the right to make copies of the company’s documents. Relief was sought under sections 198F and 290(1). Section 290(1) allows a director to access financial records of a company at all reasonable times. The application under section 198F was withdrawn.The application was returnable at 2:00pm on 5 November 2004. However, the defendants sought to adjourn the application to gather evidence to oppose Mr Lei’s application. Their ground of opposition was that Mr Lei was not seeking inspection for a proper purpose associated with the company’s affairs. Rather, the defendants alleged Mr Lei sought inspection for an improper purpose that would harm the company. Finkelstein J adjourned the application to allow the defendants time to gather evidence to support their allegations.Before the hearing resumed, the defendants filed several affidavits, which disclosed that the company’s Constitution allowed the directors of the company to remove a director by resolution. In addition, the directors were to have a meeting just before the hearing where they would pass a resolution to remove Mr Lei as a director.**(c) Decision** **(i) The right to inspect company documents**Mr Lei’s application for the right to inspect company documents under section 290 was unsuccessful. Broadly, Finkelstein J concluded that no useful purpose would be served by making the order requested, considering that the other directors intended to remove Mr Lei from office.In delivering his judgment however, Finkelstein J considered the nature of a director’s right of inspection under common law and statute (section 290 of the Corporations Act). In particular, he drew on Street CJ’s observations in Edman v Ross (1922) 22 SR (NSW) 351 at 361, that a director’s right to inspect books and records is essential to the proper performance of a director’s duties. Finkelstein J accepted however, the view of Mahon J in Berlei Hestia (NZ) Ltd v Fernyhough [1980] 2 NZLR 150, at 164-165, that while the right of inspection is an unqualified power, that power disappears “where it is proved that a director is acting or is about to act in breach of his fiduciary duty”. In this regard, Finkelstein J characterised the right of inspection in section 290 as a power rather than a right. Finkelstein J did not accept that sufficient evidence of such an improper purpose had been demonstrated in this instance. Nevertheless, Finkelstein J declined to make an order under section 290, as the order would be frustrated by the other directors of the company removing Mr Lei as a director. Even if the plaintiff originally had a legitimate reason for gaining access to the company records, he was no longer in a position where he could physically perform any duties of office. Therefore, Mr Lei had no need for inspection.**(ii) Costs**Despite the fact that Mr Lei’s applications had failed, he sought an order for his costs on a solicitor-client basis. Although Mr Lei was an unsuccessful plaintiff, Finkelstein J was satisfied that exceptional circumstances justified an order of costs in favour of Mr Lei. The exceptional circumstances identified by Finkelstein J were that the defendants’ behaviour forced Mr Lei to bring the proceedings and contributed to the failed application. Firstly, the defendants had denied Mr Lei his unqualified power to inspect company documents when they should have known he was entitled to do so. The only basis on which they sought to challenge the plaintiff’s right of inspection was that he would improperly use any information he obtained from inspection. Finkelstein J concluded that the defendants were unable to prove that Mr Lei would improperly use the information. Although there might have been some suspicion in that regard, this was not enough. Further instead of using the adjournment to gather evidence to prove their case, the defendants removed Mr Lei as director to defeat his claim. Mr Lei’s claim under section 290 would have succeeded if the defendants had not removed him as a director. To that extent, Finkelstein J concluded the defendants had acted wrongly and ought properly pay Mr Lei’s costs. **5.9 Insolvent transactions favouring institutional creditors – when does a creditor suspect insolvency?**(By Nim Sathianathan, Solicitor, Corrs Chambers Westgarth)Dean-Willcocks v Commissioner of Taxation [2004] NSWSC 1058, Supreme Court of New South Wales, Young CJ in Eq, 10 November 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/november/2004nswsc1058.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/november/2004nswsc1058.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) Relevant law**Transactions entered into by an insolvent company during the ‘relations back period’ may be declared void as against the liquidator under section 588FF of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Corporations Act). Section 588FG(2) provides a defence to an action brought under section 588FF where the recipient of funds can prove that:               the transaction was not an unfair loan or an unreasonable director-related transaction;               the transaction was entered into in good faith;               at the time the transaction was entered into, the recipient had no reasonable grounds to suspect the company was insolvent and a reasonable person in the person’s circumstances would have had no such grounds for suspecting insolvency; and               the recipient provided valuable consideration or changed his or her position in reliance on the transaction.**(b) Facts** SJP Formwork (NSW) Pty Ltd (the Company) was placed into liquidation on 8 September 1999. The relations back period commenced on 28 November 1998.During the relations back period, the Company paid to the Commissioner of Taxation (the Commissioner) amounts totalling $1,773,782.71 under arrangements for the satisfaction of previous tax debts.The Company’s liquidator (the Liquidator) commenced proceedings to recover the amounts and interest, claiming that the amounts paid were voidable transactions under section 588FF of the Corporations Act. The Commissioner sought to rely on the defence under section 588FG(2). The key issue was whether, on a subjective analysis, the Commissioner had reasonable grounds for suspecting that the Company was insolvent or near insolvent at the time when the Commissioner accepted payments from the Company under the arrangements.**(c) Decision** The NSW Supreme Court required the Commissioner to adduce evidence to negate the suggestion that the Commissioner actually suspected that the Company was insolvent. What was required was evidence of objective circumstances. In the case, it was clear that none of the Commissioner’s officers individually had actual knowledge of the full affairs of the Company and ought reasonably be taken to be aware that the Company was insolvent. The Commissioner’s state of mind was established by putting together the sum total of all of his officer’s knowledge.Specifically, the NSW Supreme Court considered the following circumstances relevant:         the Company owed a total of $1.6 million to four creditors all of which was due when payments were made to the Commissioner;         the Company had not made any arrangements with those creditors for the payment of its debts;         the Company had cash flow problems;         even if the Company had complied with its tax payment arrangements, it still owed very substantial sums to the Commissioner;         the Company was known by some of the Commissioner’s officers to be a phoenix company whose previous incarnation had died owing the Commissioner about $2.5 million; and         some of the Commissioner’s officers knew the Company had failed to file statutory tax returns during the period.Having considered the above, the NSW Supreme Court held that the Commissioner would have had reasonable grounds to suspect that the Company was insolvent at the time the payments were received.Accordingly, the NSW Supreme Court concluded that the defence under section 588FF had not been made out and made an order in favour of the Liquidator for the full amount of the payments made under the arrangements plus interest and costs.**(d) Practical implications**Establishing the defence that a recipient of funds had no grounds for suspecting the insolvency of the debtor is inherently difficult. The NSW Supreme Court’s decision arguably makes the task more difficult for large institutional creditors. This is because the knowledge of an institution’s potentially many servants and agents is pooled and attributed to it, making it difficult for the institution to prove a lack of knowledge. **5.10 Administrators' indemnity for loan** (By Niti Gupta, Blake Dawson Waldron)Mentha, in the matter of Spyglass Management Group Pty Ltd (Administrators Appointed) [2004] FCA 1469, Federal Court of Australia, Finkelstein J, 9 November 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1469.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/november/2004fca1469.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 concerns funding to be provided by an insolvent company's creditors to its administrators, to ensure that the company's business can be operated and sold as a going concern. The creditors agreed to provide such funding, subject to the following conditions:         advances made to the administrators are to be considered, for the purposes of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act"), as debts incurred by them in the performance and exercise of their functions and powers as administrators of the company for services rendered; and         if the administrator's indemnity in section 443D is insufficient to meet debts for which the administrators are personally liable to the lenders, the administrators will not be liable to repay such debt or liability to the extent of insufficiency.The administrators also sought a direction that they would be justified in providing an undertaking to the lenders to the effect that, if the company entered into a deed of company arrangement, the deed would preserve the priority claim of the lenders as established by the administrator's indemnity. Finkelstein J made orders allowing the 2 conditions and a direction allowing the undertaking to the lenders. The first condition would ensure that the administrators had an indemnity in respect of the loan. While there is a risk that the business would not be sold, all parties were willing to run that risk and there was therefore no reason for the order not to be made. Similarly, the second condition was for the benefit of the administrators and both the lenders and creditors had already agreed to its inclusion. Finally, Finkelstein J held that it was both reasonable for the lenders to seek the undertaking and reasonable for the administrators to provide it, particularly given that the creditors were content with it.**(b) Facts** Spyglass Management Group Pty Ltd (Administrators Appointed) (Spyglass) operates the AFL Hall of Fame and Sensation. It has many creditors, including most significantly, the company's landlord (which claims to be owed approximately $21 million, mostly for rent due on an unexpired lease) and the AFL, the company's major sponsor (which is owed about $408,000). The administrators believe that if the company's business is not sold, the unsecured creditors will get nothing, as the total realisable value of the company's assets (apart from its business) is less than $128,000. The administrators wish to sell the company's business as a going concern and believe that they will find a buyer who is willing to pay a reasonable price for it. However, without funding, the administrators would not be able to operate the company's business so that it could be sold as a going concern. The administrators approached the landlord and the AFL to seek funding. Those creditors agreed to lend $162,500 subject to the following conditions.The first condition provides that pursuant to section 447A of the Corporations Act 2001 (Cth) ("Act"), Part 5.3A of the Act is to operate in relation to Spyglass as if section 443A(1)(a) provides that:         advances made to the administrators are debts incurred by them in the performance and exercise of their functions and powers as administrators of the company for services rendered; and         if the indemnity that the administrators have in section 443D is insufficient to meet such other debts or any other debts for which the administrators are personally liable to the lenders, the administrators will not be liable to repay such debt or liability to the extent of insufficiency.Secondly, the administrators sought a direction that they would be justified in giving an undertaking to the lenders to the following effect: "The Administrators hereby undertake to the Lenders that, unless the Lenders agree to the contrary, if the Administrators recommend that the Company enter into a deed of company arrangement, the instrument setting out the terms of the Deed prepared by them in accordance with section 444A(3) of the Act will provide that any proceeds of realising the property of the Company that is available to pay creditors' claims, will be distributed first in the order prescribed by section 556(1)(a), (b) and (c) of the Act."**(c) Decision****(i) First condition**Section 443D(a) provides that the administrator of a company is entitled to be indemnified out of company property for debts for which he or she is liable under Division 9, Sub-division A or the remittance provisions in section 443BA(3). The administrator's indemnity is given priority over unsecured debts and most debts secured by a floating charge on the property. Debts of an administrator that are covered include those incurred in the performance or exercise of his or her functions and powers for services rendered, goods bought or property hired, leased, used or occupied. This does not include a loan to the administrators. Inclusion of the first part of the first condition would ensure that the administrators had an indemnity in respect of the loan, as the loan would in substance be a "service" rendered to the administrators. Finkelstein J held that this order should be made. While there is a risk that the business would not be sold, rather incurring further debts, the administrators (and creditors) are willing to run that risk in the belief that to do so would be in the creditors' interests. Finkelstein J also held that the second part of the first condition should be included. The order was sought for the benefit of the administrators. As the lenders had already agreed to a loan of this kind (effectively a non-recourse loan) and the creditors have no interest in it as they cannot be disadvantaged by it, but rather stand to benefit from the loan going ahead, Finklestein J held that the order should be made.**(ii) Undertaking**The lenders sought the undertaking so that if the company executed a deed of company arrangement (a likely scenario), the priority claim established by the administrator's indemnity in favour of the lenders, would be preserved. Finkelstein J held that it was both reasonable for the lenders to seek such an undertaking and reasonable for the administrators to give it. The creditors were also content with the undertaking. **5.11 Power of court to accept undertaking not to manage companies**(By William Higgs, Solicitor, Mallesons Stephen Jaques)Australian Securities and Investments Commission (ASIC) v Edwards [2004] NSWSC 1044, New South Wales Supreme Court, Barrett J, 9 November 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/november/2004nswsc1044.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/november/2004nswsc1044.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 first defendant was a director of Murray River Ltd. ASIC sought a declaration of contravention under s 1317E, as well as a disqualification order pursuant to s 206C(1) in respect of alleged contraventions involving s 588G(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (“Act”) and the duty of company directors to prevent insolvent trading. The parties agreed to compromise the proceedings subject to undertakings being given by the first defendant. The court had to consider whether to grant a consent order to give effect to the compromise. It was held that the court should not accept an undertaking by way of final disposition of a proceeding unless it has power to enjoin the acts and activities constituting the substance of the undertaking. The possibility of punishment for contempt by reason of non-compliance with an undertaking should not be allowed to arise unless the court has power to make an order to the same effect as the undertaking. Accordingly, the court decided not to accept the undertaking since the court had no power to grant an injunction in the same terms as the proffered undertaking. Instead, proceedings were stood over for further mention. **(b) Facts**The first defendant was a director of Murray River Ltd. ASIC initiated proceedings against the first defendant in relation to alleged contraventions involving s 588G(2) of the Act and the duty of company directors to prevent insolvent trading. The specific nature of the alleged contraventions were not disclosed in the judgment of Barrett J and are not relevant to this note. ASIC sought a declaration of contravention under s 1317E, as well as a disqualification order pursuant to s 206C(1).As proceedings were on foot, the parties informed the court of a mutual desire to compromise the proceedings. The compromise was subject to the first defendant making certain undertakings to ASIC. The undertakings were as follows:         not to be a director or secretary of any corporation or to participate in management of corporations for specified period;          to pay a stated sum to ASIC; and         to pay ASIC’s costs in an agreed sum by stated instalments.The court had to consider whether to accept the mutual undertaking by way of final disposition of the proceeding.**(c) Decision** It was held by the court that it should not accept an undertaking by way of final disposition of a proceeding unless it has power to enjoin the acts and activities constituting the substance of the undertaking. The possibility of punishment for contempt by reason of non-compliance with an undertaking should not be allowed to arise unless the court has power to make an order to the same effect as the undertaking. Accordingly, the court decided not to accept the mutual undertaking. Instead, proceedings were stood over for further mention. In arriving at that conclusion, the following issues were raised.  **(i) Going behind the parties agreement**The first consideration raised by way of answer to this question was whether a court could go behind a parties’ agreement to consent to declarations of contravention under s 1317E.In order to determine whether a court could go behind a parties’ agreement to make by consent declarations of contravention under s 1317E, Barrett J, considered the applicability of the recent decision of Bryson J in Re One.Tel Ltd; Australian Securities and Investments Commissioner v Rich (2003) 44 ACSR 682 and that of White J in Australian Securities and Investments Commission v Rich (2004) 50 ACSR 500.Barrett J noted that it was generally held in those cases that, “because such a declaration is a declaration on a matter relating to public or analogous rights, it should not be made by consent of ASIC and the person against whom ASIC has proceeded, unless the court has a basis for being satisfied by evidence (including agreed facts) that the statutory conditions for the making of the declaration have been fulfilled.” Barrett J concluded that these considerations do not apply directly where, as in this case, the compromise between ASIC and the first defendant by reference to ss 1317E and 206C is one under which the first defendant will give an undertaking to the court not to be involved in the management of corporations for a stated period. Relevantly, acceptance by a court of such an undertaking is not predicated upon a court being satisfied as to the existence of circumstances warranting the making of a s 1317E declaration and a s 206C order. In the circumstance of this case, the court was not being asked to exercise its statutory jurisdiction. **(ii) Further difficulties**However, Barrett J raised some additional difficulties that may arise when a court considers its power to accept and enforce an undertaking. His Honour referred to the joint judgment of Gibbs CJ and Stephen, Mason and Wilson JJ in Thomson Australian Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150. Approving of that view, Barrett J concluded that:          “a court should not accept an undertaking by way of final disposition of a proceeding unless it has power to enjoin the acts and activities constituting the substance of the undertaking”; and         “the possibility of punishment for contempt by reason of non-compliance with an undertaking should not be allowed to arise unless the court has power to make an order to the same effect as the undertaking.”**(iii) Undertaking - section 206A(1)**The first defendant undertook not to be a director or secretary of any corporation or to participate in management of corporations for specified period. Barrett J noted that this undertaking is in all material respects the same as the terms of s 206A(1) of the Act. Section 206A(1) provides, relevantly: “Disqualified person not to manage corporations A person who is disqualified from managing corporations under this Part commits an offence if: (a)  they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or(b)  they exercise the capacity to affect significantly the corporation's financial standing; or(c)  they communicate instructions or wishes (other than advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation) to the directors of the corporation:(i) knowing that the directors are accustomed to act in accordance with the person's instructions or wishes; or(ii) intending that the directors will act in accordance with those instructions or wishes.” **(iv) Difficulty - limitation of 206A(1)**Barrett J made it clear that a court does not have jurisdiction to make an order that the first defendant desist from doing the things mentioned in s 206A (1). He noted that there is no power under the Act available to the court to make an order forbidding a person to be a director or secretary of corporations generally or compelling a person to desist from all acts of management and administration in relation to corporations. Moreover, breach of s 206A(1) is an offence of strict liability in that the Criminal Code (Cth) “fault elements” are not part of the offence, but there are statutory defences available in certain situations. There is thus a special statutory scheme, (complete with its own mental elements and mechanisms for dispensation) which prescribes the effect of an order to disqualify a person from managing corporations under sections 206C, 206D, 206E and 206F of the Act. Further, Barrett J highlighted an inconsistency that might arise, by stating “it would be inconsistent with this scheme of regulation, in which a declaration by the court under s 1317E may lead on to the court’s making an order of disqualification under s 206C the effect of which is to cause conduct otherwise lawful to be an offence under s 206A(1), for the court simply to make an order prohibiting the doing of the things which, if done, would amount to the offence. The Act does not allow any such order to be made; nor does any established head of equitable jurisdiction. While an injunction may lie where conduct will entail contravention of a statutory prohibition, the position in the present context is that there is no statutory prohibition (in the form of creation of an offence) unless and until both a s 1317E declaration and a s 206C order have been made by the court. The foundation for the grant of a final injunction therefore does not exist in this case.” **(v) Intention not to impede**Barrett J made it particularly clear that the decision in this case is not intended to dissuade parties from settling proceedings or in any way impede settlements. **(vi) Alternatives**The following alternatives were proffered:         a proposal that the court make consent declarations and orders under ss 1317E and 206C ; and         acceptance of the proposed undertaking by ASIC rather than by the court. In respect of the first proposal, Barrett J considered that it would not be productive until such time as the parties put before the court relevant agreed facts.In respect of the second proposition, Barrett J, referred to s 93AA of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) and noted that the power of a statutory authority empowered by such a provision to accept undertakings is more comprehensive than that of a court which is subject to the constraints described above.**5.12 Act of sending signed, but amended contract, by facsimile not sufficient to establish authority to enter into contract.**(By Raechelle Binny, Freehills)Essington Investments Pty Limited v Regency Property Group Limited [2004] NSWCA 375, New South Wales Court of Appeal, Sheller JA, Hodgson JA and McColl HA, 19 October 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc375.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/october/2004nswsc375.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**For ostensible authority of an agent to be established, the principal must have placed the agent in a position, by a representation, whereby objectively viewed the agent had authority and the person to whom the representation was made relied on the representation of authority.**(b) Facts** Essington Investment Pty Ltd (the Appellants) agreed to buy land for $16M from Telstra (the Project). The Appellants’ solicitors prepared a draft agreement (Heads of Agreement) in relation to financing the Project. Drummond, an independent property consultant met Edwards, a director of the Appellants in relation to financing the Project. Later Drummond sent to Johns, the sole director of Regency Property Group Ltd (the Respondent), a letter providing for an equity of 20% for Drummond or Drummond’s company in the completed development, if Johns or Johns’ associates proceeded with financing the Project. Johns signed an acceptance of the terms of the letter from Drummond.From April 2003 Johns was aware that Drummond was negotiating for the Respondent to become the financier under the Heads of Agreement and did not discourage him from doing so. Although there was no direct contact between Johns and the Appellants until 31 May 2003, the Respondent appeared as a proposed financier in successive versions of the draft Heads of Agreement.On 21 April 2003 Drummond and Johns met and Drummond requested Johns to put his signature to the Heads of Agreement to demonstrate to the Appellants that he was interested in continuing negotiations. Johns signed the agreement, but requested Drummond not to release the document without his prior approval.After 21 April 2003 there were conversations between Edwards and Drummond in which Drummond said he was in possession of the executed Heads of Agreement, but not in a position to release the document. Edwards knew that Drummond could only deal with the signed document in so far as it was in accordance with Drummond’s instructions from the Respondent.On 28 April 2003 Drummond sent the signed document containing a number of unauthenticated handwritten alterations to the Appellants by facsimile. Edwards signed the document on behalf of the Appellants and returned it to Drummond by facsimile. The Appellants claimed that the exchange of facsimiles gave rise to a contract. The Respondent denied the existence of any contract.At first instance the judge found that Drummond had neither actual nor ostensible authority to forward the signed Heads of Agreement as either the first step in an exchange of contracts or as an offer capable of acceptance.**(c) Decision**The appeal was dismissed with costs. Drummond did not have authority to make the contract.Sheller JA: The Respondent had not placed Drummond in a position that objectively viewed, carried ostensible authority to take the first step in an exchange of contracts or make an offer capable of acceptance by the Appellants. Edwards was aware Drummond’s authority was limited and in such circumstances, where an agent has exceeded authority, the principal cannot be made responsible. Hodgson JA: There must have been a representation of authority that Drummond was authorised to release the document and the person to whom the representation was made must have relied on it in order for ostensible authority to be made out. There was no such representation. The representation of authority must either be made, or at least be permitted to be made, by the principal. In the present case all relevant representations were made by Drummond. So the real question was were the representations themselves authorised by the principal and so made by the principal, or were they permitted to be made by the principal. It is plain that Johns did not make or knowingly permit Drummond to make either of the following representations:         that the document, or copy of it, could be released to the Appellants with contractual effect; or         the document or a copy of it could be released to the Appellants with contractual effect; and         that such consent had in fact been given.McColl JA (dissenting): The Respondent held Drummond out as having ostensible authority. When he handed the executed original to Drummond without qualifying his signature in any manner, Johns permitted Drummond to make representations that the document or a copy of it could be released with contractual effect. Johns failed to take proper safeguards against misrepresentation. Whilst Johns gave Drummond instructions limiting the use to which the signed document could be put, the limitations were not communicated to the Appellants. The Appellants’ reliance upon the facsimile version of the original executed Heads of Agreement was based upon their dealings with Drummond who the Respondent had expressly represented was authorised to negotiate on its behalf.**5.13 Liquidation challenged by minority shareholders**(Tim Slattery and Conor Seenan, Freehills)Catto v Hampton Australia Limited (In Liquidation) (No 3) [2004] SASC 242, Supreme Court of South Australia (Civil), Justice Vanstone, 19 August 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/august/2004sasc242.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2004/august/2004sasc242.htm%22%20%5Co%20%22http%3A//cclsr.law.unimelb.edu.au/judgments/states/sa/2004/august/2004sasc242.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**Four minority shareholders in a company, Hampton Australia Ltd (Hampton), unsuccessfully challenged its liquidation on the grounds that it constituted a fraud on, and was oppressive to, the minority shareholders. The claim asserted that valuable assets of Hampton’s had been inappropriately distributed. The counterclaim that the act of the plaintiffs in initiating legal proceedings against Hampton and Kalgoorlie Lake View Pty Ltd (KLV), the majority shareholder in Hampton, was an abuse of process was also dismissed.**(b) Facts** The four plaintiffs held approximately 0.25% of the shares in Hampton, the first defendant. KLV held approximately 99.75% of shares in Hampton.On 5 December 1997, holders of more than the required 75% of issued shares passed three resolutions: that Hampton be voluntarily wound up; that Mr Bruce Carter be appointed liquidator; and that the company’s assets be distributed. KLV voted in favour of each resolution. Hampton was liquidated and, as part of the distribution of its assets, the two shares Hampton owned in Hampton Jubilee Pty Ltd (which had an interest in an exploration joint venture) were transferred to KLV. The plaintiffs argued that both Hampton and KLV had engaged in an equitable fraud upon the minority shareholders of Hampton by voting as they did on the three resolutions. Furthermore, they claimed that KLV had engaged in conduct oppressive to the minority of shareholders of Hampton and had therefore contravened sections 232-235 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act). The plaintiffs claimed the alleged wrongful actions originated in March 1991 from the development and implementation of ‘the plan’. As argued by the plaintiffs, the overall objective of the plan, in the words of Vanstone J, was ‘to rid Hampton of its minority shareholders so that “special benefits” in the form of utilisation of tax losses within, savings of administration expenses and other efficiencies would accrue’. The plaintiffs alleged that the plan resulted in two separate attempts to eliminate the minority shareholders in Hampton. The first attempt occurred in 1991 when KLV launched an unsuccessful bid under section 414 of the former Corporations Law 2001 (Cth) to compulsorily acquire the shares held by the minority shareholders in Hampton. The second attempt is the subject of this case. KLV counterclaimed that each plaintiff’s conduct in bringing their complaint against KLV (and Hampton) amounted to the tort of abuse of process because they were designed to extract an inflated price for their shares. The plaintiffs also argued that the liquidator had made inappropriate distributions and had failed to adequately address alternatives to the distribution scheme he adopted. **(c) Decision** **(i) No ‘plan’**Vanstone J rejected the argument that the sequence of events from 1991 to the liquidation of Hampton constituted a plan by the majority shareholder (i.e. KLV).The acts of KLV were ‘only a determination by KLV to move towards a winding up of Hampton and a hope to persuade the liquidator that a distribution along the lines of that which took place should follow’. **(ii) Equitable fraud on the minority** Equity requires that the ‘power vested in a person to deal with property not his own be exercised for a purpose within the scope of the instrument creating the power’. The failure to do so constitutes a fraud on a power: Gambotto v WCP Ltd (1995) 182 CLR 432 (at 451 per McHugh J). The plaintiffs argued that KLV, when voting in favour of a resolution to wind up Hampton, was subject to an equitable obligation to provide other shareholders with relevant and material information as to why Hampton should be wound up and to use voting power bona fide for the benefit of the whole company. Vanstone J held that KLV and Hampton did not engage in an equitable fraud on the minority shareholders of Hampton. Vanstone J distinguished the present facts from the line of cases which establish that there is a fetter upon the right a shareholder has to vote for a winding up in certain situations: Ngurli Ltd v McCann (1953) 90 CLR 425; Peters’ American Delicacy Co Ltd v Heath (1939) 61 CLR 457; Gambotto v WCP Ltd (1995) 182 CLR 432. He did this by stating that, first, those cases, unlike the case at hand, had involved alterations to the relevant Memoranda and Articles of Association. Secondly, Vanstone J stated that the process of winding up a company is not in any sense an expropriation of the rights of Hampton’s minority shareholders and was thus unlike the circumstances in these cases.Ultimately, Vanstone J held that KLV’s right to vote in favour of winding up of Hampton was unfettered. Furthermore, Hampton’s right to wind itself up through its shareholders in general meeting in accordance with the Act was also unfettered.**(iii) Oppression of minority** The relevant test is ‘whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair’: Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692 (at 704 per Young J). Vanstone J held that KLV and Hampton did not engage in oppressive conduct as outlined in section 232 of the Act with regards to their conduct and the subsequent effect that conduct had on the minority shareholders in Hampton. Section 232 of the Act, by its very nature, does not apply to the winding up of a company. The act of the majority shareholder, KLV, in voting in favour of a resolution at the extraordinary general meeting to wind up the company did not discriminate against, and hence did not oppress, the minority shareholders. KLV was ‘entitled to follow the course it did in moving for a voluntary winding up’ and ‘the company in general meeting was entitled to determine to wind itself up and return its capital to its contributories’. Vanstone J observed that the legal effect of Hampton being wound up is equal for all shares and shareholders. **(iv) Abuse of process** The tort of abuse of process is defined as the use of ‘pressure to effect an object not within the scope of the process … or … for a purpose other than that for which the proceedings are properly designed and exist’: Spautz v Williams [1983] 2 NSWLR 506 (at 539 per Hunt J).Vanstone J held that the plaintiffs had not committed the tort of abuse of process in bringing the current proceeding. The relief sought by the plaintiffs (namely, receiving a higher price for their shares in Hampton) is a relief that the law may provide in the event that the plaintiff succeeds in its claim: Williams v Spautz (1992) 174 CLR 509. **(v) Liquidator**Vanstone J held that the liquidator, Mr Carter, did not make inappropriate distributions. The plaintiffs (the minority shareholders in Hampton) failed to show that the distribution adopted by him resulted in any prejudice to them. Furthermore, Mr Carter adequately addressed different courses to the distribution scheme he adopted. On the facts, Mr Carter examined three possible distributions. The distribution adopted by him was ‘the most practicable and sensible way to proceed’.**5.14 Directors' power to postpone meetings called by members**(By Clare Peters, Clayton Utz, Sydney)Central Exchange Ltd (ACN 000 742 843) v Rivkin Financial Services Ltd (ACN 061 287 045) [2004] FCA 1546, Federal Court of Australia, Emmett J, 21 October 2004The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/october/2004fca1546.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/october/2004fca1546.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new)**(a) Summary**This case considers the constitutional power of directors to postpone a general meeting called by members of a company under section 249F of the[Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).**(b) Facts*** Central Exchange Ltd held more than 5% of the voting shares in Rivkin Financial Services Ltd. Accordingly Central was entitled to call a general meeting under section 249F of the Act.
* Central called a meeting of Rivkin members to be held on 3 November 2004. The notice of meeting listed 7 resolutions. These resolutions called for the removal and replacement of three directors, and the removal of any director appointed between the time the notice was sent and when the meeting took place. 27 days notice of the meeting was given.
* Clause 13.4 of Rivkin's constitution permitted directors to postpone general meetings. The directors of Rivkin resolved to postpone the meeting called by Central by 26 days until the morning of the Annual General Meeting (which was scheduled to be held on 29 November 2004). Central sought a declaration that the resolutions postponing the meeting were invalid. Rivkin sought a declaration that the convened meeting had not been validly convened.

**(c) Decision**The case is primarily concerned with the validity of the notice and the power of directors to postpone a meeting called by members under section 249F. In coming to its decision, the Court considered several discrete matters. Each is discussed below. * **(i) Postponement of the meeting - extent of directors' powers**

No suggestion was made during the proceedings that, in attempting to postpone the member-convened meeting, the directors had been motivated by an improper or irrelevant purpose. However, Central claimed that the power of the directors under Rivkin's constitution to postpone meetings did not extend to meetings convened under section 249F. Central contended that the existence of a clause such as 13.4 was "tantamount to displacing the right of members to call a general meeting conferred by section 249F".This contention was not accepted by the Court. Emmett J interpreted section 249F(2) as a requirement that a meeting called by members be called in the same way, as far as possible, as general meetings of the company are called. Therefore, the provisions of the Rivkin constitution relating to postponement of general meetings applied to the convening of a meeting called by members. Nevertheless, his Honour noted that the circumstances in which it would be proper for a board to postpone or cancel a member-convened meeting will be limited and that such powers should be exercised extremely sparingly and not arbitrarily. His Honour stated that the reasons for postponement of the meeting (which are discussed further below) should also be taken into account. He was of the view that the Rivkin directors were justified in altering the date and time of the meeting.**(ii) Postponement of the meeting - material personal interest**Central argued that each Rivkin director had a material personal interest in continuing as a director and therefore, under section 195 of the Act, had not been entitled to vote on any resolution to postpone the requisitioned meeting and its spill motions. The Court held that the directors had not been disqualified by section 195, because they did not have any material personal interest in the postponement of the spill motion. Under Rivkin's constitution, all the directors would be retiring at the AGM in any event. Postponement of the spill motion until the AGM would guarantee them only an extra 26 days in office. That 26 days was not "material" for the purposes of s 195.**(iii) Short notice**Rivkin's constitution required 28 days notice of a meeting of members. However, Central only gave 27 days notice. Rivkin sought a declaration that the notice was invalid on this ground. The Court considered whether injustice would be done to any parties by rectifying the notice and found that no substantial injustice would occur. Accordingly, the Court made an order under section 1332 rectifying the short notice.**(iv) Nomination and consent of directors**Rivkin's constitution required nominated directors to submit consent forms at least 35 days before the meeting where an election would take place. The notice sent by Central calling the meeting had nominated a number of directors but had not enclosed any director consent forms. Rivkin claimed that this made the nomination of the directors invalid. Central relied on the fact that Sofcom (another shareholder) had, some months previously, attempted to call a meeting nominating the same directors as those put forward by Central. Rivkin argued that the consent forms submitted by Sofcom did not have general application and were limited to the meeting called by Sofcom. The Court held that the consent forms were unqualified and, provided that the meeting called by Central was properly convened, the consent forms would satisfy the provisions of Rivkin's constitution.**(v) Unnamed directors**One of Central's resolutions sought the removal of any person who had been appointed as a director of Rivkin after the date of the notice. The Court considered that section 203D and the relevant provision of the Rivkin constitution contemplated the removal of a named individual. Therefore, this resolution was not authorised. The Court noted that there was an adequate safeguard in that any directors appointed by the Rivkin board retired automatically at the next AGM.**(vi) Contravention of section 249R**Rivkin claimed that the convening of a meeting 26 days before an AGM was not a reasonable time for the holding of a general meeting of the members of the company, contrary to section 249R. The Court was inclined to agree, having regard to the following factors:         it would be undesirable to have two meetings within such a short timeframe;          the substance of the resolutions to remove and replace the directors would be replicated at the AGM in any event;          the confusion and inconvenience caused to shareholders as a result of holding two meetings; and         if the spill motions had been moved under section 203D of the Act, two months' notice would have been required. This was indicative of the need for members to have adequate time to consider balanced information concerning the composition of their board.However, because the Court had already held that the directors had validly postponed the meeting, it was not necessary to rule on this point. |
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