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1. RECENT CORPORATE LAW AND CORPORATE GOVERNANCE DEVELOPMENTS

(A) CORPORATIONS AMENDMENT (REPAYMENT OF DIRECTORS' BONUSES) BILL 2002

On 19 March 2002, the report of the Economics Legislation Committee on the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002 was tabled in Federal Parliament.

The Bill proposes to amend the Corporations Act 2001 to permit liquidators to reclaim unreasonable director-related payments and transfers of property made to directors by their companies up to four years prior to liquidation. The main object of the Bill as stated in the Explanatory Memorandum is to assist in the recovery of funds, assets and other property to companies in liquidation where payments or transfers of property to directors is unreasonable.

Unreasonable director-related transactions are defined as transactions made to a recipient in circumstances where a reasonable person in the company's circumstances would not have entered into the transaction. In determining the reasonableness of a transaction factors such as the benefits and detriments to the company and the benefits to the recipient arising as a result of entering the transaction and any other relevant matters are considered.

The origin of the Bill lies in the collapse of the telecommunications carrier One.Tel in May 2001. Shortly after One.Tel was placed into administration it was reported that the company's co-managing directors, Mr Keeling and Mr Rich, had each received approximately $7 million in bonuses from the company in a year in which it had incurred substantial losses. In response to public concerns about the circumstances surrounding the collapse of One.Tel and the payment of bonuses to its directors, the Prime Minister announced on 4 June 2001 that:

"The Commonwealth intends to amend the law so that in future, where bonuses are paid in the circumstances where those bonuses were paid to the bosses of One.Tel, that money will be refundable and can be used to meet the lawful and legitimate entitlements of workers and also the other creditors of the company."

Other inquiries have brought to light inappropriate transactions between companies and their directors.

The Economics Legislation Committee made three recommendations in its report:

Recommendation 1

The Committee recommends that the Government monitor the application of the legislation with a view to assessing whether appropriate anti-avoidance provisions should be included in the legislation.

Recommendation 2

The Committee recommends that the Bill apply to senior executives who are not directors as well as directors.

Recommendation 3

The Committee reports to the Senate that it has considered that provisions of the Corporations Amendment (Repayment of Directors' Bonuses) Bill 2002 and recommends that the Bill proceed.

(B) AUSTRALIAN LAW REFORM COMMISSION CALLS FOR MORE TRANSPARENT, CONSISTENT AND 'PRINCIPLED' REGULATION

Australian federal regulators run a growing variety of civil and administrative penalty schemes that lack any real common structure, foundation or operational theory, the Australian Law Reform Commission (ALRC) has found after a study of the laws and practices underpinning the work of regulators including the Australian Securities and Investments Commission.

The ALRC's 1043-page report, Principled Regulation: Federal Civil & Administrative Penalties in Australia (ALRC 95), tabled on 19 March 2003 by Attorney-General Daryl Williams QC, completes the major three-year inquiry. The ALRC has identified areas in which a clearer structure and improved laws and procedures would promote greater transparency, consistency and fairness.

Civil penalties are an alternative to fines, prison sentences and other criminal punishments, and must be imposed by the courts. Administrative penalties arise automatically by operation of the law-such as additional tax for late payment, or loss of benefits for breach of social security requirements.

ALRC President, Professor David Weisbrot, pointed out that, "In the criminal law, we have developed and tested rules and safeguards over a long period of time, such as the presumption of innocence, the burden of proof, the right to silence, and double jeopardy. We also have pretty clear rules about how the police and the DPP are meant to behave.

"However, in the regulatory area, we are increasingly likely to use civil and administrative penalties, because they are quicker and easier to enforce. Each regulatory system has developed its own rules and culture. We understand that operating context is important, and we certainly don't advocate a 'one-size-fits-all' approach to cover all of corporate regulation, trade practices, social security, environmental protection, tax, customs, social security, and so on. However, our report does highlight some basic issues that apply across the board," said Professor Weisbrot.

Commissioner Ian Davis said, "A key recommendation of the report is that Parliament should enact a 'Regulatory Contraventions Statute'. This would parallel the Commonwealth Criminal Code and provide a set of principles and standards relating to civil and administrative penalties, as well as to the processes that apply to their imposition.

"We also need to sharpen the legislative distinction between criminal offences and civil and administrative penalties, especially where there the regulator has a choice of which one to use for basically the same behaviour. This choice has many consequences in terms of the nature and cost of proceedings, the safeguards that may apply, the penalties available, and stigma faced upon conviction," said Mr Davis.

Other key recommendations include:

(a) Providing individuals facing a possible civil penalty with a 'privilege against self-exposure' (similar to the privilege against self-incrimination in criminal matters);

(b) Utilising a greater variety of penalties-not just monetary ones-especially in relation to corporations, so that the courts can tailor penalties to the particular circumstances and severity of the breach, and encourage compliance in future;

(c) Improving the transparency of decision-making processes by federal regulators, who should develop and publish guidelines about, eg, how they will use adverse publicity, and how they will exercise a range of discretions (such as leniency policies).

The report is available on the ALRC website at <http://www.alrc.gov.au>

(C) SEC REVIEW OF FORTUNE 500 ANNUAL REPORTS

A United States Securities and Exchange Commission (SEC) review of annual reports of Fortune 500 companies has found a number of problems. The SEC reviewed the 2002 annual reports filed by the Fortune 500, and issued written comments on its concerns to 350 firms. The issue that raised the most concern for the SEC was management discussion and analysis (MD&A), with the regulators wanting corporate executives to do away with "boiler plate" material to provide more analysis of finances. The SEC also said disclosure of year-to-year changes received "insufficient attention" in annual reports. Among the other problem areas identified by the SEC were: pension accounting, for which the SEC called for more clarity on assumptions and estimates; poor investments; poor disclosure of critical accounting policies; and the use of pro forma accounting.

In relation to lack of adequate disclosure of critical accounting policies, the following are the areas where additional disclosure was required:

- revenue recognition;  
- restructuring charges;  
- impairments of long-lived assets, investments and goodwill;  
- depreciation and amortization expenses;  
- income tax liabilities;  
- retirement and post retirement liabilities;  
- pension income and expense;  
- environmental liabilities;  
- repurchase obligations under repurchase commitments;  
- stock based compensation;  
- insurance loss reserves; and  
- inventory reserves and allowance for doubtful accounts.

In relation to MD&A, the SEC stated that it issued more comments on the MD&A discussions of the Fortune 500 companies than on any other topic. Item 303 of Regulation S-K requires a company to discuss its financial condition, changes in financial condition and results of operations. A company must include in this section a discussion of its liquidity, capital resources and results of operations. In particular, forward looking information is required where there are known trends, uncertainties or other factors enumerated in the rules that will result in, or that are reasonably likely to result in, a material impact on the company's liquidity, capital resources, revenues and results of operations, including income from continuing operations. A company must focus on known material events and uncertainties that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition.

The SEC issued a significant number of comments generally seeking greater analysis of the company's financial condition and results of operations. Comments addressed situations where companies simply recited financial statement information without analysis or presented boilerplate analyses that did not provide any insight into the companies' past performance or business prospects as understood by management. In this vein, the SEC sought information regarding the existence of known trends, uncertainties or other factors that required disclosure that was not included. The SEC issued comments discouraging companies from providing rote calculations of percentage changes of financial statement items and boilerplate explanations of immaterial changes to these figures, encouraging them to include instead, a detailed analysis of material year-to-year changes and trends. In addition, the SEC issued comments addressing key areas, in particular the related topics of liquidity, cash flow and capital resources, which were given insufficient attention. The SEC stated that it will continue to focus on this section of disclosure documents in its review efforts and encourage all companies to present useful and meaningful disclosure of their financial condition and results of operations.

More details of the SEC review are available on the SEC website at <http://www.sec.gov/divisions/corpfin/fortune500rep.htm>

(D) BUSINESS COUNCIL ISSUES DISCUSSSION PAPER ON EXECTIVE SALARIES

On 18 March 2003, the Business Council of Australia published a Discussion Paper on Executive Salaries. In the Paper, the Council proposes several practices for companies to consider. They are:

(1) Ensuring all listed companies have clearly established and disclosed policies governing the remuneration of their most senior executives, to enable shareholders to understand better how remuneration is determined;

(2) Ensuring companies should have remuneration committees that set and apply those policies in their recommendations to the Board on executive appointment and remuneration;

(3) Short and long-term executive bonuses being tied transparently to pre-agreed performance measures;

(4) No hedging of equity based bonuses, which undermines the performance incentive of these bonuses;

(5) For new contracts, only bonuses for which performance and vesting criteria have already been met, should be paid, together with contracted superannuation and regulated payments, such as holiday pay;

(6) Boards to specifically ensure that the terms and conditions of executive contracts are tightly and clearly framed, particularly in relation to termination payouts which must be minimised wherever performance is poor; and

(7) Boards to work actively with management to ensure an ethical, high-performance culture exists within the company.

The Discussion Paper is available on the website of the Business Council at <http://www.bca.com.au/content.asp>

(E) CORPORATE GOVERNANCE INTERNATIONAL GUIDELINES ON REMUNERATION

On 17 March 2003, Corporate Governance International (CGI) published Guidelines for institutional investors and listed companies on remuneration.

(1) Introduction

The Guidelines are published by CGI for the attention of investment managers, superannuation trustees and other institutions, all of whom are in charge of the retirement and investment funds of millions of Australians invested in major Australian listed companies. Since 1994, CGI has analysed the governance of the major Australian listed companies for institutional subscribers to CGI's Proxy Advisory Service. These guidelines reflect CGI's experience in reviewing remuneration aspects of the governance of those companies. They are also intended to provide practical assistance to directors of companies who are answerable to investors for the performance of the company and its overall standing among its peers and in the community. The Australian Council of Superannuation Investors (ACSI) and the Australian Shareholders'Association (ASA) have already indicated that they support these guidelines. Other Australian investor bodies will now be invited to add their support.

(2) Guidelines for institutions

Guideline 1 - Resources  
Investment managers should increase the resources applied to the analysis of companies' remuneration policies and practices in general and to the analysis of the remuneration of executive and non-executive directors in particular, including resolutions put to shareholders through a vote at an annual or other general meeting.

Guideline 2 - Communication with directors  
Investment managers should communicate constructively with the appropriate independent member(s) of the board on the company's remuneration policies and practices in general and those that apply to executive and non-executive directors in particular, including resolutions put to shareholders through a vote at an annual or other general meeting.

Guideline 3 - Voting  
Investment managers should vote on all remuneration issues at all Australian company meetings where they have the voting authority and responsibility to do so.

Guideline 4 - Proxy voting policy and procedures  
Investment managers should have a written policy on the exercise of proxy votes on  
remuneration issues at Australian company meetings and formal internal procedures to ensure that that policy is consistently applied. The policy and procedures, including any changes thereto, should be communicated to their clients.

Guideline 5 - Reporting to clients  
Investment managers should, as part of the regular reporting process to each client, report to the client in respect of investments owned by the client for the period since the last such report on communications with companies on material remuneration issues as set out in Guideline 2 and on how they exercised proxy votes (including abstentions) on material remuneration issues as recommended under Guideline 3.

Guideline 6 - Monitoring by clients  
Institutional clients of investment managers should communicate constructively with their investment managers on each manager's supervision of companies' remuneration policies and practices under these Guidelines. That should include monitoring from time to time the efficacy of the manager's communications with companies and exercise of proxy votes on material remuneration issues under Guidelines 2 and 3, the appropriateness of the manager's proxy voting policy and procedures under Guideline 4 and the standard of the manager's reporting to the client under Guideline 5.

(3) Guidelines for listed companies

Guideline 1 - Transparency  
Transparency is the fundamental requirement in the setting and reporting of remuneration policies and practices.

Guideline 2 - Remuneration policies and practices  
The board of a listed company should adopt, document, disclose and review on a regular basis a set of policies for the remuneration of company employees in general and of directors and senior executives in particular and a set of practices to give reliable effect to those policies. The policies and practices should be tailored to and appropriate for the business of the company and the industry sector in which it operates. They should deal, inter alia, with all of the matters listed in the commentary on this Guideline.

Guideline 3 - Remuneration committee  
The board of a listed company should appoint a remuneration committee with the composition, role and resources as described in the commentary on this Guideline.

Guideline 4 - Annual remuneration report  
The remuneration committee should prepare, and the board of a listed company should approve with or without amendment, an annual remuneration report to shareholders for inclusion in the annual report. The remuneration report should provide public shareholders with all the information they may reasonably require to enable them to understand and assess the company's policies and practices referred to in Guideline 2 above. The remuneration report should address, inter alia, all of the matters listed in the commentary on this Guideline.

Guideline 5 - Equity participation or incentive schemes generally  
The board of a listed company should ensure that equity participation or incentive schemes encourage recipients to retain and grow their shareholdings and contain limits on dilution of public shareholders in accordance with the commentary on this Guideline.

Guideline 6 - Equity awards to key executives  
The board of a listed company should ensure that the award of shares, options or other equity securities to key executives is subject to the achievement of "stretching" financial performance through an extended period. The proposed award should be fully explained and all material information in connection with the award should be disclosed, in accordance with the commentary on this Guideline.

Guideline 7 - Recognition of costs  
For each reporting period, companies should disclose both the value of remuneration of directors, executives and employees and the amount that has been recognised as a cost for the reporting period. That should include the value and cost of awards of shares, options or other equity securities, interest-free or interest-discounted loans and any taxes (eg fringe benefits tax) that may apply as the result of the operation of remuneration schemes.

Guideline 8 - Remuneration of non-executive directors  
The remuneration of a non-executive director of a listed company ("NED"):  
8.1 should be tailored to the role and work that the NED performs in the listed company   
8.2 should fully reward the NED during the year for the role and work that the NED performs during the year   
8.3 should not include a retirement benefit when the NED ceases to be a director (although, in companies with existing retirement benefit schemes, accrued benefits may be preserved, but the accrual of benefits in respect of future service by existing or future NED's should be replaced by remuneration structured in accordance with 8.1 and 8.2 above)   
8.4 should not include options to acquire shares in the company (the only possible exception being in the case of a company in start-up mode, but in that case any NED options should be on terms materially different from the terms of any executive or employee incentives, should not entitle the NED to acquire shares at a discount to the market price of the shares at the time of option grant and should require the option and/or exercise price to be paid in cash in full not later than the NED's acquisition of the resulting shares and out of the NED's own pocket)   
8.5 should include participation by the NED in a share acquisition scheme for NEDs run by the company (whereby at least 25% of the NED's annual remuneration is applied by way of salary sacrifice to fund the acquisition of fully paid shares in the company to be held for the benefit of the NED while the NED remains a director of the company and to be released to the NED when the NED ceases to be a director of the company or on the expiry of ten years from the acquisition date if earlier)   
8.6 should be paid to the NED by the company (and not by a third party) and should be received and retained by the NED in his or her own right   
8.7 should be fully explained and disclosed in the annual remuneration report in accordance with Guideline 4  
8.8 in the case of requests to shareholders to increase the cap on NEDs' fees, should be fully explained and disclosed in the explanatory notes accompanying the notice of meeting in accordance with the commentary on this Guideline.

Copies of the Guidelines and commentary on the Guidelines are available from CGI: tel (02) 9231 1700; fax (02) 9231 1708.

(F) THIRTY-ONE PERCENT MORE SECURITIES CLASS ACTION SUITS FILED IN US IN 2002 THAN IN 2001

On 13 March 2003, the Securities Class Action Clearinghouse at Stanford University published research showing that Federal securities class action litigation suits in the United States increased by 31 percent between 2001 and 2002, rising from 171 to 224 filings. The companies sued in 2002 also lost more than $1.9 trillion in market capitalisation during the class periods, a 24 percent increase over the comparable figure for companies sued in 2001.

These comparisons do not include the 312 "IPO Allocation" securities class action filings in 2001 alleging fraud in the IPO underwriting process, or the more recent "Analyst" class actions naming securities analysts and investment banks as defendants, which are categorised separately by the Clearinghouse.

The Clearinghouse found that the suits filed in 2002 cut a broad swath across industries and hit hard at communication companies (including Internet-related companies), consumer products companies, and financial services firms. However, suits against technology companies had a lower impact on total filings and market capitalisation losses than they did in 2000 and 2001. The shift in litigation activity to the broader market is also evidenced by the incidence of the stock exchange on which the 2002 defendants list their shares: in 2001, almost 60 percent of the companies sued were listed on the Nasdaq; in 2002, fewer than 40 percent of the companies sued were listed on the Nasdaq. A total of 3.0 percent of companies listed on the national stock exchanges were defendants in securities class action lawsuits filed in 2002 compared to 2.3 percent in 2001.

The Clearinghouse also found that 85 percent of the filings charge defendants with 10b-5 violations (i.e. affirmative fraud or failures to disclose material information). More than 80 percent of the complaints cite misrepresentations in financial documents. Almost 60 percent allege GAAP violations, and half of those contain allegations related to revenue recognition. Insider trading is alleged in 26 percent of the complaints.

The full text of the report can be found on the Clearinghouse site at <http://securities.stanford.edu>

(G) HIGGS REPORT RECOMMENDATION ON SENIOR INDEPENDENT DIRECTOR CRITICISED

Derek Higgs' proposals for an enhanced role for the Senior Independent Director would undermine the role of company chairmen and their ability to run an effective unified Board, according to a Confederation of British Industry (CBI) poll of FTSE 100 Chairmen published on 10 March 2003. Director-General Digby Jones said the findings backed anecdotal member comment and other evidence from across the business community.

Over sixty chairmen completed the formal survey while many others sent letters expressing their concerns. Eighty-two percent agreed or strongly agreed that their role as chairman would be undermined if the extra powers for a senior non-executive director proposed by Higgs were enforced.

Chairmen were also unconvinced that the recommendation for an independent non-executive to chair the Nominations Committee would strengthen corporate governance. Eighty-seven percent disagreed or strongly disagreed with this proposal.

Commenting on these findings Digby Jones said: "Business backs the broad approach proposed by the Higgs Report but chairmen have got to be allowed to run an effective unified Board. My greatest fear is that the law of unintended consequences might stifle the creativity and drive that characterises so much of what is good about UK business.

"The Senior Independent Director should not open up a separate and potentially divisive channel of communication with shareholders or have responsibility for reporting back to the other non-executives on an exclusive basis.

"Primary Board responsibility for communication with shareholders must rest with the Chairman. Only in exceptional circumstances, when normal channels of communication have broken down, should the Senior Independent be available privately for shareholders to voice concerns. This is how the governance of modern major companies already operates.

"Disallowing the chairman from Chairmanship of the Nominations Committee is also seen as running counter to the drive to maintain a strong and unified Board. This ban should not apply. Attempts by chairmen to recruit other than on the basis of merit, ability and independence should be resisted and seen to be resisted by the rest of the Board. Business clearly has to prove that the days of mutual back-scratching have ended."

Views were more evenly spread on the other two issues put to company chairmen: would the proposal for non-executive directors to meet once a year in the absence of the chairmen be useful for good corporate governance; and would disallowing a Chief Executive Officer to become chairman of the same company lead to better Board performance.

Fifty-six percent disagreed or strongly disagreed that the meeting proposal would be good for corporate governance while fifty percent disagreed or strongly disagreed that disallowing CEOs to become chairman would lead to better Board performance.

Digby Jones added: "Views in these areas are less polarised. However, the main danger is that the whole code is too prescriptive. The wording needs to be more flexible to guard against regulatory creep in the area of 'comply or explain'. Derek Higgs' good intentions could become institutionalised over a period of time so the only imprint left on the mind of the over zealous regulator or fund manager is 'comply'."

Further details of the CBI survey are available on its website at <http://www.cbi.org.uk>

(H) ACCOUNTING FOR CHANGE - SURVEY LOOKS AT HOW PRIVATE COMPANIES ARE REACTING TO NEW CORPORATE GOVERNANCE STANDARDS

New accounting regulations have placed a spotlight on public companies, but how is the rest of corporate America reacting? In a survey of privately held businesses published on 6 March 2003, 58 percent of chief financial officers (CFOs) said they are implementing new practices in response to these regulations. Steps they reported taking include changing their firms' accounting procedures and enhancing their organizations' internal audit function.

The survey was developed by Robert Half Management Resources. It was conducted by an independent research firm and includes responses from 1,400 CFOs from a stratified random sample of US private companies with more than 20 employees.

CFOs were asked, "In light of new corporate governance standards, what steps has your company taken or does it plan to take to ensure greater control of accounting processes?" Among the 58 percent who cited a specific action, their responses\* were:

Review or change current accounting procedure - 44%  
Create or expand internal audit function - 36%  
Hire an independent firm for consulting work - 23%  
Restructure executive compensation plans - 8%  
Total = 100%  
(\*multiple answers were allowed)  
Thirty-seven percent of the 1,400 CFOs polled indicated they are not taking any of the above steps, and 5 percent do not know what steps, if any, they would take.

(I) SUPERANNUATION TRUSTEES TO SEEK HIGHER STANDARDS OF CORPORATE BEHAVIOUR

On 12 March 2003, the Australian Council of Superannuation Investors (ACSI) launched its corporate governance guideline intended to apply to all Australian listed companies.

These guidelines were developed by number of superannuation funds who, as members of ACSI, represent over $45 billion in investments. The guidelines provide a framework for superannuation trustees who seek high standards of corporate governance from corporations, their directors, executives and staff.

The ACSI guidelines seek to promote high standards of corporate governance behaviour required by superannuation fund trustees. They represent a set of practices that corporations should follow when conducting their business and reinforce the accountability of corporate boards and management to shareholders.

The underpinning themes of the guidelines include principles of independence, disclosure and performance related remuneration outcomes.

The guidelines deal with the following matters:

(1) Responsibilities of the Board  
(2) Board composition  
(3) Indemnity and liability of directors  
(4) Rights of directors  
(5) Board accountability to shareholders  
(6) Evaluation of Board performance  
(7) Board meetings  
(8) Disclosure of Board information  
(9) Chairperson  
(10) Board Committees  
(11) Chief Executive Officer  
(12) Remuneration  
(13) Shareholders' rights and proxy voting  
(14) Continuous disclosure  
(15) Corporate financial integrity  
(16) Relationship with the auditor

The guidelines are available on the ACSI website at <http://www.acsi.org.au>

(J) FSA CLARIFIES STANDARDS FOR INVESTMENT RESEARCH AND NEW SECURITIES ISSUES

The UK Financial Services Authority (FSA) has announced plans to clarify the standards which it expects investment banks to meet when publishing investment research and in the new issues of securities. Investment banks must properly manage conflicts of interests if there is to be confidence in the objectivity of investment research and the integrity of the capital raising process.

Howard Davies, Chairman of the FSA, said:

"In London we have been spared the worst of the abusive practices seen on Wall Street. But we have found evidence of systematic bias in analyst recommendations, and of bad management of conflicts of interest. The proposals we are publishing will strengthen the regulatory regime and promote higher standards. They will enhance transparency and outlaw the most blatant abuses of trust. They go with the grain of the US changes, but do not replicate them in every detail. We remain convinced that a regime based on principles, and senior management responsibility, is the right approach."

The key principle in the paper concerning conflicts of interest in investment research is that regulated firms should have systems and controls in place to ensure their own interests do not improperly influence the content of research reports. For example:

- it would be unacceptable for analysts to be involved either in pitches for new investment banking mandates or in the active marketing of new issues; and   
- firms should avoid reward structures that create direct incentives for analysts to act in ways that would compromise their judgment.

There would also be specific limitations on personal dealings by analysts both in the securities of the companies they cover and of other companies in the same sector. These would include:

- quiet periods: a quiet period will be introduced for new issues of securities;  
- specific disclosures such as a clear and unambiguous explanation of any ratings or recommendations; and   
- a three year historical chart showing price movements against recommendations.

Further conflicts of interest also arise in relation to new issue business and the FSA has set forth new proposals for systems and controls to cover allocation policy:

- firms should provide the issuer with relevant information about the proposed allocation policy for the issue before accepting a mandate;  
- allocation should be controlled by the senior finance personnel, and not by staff servicing investment clients; and   
- any allocation to a private client who is a senior executive of a listed company (or potential or existing investment banking customer) should be confirmed by the audit committee of the company.

The FSA is also concerned that many retail investors are unaware of the potential bias behind headline recommendations. It will be working with other organisations to increase retail investors understanding of investment research.   
The consultation paper is available on the FSA website at <http://www.fsa.gov.uk>

(K) TAKEOVERS PANEL APPOINTMENTS

The Parliamentary Secretary to the Australian Treasurer, Senator Ian Campbell, has announced the re-appointment of 13 members of the Takeovers Panel.

Ms Robyn Ahern, Ms Elizabeth Alexander AM, Mr Denis Byrne, Mr Peter Cameron, Mr Brett Heading, Ms Louise McBride, Ms Marian Micalizzi, Professor Ian Ramsay, Ms Jennifer Seabrook, Mr Jeremy Schultz, Mr Leslie Taylor, Mr Michael Tilley and Ms Karen Wood are to be re-appointed until 7 March 2006.

"These members have already made an outstanding contribution to the work of the Panel and I would like to thank them for their continued commitment," Senator Campbell said.

He said the reappointment process, and the intention of a number of senior members to resign at the end of their appointment period, had given the Government an opportunity to reassess the optimal size of the Panel.

"A key issue to consider in this regard is whether members have the opportunity to sit on a sufficient number of proceedings to maintain their familiarity with takeovers provisions and Panel processes," Senator Campbell said.

"Consequently, a number of people have not been reappointed at this time. I wish to convey the Government's appreciation of their valuable work."

The Takeovers Panel, formerly the Corporations and Securities Panel, was established in 1991 to streamline takeover processes. It is acknowledged as one of the major successes of the Government's Corporate Law Economic Reform Program.

(L) SINGAPORE MONETARY AUTHORITY INVITES PUBLIC COMMENT ON PROPOSED CORPORATE GOVERNANCE FRAMEWORK

The Monetary Authority of Singapore (MAS) has issued a consultation paper on a set of proposed guidelines and regulations to enhance the existing corporate governance framework for locally incorporated banks and direct insurers. The paper consists of two parts: (i) a set of guidelines on the principles of corporate governance and disclosure, and (ii) regulations on corporate governance.

The proposed guidelines are built upon the Code of Corporate Governance, issued by the Corporate Governance Committee in March 2001. The Corporate Governance Committee was set up by the Ministry of Finance, MAS and the Attorney-General's Chambers to promote good corporate governance practices. To safeguard the interests of depositors and policyholders, MAS has added or enhanced certain principles in the guidelines.

The key points to note in the regulations are:

(a) The proposed regulations define clearly what is meant by an independent director and set out the requirements for the composition of the board of directors and board committees, such as the Nominating Committee, Remuneration Committee and Audit Committee. The Banking Regulations also incorporate the separation rules for the board and management as announced by MAS on 21 June 2000.

(b) To help ensure appropriate oversight of the decision-making process, the proposed regulations also require the separation of the roles of Chairman and Chief Executive Officer (CEO)/Principal Officer and outline how this rule is to be applied. Affected financial institutions are not required to revoke any appointment of its Chairman or CEO made before these Regulations come into effect or any subsequent reappointment of such Chairman or CEO in the same office.

The corporate governance principles are:

Principle 1: Every Institution should be headed by an effective Board.

Principle 2: There should be a strong and independent element on the Board, which is able to exercise objective judgment on corporate affairs independently from management and substantial shareholders.

Principle 3: The Board should set and enforce clear lines of responsibility and accountability throughout the Institution.

Principle 4: There should be a formal and transparent process for the appointment of new directors to the Board.

Principle 5: There should be a formal assessment of the effectiveness of the Board as a whole and the contribution by each director to the effectiveness of the Board.

Principle 6: In order to fulfill their responsibilities, Board members should be provided with complete, adequate and timely information prior to Board meetings and on an on-going basis by the management.

Principle 7: There should be a formal and transparent procedure for fixing the remuneration packages of individual directors No director should be involved in deciding his own remuneration.

Principle 8: The level and composition of remuneration should be appropriate to attract, retain and motivate the directors to perform their roles and carry out their responsibilities.

Principle 9: The Board should establish an Audit Committee with a set of written terms of reference that clearly sets out its authority and duties.

Principle 10: The Board should ensure that there is an adequate risk management system and sound internal controls.

Principle 11: The Board should ensure that an internal audit function that is independent of the activities audited is established.

Principle 12: The Board should ensure that management formulates policies to ensure dealings with the public, the Institution's policyholders and claimants, depositors and other customers are conducted fairly, responsibly and professionally.

Principle 13: The Board should ensure that related party transactions with the Institution are made on an arm's length basis.

The consultation paper is available on the MAS website at <http://www.mas.gov.sg> -> Singapore's Financial Sector -> Reports and Consultation Papers

(M) COMPULSORY DUE DILIGENCE IN TAKEOVERS?  
(By Will Moncrieff and Heath Lewis, [Clayton Utz](http://www.claytonutz.com))

This article was first published in the March 2003 issue of the Clayton Utz publication Mergers and Acquisitions Insights.

(1) Introduction

A new takeover tactic appears designed to overcome a bidder's inability to conduct due diligence in a hostile takeover bid. The recent bids for Goodman Fielder and Anaconda included conditions apparently aimed at forcing the disclosure of financial information about the targets. In Anaconda's case, other proprietary, non-public information was also targeted. In both cases, the Takeovers Panel gave a qualified green light to the inclusion of the conditions in a bid - but left target directors with little guidance on how to respond.

(2) Goodman Fielder

A hostile bidder who can't conduct due diligence eventually has to decide whether or not to take the plunge. Until now, the only protection a hostile bidder could build into the bid was a "no material adverse change" condition. That, however, falls far short of the assurance offered by due diligence - the bidder is hostage to whatever information happens to become available.

The Burns Philp bid for Goodman Fielder was notable for several things. As well as being highly leveraged, it included conditions apparently designed to maximise the bidder's chances of obtaining financial information from the target. These "Accounting Conditions" required Goodman Fielder's target's statement to supply information about a number of aspects of Goodman Fielder's accounts. These related to:

(a) whether amounts booked to restructuring costs in previous years had included recurring ordinary expenses;

(b) whether the 2003 annual accounts were expected to include restructuring costs additional to those provided for in the 2002 annual accounts;

(c) whether the working capital disclosed in the 2002 annual accounts reflected any materially different payment terms (with creditors or debtors);

(d) whether Goodman Fielder currently had any previously undisclosed off-balance sheet or contingent liabilities; and

(e) whether Goodman Fielder's defined benefit superannuation fund was in deficit (this matter to be certified by an actuary).

According to Burns Philp, these conditions were designed to confirm the publicly-available information about Goodman Fielder's accounts. Goodman Fielder responded by asking the Takeovers Panel to delete these conditions or, at the very least:

(a) declare that the Goodman Fielder directors were not obliged to respond to the conditions; and

(b) give Burns Philp seven days from receipt of the target's statement to say whether it would rely on or waive the conditions.

The Panel refused to give Goodman Fielder what it asked for. It said that it was not unreasonable for a bidder to seek information from the target where that information was relevant to the bid price or the bid objectives. Nor was it unreasonable for a bidder to make that information a condition of the bid.

That, however, was not the end of the matter. The Panel went on to make comments that bear heavily on future attempts to employ "Accounting Conditions". The first related to the duty of Goodman Fielder's directors. The company had asked for a declaration that its directors had no obligation to provide the information Burns Philp wanted. The Panel declined to make that declaration but the phrasing of its decision suggests that this remains an open issue:

"[T]he Panel has not reached any view that a target is placed under any additional obligation, in general or in particular circumstances, to disclose any or particular information merely because a bidder has chosen to make its bid subject to such a condition."

Then there was the question of what should happen if Burns Philp obtained the assurance it was seeking, but without the specific information it was looking for. The Panel appeared to believe that Goodman Fielder could theoretically address the bidder's concerns without supplying all the information required by the Accounting Conditions. If that happened, the Panel seemed to suggest, Burns Philp would have to waive the conditions.

Finally, in what appears to be a bet each way, the Panel warned that its refusal to knock out Burns Philp's Accounting Conditions "should not be taken as encouragement for the routine use of [similar] conditions". This last comment is difficult to understand, particularly in the light of what happened a few weeks later, in the Anaconda bid.

(3) Anaconda

Anaconda's major asset is a 60% share in the Murrin Murrin nickel and cobalt project in Western Australia. The MatlinPatterson bid for Anaconda included a condition that Anaconda give an independent expert access to the Murrin Murrin project (including access to the mine and processing sites, access to records and access to personnel). The expert would report to MatlinPatterson on the current and future output capacities of the project.

Unsurprisingly, this became a major focus of the subsequent battles at the Panel. Among other things, Anaconda applied for a declaration that the condition was unacceptable. In rejecting that application, the Panel echoed what it said in the Goodman Fielder case:

(a) a bidder is free to make its bid subject to such assurances as it wishes; but

(b) target directors are not under a prima facie obligation to provide the access sought by the bidder.

However, the Panel went further on the question of the duties of directors. It said that, when deciding whether or not to comply with such a condition, target directors should take a number of factors into account. These included:

(a) the target's contractual obligations to third parties;

(b) confidentiality and other undertakings offered by a bidder; and

(c) the value that might be lost to the shareholders if an offer fails because the directors decline to provide access or information to the bidder.

(4) Comment

On one view, the information disclosure conditions in the Goodman Fielder and Anaconda bids are a response to the level of uncertainty faced by any hostile bidder. They go further than the standard "no material adverse change" condition, in that they appear to be an attempt to prise information out of the target.

How effective might they be? As the Panel has now pointed out twice, target directors are under no absolute obligation to comply with the conditions. If the target directors refuse to budge, the bidder is no better informed than when the bid began.

But do the directors have a completely free hand? Comments by both Panels suggest that directors may need to be very careful when faced with such conditions in the future. In the case of Goodman Fielder, the Panel said that the target company was not obliged to disclose the information merely because it was a condition of the bid. What, however, if there were additional factors that had to be considered? The Anaconda Panel suggested a number of factors that might change the situation:

(a) the target's contractual obligations to third parties;

(b) confidentiality and other undertakings offered by a bidder; and

(c) the value that might be lost to the shareholders if an offer fails because the directors decline to provide access or information to the bidder.

The last point directly raises the spectre of directors' responsibility for a bid's failure. What happens if a target shareholder believes that the directors' failure to comply with an information condition deprived the shareholder of the benefits on offer in a bid? Certainly, the Panel's "frustrating action" policy is a precedent for intervening to overrule actions of directors that might trigger a defeating condition in a bid. Would the Panel take a similar position if a defeating condition was triggered by directors' inaction?

Against this, a later Panel decision on the Goodman Fielder bid upheld target directors' freedom of choice: "The Panel found no grounds to override Goodman Fielder's right to choose to whom and on what terms to provide access to its proprietary information in the best interests of Goodman Fielder and its shareholders."

(Panel Media Release, 26 February 2003 - That Panel also refused to order Goodman Fielder to provide Burns Philp with access to non-public information similar to that given to prospective rival bidders. This sets the Panel apart from its UK counterpart, which requires targets to provide equality of information to competing offerors).

Finally, of course, there is the question of target directors' liability to the bidder itself. If they do agree to supply information to the bidder, will they be liable if the information later turns out to have been misleading or incomplete?

(N) DRAFT ICGN STATEMENT ON INSTITUTIONAL SHAREHOLDER RESPONSIBILITIES

The International Corporate Corporate Governance Network (ICGN) Board of Governors has released draft best practice guidelines designed to help shareholders monitor corporations. The ICGN is an international coalition of institutional investors.

This ICGN Statement sets out a framework of best practices describing institutional investors´ fiduciary responsibilities in relation to their equity shareholdings. It is meant to apply to investing institutions around the world.

Without trying to apply a comprehensive legal definition, in this Statement the term "institutional investor" is used for those institutions that invest on a fiduciary basis for the benefit of their beneficiaries as the ultimate bearers of the economic risk of the investments made. As such it embraces pension funds, insurance companies, mutual funds and other collective investment schemes.

(1) General responsibilities

(a) Institutional investors have a general fiduciary responsibility to ensure that investments are managed exclusively in the long-term financial interests of their beneficiaries, as amplified - where relevant - by contract or law.

(b) As a matter of best practice, in discharging this responsibility, institutional investors should contribute to improving and upholding the corporate governance of companies and markets in which they invest, where practicable. The objective is to stimulate the preservation and growth of the companies' long-term value. Institutional investors should judge which actions are suitable and effective to that end, taking into account the specific circumstances of the case at hand.

Appropriate actions to give effect to these ownership responsibilities include:

- Voting;   
- Expressing concerns to the board, either directly or in a shareholders meeting;   
- Making a public statement;   
- Submitting proposals for the agenda of a shareholders meeting;   
- Submitting one or more nominees for election to the board as appropriate;   
- Convening a shareholders meeting;   
- Teaming up with other investors and local investment associations either in general or in specific cases;   
- Taking legal actions, such as legal investigations and class actions;   
- Lobbying governmental bodies and other authoritative organisations;   
- Incorporating corporate governance analysis in the investment process;   
- Stimulating independent buy-side research;   
- Outsourcing any or all of these powers to specialized agents, for instance in the event the institutional investor concludes that it does not have the ability to muster necessary skills in-house.

(a) These ownership responsibilities should be dealt with diligently and pragmatically. This Statement, for instance, encourages the support of good corporate management initiatives, as much as opposition to bad ones. Furthermore, as a general rule, institutional investors should not interfere with the day-to-day management of companies.

(b) However, it is clear that institutions risk failing to meet their responsibilities as fiduciaries if they disregard serious corporate governance concerns that may affect the long-term value of their investment. They should follow up on these concerns and assume their responsibility to deal with them properly.

Such concerns may for instance relate to:

- The level and quality of transparency;   
- The company's financial and operational performance, including significant strategic issues;   
- Substantial changes in the financial or control structure of the company;   
- The role, independence and suitability of non-executives and supervisory directors;   
- The quality of succession practices and procedures;   
- The remuneration policy of the company;   
- Conflicts of interest with large shareholders and other related parties;   
- The level and protection of shareholder rights;   
- Minority investor protection;   
- Proxy voting;   
- The independence of fairness opinions;   
- The accounting and auditing practices;   
- The composition of the audit- and remuneration committees;   
- The adequacy of internal control systems and procedures;   
- The management of environmental, ethical and social risks.

(2) Voting

(a) Voting forms a prominent part of institutional investor´s approach to corporate governance. It should be assumed that all votes cast - regardless of their number - contribute to a stronger management focus on the actual (long-term) interests of shareholders in the case at hand, as well as in general.

(b) To strengthen this focus, votes should be cast on the basis of careful analysis, consistent with an institutional investor's well-considered policy and with a view towards improving and upholding the corporate governance of companies and markets. Automatic voting should be avoided.

(c) In this respect, voting guidelines need to be adopted to support the applied policy. In developing these, institutional investors are advised to take due account of already existing international and national influential standards, including the ICGN´s own Statements.

(3) Accountability of the institutional investor

(a) Institutional investors are accountable to the beneficiaries of their investments for the way they execute their ownership responsibilities. To show how they discharge these responsibilities, institutional investors should as a matter of best practice disclose to these beneficiaries:

(i) Their corporate governance policy outlining how they deal with their ownership responsibilities, how corporate governance aspects are taken into account in their investment policy, and their voting guidelines;

(ii) How companies in which they invest are regularly monitored, and how they periodically measure and review the effects of their monitoring and ownership activities;

(iii) A annual summary of their voting records together with their full voting records in important cases, e.g. cases of conflict or controversy. Voting records should include an indication whether the votes were cast for or against the recommendations of company management. The summary should at least include the percentage of shares voted and the extent to which votes have been cast with or against management;

(iv) An explanation of specific action taken in important cases;

(v) A list of all companies in which they are a shareholder, preferably together with the number of shares held;

(vi) What resources they have allocated to execute their corporate governance policy;

(vii) In case no (material) resources have been allocated: how they have weighed the various arguments coming to this decision and an indication of what developments would make them reconsider their position;

(viii) A list of conflicts of interest that may impede an independent approach towards the companies in which they have invested;

(ix) What procedures they have in place to deal adequately with these conflicts;

(x) The names of the agents to which they have outsourced ownership responsibilities together with a description of the nature and extent of this outsourcing and how it is regularly monitored.

(b) Disclosures should be made at least once a year on the investor´s website, and, preferably, simultaneously in or with the annual reports. The investor may choose however to provide voting records to requesting beneficiaries at no cost directly on an annual basis.

(4) Conflicts of interest

(a) Some institutional investors have conflicts of interest that could impair an independent approach towards the companies they have invested in, generally because they directly or indirectly have other actual or prospective relationships with the companies concerned. In all such cases, the institutional investor should ensure full transparency as outlined above. Where such a conflict has the potential to harm the interests of the beneficiaries of their investment in the company, they should consider outsourcing the power to perform their ownership responsibility to a separate independent agent or trust company set up for that purpose.

(b) Institutional investors should also be aware of possible conflicts faced by their agents. If the casting of votes or the performance of other ownership responsibilities are outsourced (whether or not together with asset management), the institutional investor should ensure that the agent acts fully independently from corporate management or other conflicting business relationships. The investing institution should ensure, in particular, that votes are cast in an informed manner and on the basis of voting guidelines that are materially consistent with its own. It should furthermore regularly evaluate the performance of the agent on the basis of detailed reports and ensure that the institutional investor can override agent decisions if need be. In case of doubt regarding the independence of an agent, the institutional investor is advised to outsource the power to perform the ownership responsibilities to a separate independent agent or trust company set up for that purpose.

(5) Other responsibilities

(a) Agents of institutional investors have a general duty to facilitate the proper discharge of their client´s fiduciary responsibilities and should therefore act as if those responsibilities are their own.

(b) Given the large differences in market development around the world, it is apparent that the implementation of the provisions of this Statement in day-to-day practice will be more straightforward for some institutions than others. However, the ICGN believes that if institutional investors take their responsibilities seriously then this can contribute significantly to the creation of an environment suited for solid long-term investment. Therefore, all institutional investors are encouraged to establish an action plan working towards full implementation of the Statement´s recommendations as soon as is practicable.

(c) Although share lending in many cases is useful and appropriate, there are negative effects and abuses that require attention. The ICGN is committed to investigate developing a Code of Best Practice to deal with these issues.

2. RECENT ASIC DEVELOPMENTS

(A) ASIC RELEASES REPORT INTO MORTGAGE BROKERS

On 26 March 2003 ASIC released a report on the mortgage broking industry prepared by the Consumer Credit Legal Centre NSW (Inc) (CCLC). The report found that while the consumer use of brokers has expanded greatly, there are still few barriers to entry in the industry such as clear minimum competency or training standards. Up to one in two home loans are now sourced through brokers, who can provide a valuable service to consumers faced with an ever-increasing choice of credit options.

'The CCLC report presents evidence that standards need to improve in the mortgage broking sector in order to reduce the risks to consumers. It is pleasing to see that there is wide acceptance in the industry that this is the case', ASIC Executive Director of Consumer Protection, Mr Peter Kell said.

The report analyses the structure of the industry, identifies a range of problems experienced by consumers, and examines the way in which the industry is regulated in Australia and internationally. It also includes a number of case studies, as well as the results of surveys of consumer caseworkers and brokers.

The CCLC report has found that while consumers are increasingly using brokers, consumers who use the mortgage broking industry can face problems that include:

- poor advice, with the increased costs of the inappropriate loans that might result;   
- inadequate disclosure of fees and commissions by some brokers;   
- inconsistent documentation from brokers;   
- uncertainty about the nature and price of the service; and  
- in a small number of cases, fraudulent activity such as manipulating loan applications.

''There is also a need for clarity as to whether brokers are acting for consumers or are really agents for lenders', Mr Kell said.

'The CCLC report has identified significant issues about the structure and practices of the industry, and raised possible options for addressing these issues', Mr Kell said.

'ASIC will provide copies of the report to state governments across Australia, as they are primarily responsible for detailed regulation of the credit marketplace. We will provide copies to the Federal Government as well as key industry players, such as the Mortgage Industry Association and the Finance Brokers Association, and consumer organisations.

'While ASIC does not have full responsibility for the mortgage broker market, the report has greatly assisted in identifying the types of problems that ASIC can address with its consumer protection powers, including examples of misleading conduct', Mr Kell said.

'We are currently investigating a number of matters with a view towards possible enforcement action, and some of these were identified in the process of the report's development', Mr Kell said.

'We are also pleased that in response to the gap identified in the CCLC report regarding consumer complaint schemes, the Mortgage Industry Association of Australasia (MIAA) has announced that it will seek formal ASIC approval for its external dispute resolution scheme, the Mortgage Industry Ombudsman Scheme (MIOS). While the MIOS scheme does not cover the whole industry, ASIC is committed to ensuring that the scheme meets proper standards for those it does cover', Mr Kell said.

Additionally, in response to the report findings, ASIC will be increasing its information to consumers about the best ways to choose and deal with brokers. A new guide to 'Using a Mortgage Broker', is available on ASIC's consumer website at <http://www.fido.asic.gov.au>.

'ASIC is also in the process of developing an online 'mortgage calculator' to help consumers understand the costs of home loans', Mr Kell said.

The report is available on the ASIC website at <http://www.asic.gov.au>.

(B) ASIC REACHES AGREEMENT WITH BRAD KEELING IN ONE.TEL PROCEEDINGS

On 21 March 2003, Mr David Knott, Chairman of ASIC, announced that ASIC has reached an agreement with Mr Bradley Keeling, a former director of One.Tel Limited (One.Tel), in the court proceedings against him and that the New South Wales Supreme Court had approved the settlement.

Mr Keeling is one of four defendants in the proceedings brought by ASIC following the collapse of One.Tel in May 2001. The other defendants are Mr Jodee Rich, Mr Mark Silbermann and Mr John Greaves.

Under the agreement with ASIC, Mr Keeling has admitted to contraventions of the Corporations Act 2001 between February and May 2001 in relation to the discharge of his duties as a director of One.Tel.

The New South Wales Supreme Court has made order giving effect to the settlement. Under the orders Mr Keeling:

- is banned from being a director, or otherwise being involved in the management of any corporation, for 10 years;  
- is liable to pay compensation of $92 million to One.Tel; and   
- has agreed to pay ASIC's costs of $750,000.

As part of the terms of agreement Mr Keeling denies that he deliberately misled the board and the market, but admits that he failed to take the reasonable steps he should have in order to apprise himself of the true financial position of the company during that period.

(C) FUNDRAISING DOCUMENTS HAVE COMMON FAILURES

On 10 March 2003 ASIC announced recent results in its ongoing campaign to improve the quality of information and levels of disclosure in fundraising documents.

Since 1 July 2002, ASIC has issued 51 interim stop orders and 8 final stop orders on prospectuses or Offer Information Statements (OIS).

'Stop orders are an outcome of ASIC's risk-based review of selected documents. This means we identify areas where we suspect the risk of poor information may be greater than usual, and we review documents that fall into that area', ASIC Director of Corporate Finance, Mr Richard Cockburn said.

'What ASIC does is to ensure the documents comply with the law. The company is required to include all the information an investor would reasonably require to make an informed decision about whether to invest. This includes information about both potential risks and rewards. It's then up to the individual to make a decision about whether the proposal is a suitable investment for them', Mr Cockburn said.

'If ASIC reviews a document which we think is misleading, or lacking in information, we have the power to issue an interim stop order on the document. The company can't accept any applications from investors while this is in place', he said.

'ASIC can lift the stop order if the company amends its document, or issues a new one that includes all the information the Act requires. If not, we can put a final stop order on the prospectus - and that's permanent. A company has to go through the entire process again if they want to make the offer public for a second time', Mr Cockburn said.

ASIC periodically issues media releases advising which fundraising documents have had interim stop orders placed on them, and the reasons why these stop orders have been issued. This is intended to assist companies and their advisers identify what particular information must be disclosed.

'It is disappointing that we detect similar non-disclosure issues time and time again. Generally, it is the companies seeking to raise relatively small amounts, typically less than $5 million, where the following defects most commonly occur', Mr Cockburn said.

(1) Failure to deal with the consequences of the company not raising the full amount sought.

Of all the interim stop orders issued since 1 July 2002, 26 per cent resulted from the failure of the company to disclose the financial position and prospects of the company in the event that the offer is not fully subscribed.

ASIC expects all fundraising documents to address how the company will use the funds raised. A breakdown should be given if the company has different uses for the funds raised.

If the company fails to reach the minimum subscription amount specified in the document, the company is required to refund all application money. This helps to protect investors from being locked into a company that cannot achieve its stated objectives as a result of insufficient funds.

Where the minimum subscription equals the full amount of the funds sought to be raised (full amount), or where the fundraising is fully underwritten, ASIC considers it sufficient for the document to detail how the funds raised will be applied on the basis the full amount is raised.

Where the fundraising is not fully underwritten, or where the minimum subscription is less than the full amount, it is not sufficient only to disclose how the funds will be applied if the full amount is raised. The document must also describe how funds will be applied if less than the full amount is raised.

For example, the document must explicitly state:

(i) whether some or all of the stated activities may need to be scaled back, and if so, how this will be done. It is not sufficient to state that the activities will be scaled back 'as appropriate' or 'as the directors determine';

(ii) whether funds will be allocated to stated activities in any particular priority until each activity is fully funded, or whether they will be allocated pro rata across all stated activities;

(iii) the effect if any, this has on the company's financial position and prospects. For example, it may affect a company's ability to continue as a going concern, or materially alter its debt levels.

Recently, interim stop orders have been placed on the fundraising documents of the following companies:

- Reedy Lagoon Corporation Limited;  
- Conquest Mining Ltd;  
- Olea Australis Ltd;  
- Solagran Ltd (formerly Travelshop Limited);  
- Rusina Mining Ltd; and  
- First Australian Resources Ltd.

All companies have subsequently lodged a supplementary or replacement document which satisfactorily addresses ASIC's concerns.

(2) Prospective financial information

Another area where ASIC commonly identifies problems relates to the provision of prospective financial information. 16 per cent of the interim stop orders which have been issued since 1 July 2002 resulted from defective disclosure in this area.

ASIC requires all prospective financial information to be prepared in accordance with ASIC Policy Statement 170.

ASIC has also released guidelines for preparers and reviewers of prospective financial information included in disclosure documents, in response to requests by companies and their experts for guidance on this matter.

Examples of defects commonly identified by ASIC include:

(i) stand-alone, unsubstantiated statements, such as 'the directors expect that the company will become profitable by the end of the 2004 financial year';

(ii) insufficient distinction between hypothetical assumptions and assumptions as to future matters which management expects to take place;

(iii) lack of reasonable grounds for predictions beyond two years, such as the absence of an independent expert's report, or the absence of contracts relating to forward sales, or future expenses.

Recently, ASIC has placed interim stop orders on the fundraising documents of the following companies, due to concerns in relation to prospective financial information:

- Teebook Global Limited;  
- Pisces Marine Aquaculture Limited; and  
- Argus Solutions Limited.

These interim stop orders have now been revoked due to the lodgement of replacement documents which address ASIC's concerns.

(D) ASIC FILES PROCEEDINGS AGAINST SOUTHCORP

On 26 February 2003ASIC filed proceedings in the Federal Court against Southcorp Limited (Southcorp) alleging a breach of its continuous disclosure obligations in April 2002.

The proceedings relate to an email sent by Southcorp to selected analysts containing information relevant to the company's forecast earnings for the year ending 30 June 2003. ASIC is seeking a court declaration that Southcorp's conduct contravened its market disclosure obligations, together with the imposition of a pecuniary penalty.

'This is the first case of its type commenced by ASIC and will test the operation of both the ASX Listing Rules and the relevant provisions of the Corporations Act', ASIC Chairman, Mr David Knott said.

On 18 April 2002 Southcorp's then Executive General Manager of Corporate Affairs, Mr Glen Cunningham, sent an email to selected analysts containing information about the likely impact of the poor 2000 vintage for premium wines on Southcorp's 2003 gross profit. ASIC alleges that the information should have been disclosed to the Australian Stock Exchange under its Listing Rules and in accordance with the Corporations Act, rather than to selected analysts.

ASIC will seek to establish, inter alia, that:

(i) the information was of a type required to be disclosed to the ASX under its Listing Rules (that a reasonable person would expect the information or some of it to have a material effect on the price or value of Southcorp's shares); and

(ii) the information was required to be disclosed pursuant to section 674 of the Corporations Act (that the information was not generally available and a reasonable person would expect, if all or some of it were generally available, that it would have a material effect on the price or value of Southcorp's shares).

Under Section 1317E of the Corporations Act the Court has power to make a declaration that the continuous disclosure provisions of the Act have been breached. If a declaration is made the Court may impose a pecuniary penalty of up to $200,000. These provisions took effect on 11 March 2002.

In this case, ASIC is seeking a declaration and penalty against Southcorp itself, not against existing or former officers. ASIC will seek to establish that Southcorp is legally responsible for this alleged breach of the continuous disclosure provisions.

3. RECENT ASX DEVELOPMENTS

(A) AUSTRALIAN FLOAT ACTIVITY RESILIENT DESPITE FALL IN MARKET

Despite a fall in the market in 2002, a small increase in float activity saw the total value of new listings on the Australian Stock Exchange (ASX) more than double, according to a report released by PricewaterhouseCoopers.

The report showed 42 floats listed on the ASX in 2002 (excluding resource sector floats), compared with 40 the previous year. However, the total amount raised through new listings increased significantly to around $3.2 billion, compared with $1.5 billion in 2001.

Overall, investor returns from new listings were relatively poor in 2002. This was also the case across Australian equities more generally, with the S&P/ASX 300 Industrials Index falling by around 14 per cent over the course of the year.

The report showed increased float activity in the second half of 2002; a positive sign for 2003. However, the S&P/ASX 300 Industrials Index has declined a further 6% since the beginning of this year.

Key findings from the survey include:

(a) In 2002, 42 companies, property trusts and investment funds were listed on the ASX, a slight increase on the 40 listings in 2001, but still making 2002 the third lowest year for new listings in the last decade.

(b) Total funds raised were $3.2 billion, more than double the funds raised in 2001, and only 11% lower than the $3.6 billion raised by the 141 floats in 2000.

(c) The bulk of funds raised in 2002 came from the 7 large cap floats ($2.4 billion) with the median amount raised per float at $285 million, a 157% increase from 2001.

(d) 24 of the 42 floats (57%) occurred in the second half of the year, with particularly strong activity from September through to December.

(e) Investment & Financial Services (11 floats), Infrastructure & Utilities (6 floats) and Health & Biotechnology (5 floats) were the most prominent sectors for float activity.

(f) Continuing the downward trend, there was only 1 technology float in 2002, compared with 6 in 2001 and 69 in 2000.

(g) Overall, listing premiums (stag profits) were low, with a third of companies (14) ending the first day of trading with their share prices below issue price.

(h) There was a continued decline in the proportion of companies including forecasts in their prospectuses.

(i) Generally, company performance against prospectus forecasts continued to be poor.

4. RECENT TAKEOVERS PANEL MATTERS

(A) PANEL DECLINES APPLICATION IN RELATION TO AUSTAR UNITED COMMUNICATIONS

On 18 March 2003, the Takeovers Panel advised that it had declined an application in relation to the affairs of Austar United Communications Limited (Austar). The application was made on 28 February 2003 by a shareholder in Austar, Pondale Properties Pty Limited (Pondale).

The Panel declined the application because, while it considered that the applicant had made out some of the concerns it alleged, the Panel believed that those concerns were addressed by the recent issue of a detailed media release to the market, and the disclosure to the market of a copy of an agreement (Shareholders Agreement) between the future controllers of 81% of Austar in supplementary substantial shareholding notices.

The application was in relation to the acquisition by CHAMP SPV Pty Ltd and its related entities (CHAMP Group) of a relevant interest of approximately 81% of the shares in Austar (the Austar Shares) for the sum of US $34.5 million. The CHAMP Group acquired the relevant interest in the Austar Shares through funding a US Chapter 11 debt restructure of a subsidiary of United Asia/Pacific Communications Inc. (UAPC). A US court will consider the Chapter 11 proceedings on 18 March 2003.

Pondale asserted in the application that the market was not adequately informed about the ultimate ownership and control of the CHAMP Group. It alleged that the acquisition by the CHAMP Group of a controlling interest in Austar will not take place in an efficient, competitive and informed market.

Specifically, Pondale's application raised four issues:

(1) Ownership and control of CHAMP Group

Pondale asserted that the market, and Austar shareholders, were inadequately informed about the ownership and control of the CHAMP Group. Pondale asserted that the ultimate ownership and control of the CHAMP Group (to the extent that additional entities have a relevant interest in the Austar Shares) should be disclosed. As a result of the Austar Proceedings, the CHAMP Group issued a detailed media release to the market on 5 March 2003 dealing (in part) with this matter, while the controlling shareholders of CHAMP P/L (the 100% parent of CHAMP SPV) gave substantial shareholding notices on 13 March 2003, concerning their substantial holding in Austar as owners of more than 20% each of CHAMP P/L, CHAMP SPV being the entity which entered the agreement with UAPC.

The Panel considered that the media release and the substantial shareholding notices given by owners of CHAMP P/L now adequately disclose their interests and substantial holdings in the Austar Shares and there is no longer a need for the Panel to consider whether their failure to lodge substantial shareholding notices in December 2002 constituted unacceptable circumstances.

The funding structure which the CHAMP Group has put in place to fund the acquisition of its interests in the Austar Shares will include a number of Belgian limited liability companies. The identities of the investment companies were disclosed in the CHAMP Group substantial shareholding notices of 23 December 2002 (but not the individual investors in the funds which will invest in the investment companies).

The CHAMP Group advised that none of the investors in the CHAMP investment funds will have an interest in the Austar Shares which the Corporations Act would require to be disclosed. The CHAMP Group advised that the investors in the CHAMP investment funds will not have relevant interests in the Austar Shares, in a similar way to sub 20% shareholders in any entity owning shares in a public company.

The Panel considered that the advice provided by the CHAMP Group as to the dispersed ownership of the investment funds supports the claim by the CHAMP Group that substantial shareholding notices are not currently required from the investors in the investment funds. Changes in the structure or relationships of the CHAMP Group or the investment funds may bring about different disclosure requirements, but that is not a question currently before the Panel.

(2) Disclosure of the Shareholders Agreement

Pondale asserted that the Shareholders Agreement, entered into by CHAMP SPV, UAPC and United Austar Inc (the direct holder of the Austar Shares) on 23 December 2002 (US time) was required to have been attached to the substantial shareholding notice given by CHAMP SPV on 23 December 2002 (Australian time). CHAMP SPV had entered into two separate agreements (the Master Agreement and the Reorganization Agreement) on 20 December 2002 (US time) which had given CHAMP SPV the substantial shareholding in the Austar Shares. CHAMP SPV was then required to give its substantial shareholding notice on or before the end of 24 December 2003. It gave the substantial shareholding notice on 23 December 2002 at 2.00 pm or thereabouts Sydney time. CHAMP SPV attached both the Master Agreement and the Reorganization Agreement to its substantial shareholding notice on 23 December 2002, but not the Shareholders Agreement which was still in the process of finalisation.

The Panel accepted that the Shareholders Agreement had not been executed at the time the CHAMP SPV substantial shareholding notice was given. On the other hand, it considers it highly likely that the material terms of the agreement were sufficiently well developed that section 671B(4)(b) of the Corporations Act (Act) required CHAMP SPV to have attached a written description of the Shareholders Agreement to its substantial shareholding notice. The owners of CHAMP P/L have attached a copy of the Shareholders Agreement to their substantial shareholding notices dated 13 March 2003.

The Panel considered that the better view is that the CHAMP Group, or the owners of CHAMP P/L, were in breach of the disclosure required under the substantial shareholding provisions, and section 602 of the Act, for nearly 3 months. Because they volunteered to make full disclosure once they fully understood the Panel's interpretation of section 671B(4)(b) of the Act, the Panel was not required to decide whether or not to make a declaration of unacceptable circumstances in this instance.

The Panel considered that where a commercial transaction is the subject of a number of interlinked agreements, and the obligation to give a substantial shareholding notice is triggered by entry into the first agreement, with negotiations proceeding on subsequent documents, it will frequently be likely that section 671B(4)(b) will require disclosure of a written description of the agreements still under negotiation. It is likely that commercially, the onus will be on the person giving the substantial shareholding notice to explain why, having entered the triggering agreement, the parties have not reached sufficient consensus on the terms of the other agreements to bring section 671B(4)(b) into play. Thus, it is likely that the decision in New Ashwick Pty Ltd v Wesfarmers Ltd (2000) 35 ACSR 263 in many cases will have effect in requiring the disclosure of the related agreements (or a summary of them if they are not yet concluded) despite any timing anomalies arising out of one agreement being signed before the others have been concluded.

The Shareholders Agreement contains provisions relating to, inter alia:

- The number of CHAMP Group and UAPC nominee directors elected to the Austar board;  
- Future independent directors on the Austar board;  
- The chairmanship of the Austar board;  
- The CEO of Austar;  
- The make-up of the underwriting agreement for a proposed future rights issue by Austar;  
- Restrictions on transfer of Austar shares controlled by CHAMP Group and UAPC;  
- Management fees in relation to Austar; and  
- Standstill agreements between UAPC and CHAMP Group.

The CHAMP Group disclosed a summary of aspects of the Shareholders Agreement on 5 March 2003 in supplementary disclosures through its media release to the market.

(3) Difference between percentage exempted under ASIC Relief and CHAMP Group Substantial Shareholding Notices.

On 20 December 2002, ASIC granted CHAMP Group an exemption from section 606 of the Act (the 20% threshold ) to allow CHAMP Group to enter the debt restructure agreements under which it acquired relevant interests in the Austar Shares. The relief is conditional on CHAMP Group making takeover offers for the 18.1% of shares in Austar held by the public.

The percentage specified in the ASIC instrument did not include two parcels of Austar shares: 0.6% owned directly by UAPC and 0.000196% held by an associate director of the CHAMP Group.

The CHAMP Group's initial substantial shareholding notice did not disclose its interest in either of these parcels of shares. The CHAMP Group subsequently gave amended substantial shareholding notices on 18 and 20 February 2003 disclosing the CHAMP Group's associates' relevant interest in the two additional parcels of shares.

It is unclear whether or not the 0.6% parcel should have been included in the relief. However, the Panel does not consider in these circumstances that a breach (if any) of section 606 occasioned by the ASIC relief relating only to 80.7% of Austar would constitute unacceptable circumstances.

(4) CHAMP Group's intentions for Austar

Pondale asserted that the market for control of Austar is uninformed because the CHAMP Group has not made detailed disclosures about its intentions for the future of Austar.

The Panel considered that ASIC's relief requires CHAMP Group to make takeover offers for the publicly held shares in Austar and that the proper time for the CHAMP Group to make such disclosures is when it issues its bidder's statement. The Panel considered that in the present circumstances, the market and Austar shareholders have been properly informed of CHAMP Group's substantial shareholding and of the requirement in ASIC's relief for a follow-on bid.

(5) Pondale's standing

An issue of concern to the Austar Panel, which was not raised by Pondale, was Pondale's standing, and good faith, in making its application. Pondale is the owner of 3,000 shares in Austar. It paid $622 for the shares, which it acquired on 23 January 2003 (almost a month after the CHAMP Group announcements and first substantial shareholding notice).

Pondale is a private company of the solicitor acting for Pondale.

The Panel was concerned that it know the identity of any person bringing an application before the Panel. It therefore sought information from Pondale, and its solicitors, as to any person who had given instructions to Pondale in relation to the application that Pondale had made. Pondale has advised the Panel that a client of Watson Mangioni (Pondale's solicitors) requested Watson Mangioni to acquire shares in Austar, to acquire those shares through a vehicle connected with Watson Mangioni ie Pondale, and to commence the application. The client agreed to pay all of Pondale's costs of the application.

Pondale gave none of this information to the Panel in its initial application.The Panel seriously considered declining the application when advised of the instructions behind Pondale's application. However, as Pondale formally had standing, the Panel decided to consider whether the issues raised by the Pondale application raised issues which would properly concern the market for Austar shares, and Austar shareholders. It decided that at least two of the issues raised were, of themselves, sufficiently material to the market for Austar shares to proceed with the application, regardless of the hands behind Pondale.

The Panel is continuing with its enquiries concerning the instructions given to Watson Mangioni in relation to the application by Pondale and may make further comment in its published reasons.

The Panel considered it was appropriate to publish its decision, and the outline of its reasons, to allow Austar to give the decision to the US court considering the Chapter 11 arrangements to reassure the US court that it need not make any provision for any decision by the Panel in the US court's considerations.

The Panel will publish its reasons on its website when finalised.

The President of the Panel appointed Nerolie Withnall, Alice McCleary and Michael Ashforth to be the Sitting Panel to consider the application.

5. RECENT CORPORATE LAW DECISIONS

(A) BANK'S FAILURE TO LODGE A CHARGE  
(By Martin MacDonald, [Freehills](http://www.freehills.com.au))

National Australia Bank Limited v Davis and Waddell (Vic) Pty Ltd [2003] VSC 00001, Supreme Court of Victoria, Hansen J, 13 February 2003

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2003/february/2003vsc00001.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Overview

On 13 February 2003, Justice Hansen in the Supreme Court of Victoria granted National Australia Bank ("NAB") an order extending the time to register a charge granted in its favour by Davis and Waddell (Vic) Pty Ltd ("Davis").

Pursuant to section 266 of the Corporations Act, the charge would have been void as against the liquidator of Davis without the grant of an extension of time. This would have resulted in NAB constituting an unsecured creditor in the winding up of Davis (significantly reducing the amount that NAB would recover).

On the facts, Hansen J held that the failure by NAB to lodge a notice of the charge within the relevant period (45 days) was "accidental or due to inadvertence or some other sufficient cause". Accordingly, pursuant to section 266(4), the court had the discretion to extend the period for lodgement of that notice on such terms and conditions as the court thought just and expedient. The court considered that it was just and expedient to extend that period to the date the charge was actually lodged by NAB.

(2) The case

Davis had created a charge in favour of NAB on 6 December 2000. NAB lodged notice of the charge on 15 February 2001 - this was 24 days after the period of 45 days within which it should have been lodged. On 10 April 2001, Davis resolved that it was insolvent and appointed an administrator to the company. On 12 April 2001, NAB appointed a receiver and manager to the company's assets. On 10 May 2001, at a meeting of the creditors of Davis, it was resolved that the company be wound up (upon which the administrator assumed the role of liquidator).  
Section 266 of the Corporations Act provides that:

- where an order is made, or a resolution is passed, for the winding up of a company;  
- an administrator of the company is appointed under section 436A, 436B or 436C of the Corporations Act; or  
- a company executes a deed of arrangement,

a registrable charge of property of the company is void as against the liquidator of the company unless (among other things) a notice of the charge was lodged within the relevant period (pursuant to section 264 of the Corporations Act, this period is 45 days after the charge is created) or at least six months before the critical day (in the context of a winding up, the critical day is the day the winding up commenced).

As NAB's charge was not registered within the relevant period, it would be considered void against the liquidator and NAB would be considered an unsecured creditor in the winding up. This would have resulted in an amount of between 40 and 50 cents in the dollar being paid to the unsecured creditors (including NAB).

However, if an extension of time was granted, NAB would constitute a secured creditor and recover virtually the full amount owing to it.

(3) The decision

Section 266(4) of the Corporations Act provides that, if the failure to lodge a notice in respect of a charge was (among other things) "accidental or due to inadvertence or some other sufficient cause", then the court may, on the application of the company or any person interested, extend the period for registration on such terms and conditions as seem to the court "just and expedient".

In the course of his judgment, Hansen J noted that section 266(4) is a benevolent section in that it appears to give the chargee a complete and unfettered opportunity for repentance and to place the chargee in the same position as if it had been careful and diligent.

(a) "accidental or due to inadvertence or some other sufficient cause"

Hansen J noted that the failure to lodge the notice need only be either accidental, due to inadvertence or due to some other sufficient cause.

(i) Accidental

Hansen J found that the employee of NAB responsible for the charge made a deliberate decision to delay lodgement of the charge beyond the 45 day period. This decision was made as not all the documents relating to the charge were ready by the expiration of that period. However, Hansen J found that this decision was based on two mistaken beliefs held by the employee:

- that, while the employee was aware of the requirement to lodge the notice within 45 days, he believed that the only consequences of failing to do so would be that a penalty registration fee would be payable; and  
- that it was not possible to lodge documents in an incomplete form.

Therefore, while it could not be said that the failure to lodge the notice was "accidental" in the sense that it was unintentional (as argued by the liquidator), Hansen J held that the failure was "accidental" in the sense that the intention to delay lodgement was founded on a mistake. This was within the ordinary meaning of the word "accidental" and the terms of the Corporations Act. Accordingly, section 266(4) provided the court with discretion to extend the period for lodgement.

Given the above finding, it was not necessary for the court to express a view on whether the failure to lodge the notice was due to inadvertence or some other sufficient cause. However, Hansen J did consider those two points.

(ii) Due to inadvertence

Hansen J followed earlier judgments and held that ignorance of a legal requirement is sufficient to constitute inadvertence. Ignorance of the law includes ignorance of the adverse effects of a failure to register a charge. Accordingly, Hansen J found that the mistaken beliefs outlined above did amount to a failure to properly avert to the precise registration requirements and, on the facts, it was this failure to avert to those requirements which led to the failure to lodge the notice.  
In addition, the failure by NAB was not made with any fraudulent or improper intention and, accordingly, was not beyond the scope of the acts and omissions for which the curative power of the court under section 266(4) is intended.

(iii) Due to some other sufficient cause

Hansen J found that the grounds of accident and inadvertence were also sufficient to support a finding that the failure was due to some other sufficient cause. While NAB's failure was negligent, it was not in wilful and deliberate contravention of the law.

(b) On terms "just and expedient"

If a chargee's failure to lodge the charge is accidental, due to inadvertence or some other sufficient cause, the court will have the discretion to extend the period for lodgement on terms that it considers "just and expedient". Hansen J noted that, in exercising its discretion, the court is to make the decision it considers just having regard to the competing considerations and circumstances of the case.

Hansen J considered the "right" of creditors that, when a liquidation has commenced, one creditor should not be assisted by the court to improve its position vis-à-vis the other creditors. Davis submitted that if the court ordered an extension of time, NAB's position would be improved with respect to the other unsecured creditors. Hansen J noted that this "right" was contingent upon the exercise of the court's discretion under section 266(4). Therefore, while the fact of liquidation and the detriment to unsecured creditors were factors which militated against ordering an extension of time, they were not fatal to NAB's application.

The parties proceeded on the basis that, when a liquidation has commenced, exceptional circumstances must be shown before a court should make an order which will adversely affect the interests of the unsecured creditors. Hansen J appeared comfortable to proceed on that basis (although, he did note that this requirement could constitute an impermissible fetter on the court's discretion under section 266(4) - this was an issue which Hansen J considered more appropriate for an appellate court).

Hansen J held that, on the facts, exceptional circumstances did exist. In reaching this conclusion, he placed importance on the following factors:

- that, at all times, a charge did appear on the ASIC register. NAB had provided finance to Davis which allowed Davis to discharge its liability to HSBC (its previous banker). The amounts owing to HSBC had been secured by a charge - this charge was only removed from the register at the time the NAB charge was lodged. Although this charge did not reflect reality, it ensured that a creditor searching the register would be aware that a charge over the property of the company existed;  
- NAB was entitled to be subrogated to the HSBC charge in respect of the amount it had paid to HSBC;  
- there was no evidence that any person, whether an existing creditor or a person minded to transact with Davis, searched the register or that NAB's failure to register its charge misled or caused prejudice to any person;  
- at all times prior to lodgement of the notice, NAB believed Davis was solvent. It could not be said that the charge was registered due to concerns over Davis' solvency; and  
- the delay in lodging the notice was relatively short.

Accordingly, Hansen J considered it just and expedient to extend the period for registration of the charge until 15 February 2001 (the date the charge was registered). This allowed NAB to constitute a secured creditor for the purposes of the winding up.

The court did not consider it necessary for a proviso be added to the order which would protect the rights of parties which acquired rights in the period between the date of creation of the charge and the date of its registration as there was no evidence that any unsecured creditor was misled or prejudiced as a result of the charge not being registered.

(B) DIRECT LODGEMENT OF PROXY FORMS WITH THE COMPANY REQUIRED?  
(By Andrew Walker and Nigel Vise, [Clayton Utz](http://www.claytonutz.com))

Bisan Ltd v Cellante; Eromanga Hydrocarbons NL v Cellante [2002] VSC 430, Supreme Court of Victoria, Dodds-Streeton J, 15 October 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2002/october/2002vsc430.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Facts

The plaintiffs, Bisan Ltd and Eromanga Hydrocarbons NL, were listed public companies which had significant cross-shareholdings and common directors. Both plaintiffs sought injunctions restraining the holding of general meetings of their respective members convened by the defendants (Mr Cellante and others) pursuant to section 249F of the Corporations Act (Cth) 2001 in their capacity as the holders (or agents for the holders) of at least 5% of the votes. Bisan Ltd claimed that the defendants had no power to call the meetings under section 249F by reason of the revocation of a power of attorney by one member in favour of Cellante.

Members of both plaintiffs had been provided with a notice of meeting and a pre-completed proxy form which stipulated the address of an agent of the defendants (Omnium Corporate) for return. Both plaintiffs alleged that the proxy forms were invalid.

(2) Requisitioned meetings (section 249F)

Dodds-Streeton J held that, due to the potential for requisitioned meetings to be disruptive and distracting to management, the pre-conditions enlivening this entitlement should be strictly observed. A member which held 1.21% of the shares in Bisan Ltd had executed a power of attorney in favour of Cellante, who then called a general meeting pursuant to section 249F. That member then executed a transfer of the shares in favour of one of the defendants (which the directors declined to register) and subsequently notified Cellante of the revocation of the power of attorney. Without these shares, the defendants would not have had 5% of votes for the purposes of section 249F.

Her Honour concluded that there was at least a serious question that the minimum statutory percentage was lacking on the basis that there was no authority from the member for any subsequent acts necessary for calling and holding the meeting, and that the defendant who was the beneficial owner had no power to direct the member to participate in calling and/or holding a meeting under section 249F (notwithstanding that she was entitled to direct the member as to the exercise of voting rights).

The plaintiffs failed to establish that the meetings had been convened for an improper purpose within the meaning of section 249Q. Her Honour held that the stated purpose of the meetings to change the composition of the plaintiffs' respective boards of directors was proper and expressly contemplated by sections 203D and 203E. The plaintiffs alleged the existence of a further purpose of obtaining control of the plaintiffs without making a takeover offer. Her Honour concluded that, even if the evidence had established such a purpose on the part of the convening shareholders, it would generally not be unlawful or improper assuming that Chapter 6 of the Corporations Act was not infringed.

(3) Form of proxy appointments

It was alleged that the proxy forms provided by the defendants with the notices of meeting did not conform with the plaintiffs' respective constitutions. Her Honour considered that section 250A is inconsistent with the prescription of a form of proxy (or any additional formal requirements) by the company's constitution. As the limited statutory requirements were satisfied, the proxy forms were valid notwithstanding that Cellante (rather than the chairman of the meeting as per the form prescribed by the constitution) was appointed the proxy in the absence of another individual being specified.

(4) Lodgement of proxy forms via intermediary

Section 250B of the Corporations Act requires that instruments appointing a proxy are received by the company at least 48 hours prior to the meeting. The defendants' notice of meeting and proxy form stated that the proxy form must be returned to Omnium Corporate (an agent of the defendants) at least 48 hours prior to the meeting in order to be effective. Her Honour considered that this direction was inconsistent with section 250B because the proxy forms would be received by the relevant company only following initial receipt by a third party. In this regard, her Honour applied (arguably with some extrapolation) the decision of Lockhart J in Australian Innovations Ltd v Petrovsky (1996) 21 ACSR 218 in the context of a provision of the company's constitution which was analogous to section 250B.

Section 250BA requires a notice of meeting to specify a place and fax number for the return of instruments of proxy. Section 249F(2) provides that a meeting pursuant to section 249F must be called in the same way, so far as is possible, as a general meeting. Her Honour therefore concluded that it was strongly arguable that notices convening a section 249F meeting must specify the company's address (and fax number) or one nominated by the company for the return of proxies.

Her Honour considered that the abovementioned provisions reflect a legislative intent that directors be able to inspect and verify proxy appointments prior to the meeting (as to which see Armstrong v Landmark Corporation Ltd [1967] 1 NSWR 13; Lew v Coles Myer Ltd (2002) 43 ACSR 432). Her Honour also considered that a further legislative purpose may be to safeguard the actual and perceived integrity of the voting process by requiring the direct return of proxy forms to the company or its agent. The return of proxy forms via an intermediary owing no fiduciary obligations to the company would, in her Honour's view, introduce the possibility of inappropriate handling such as "filtering" (by which her Honour was presumably referring to the selective lodgement of proxy forms according to voting instructions) which "could entail a grave defect in the electoral process". This feature was considered a fatal defect in the form even in the absence of any evidence of such inappropriate handling.

(5) Orders

Her Honour did not consider it appropriate to declare that votes cast pursuant to the proxy forms lodged via the intermediary be disregarded, as to do so would disenfranchise those members who had sought to exercise their votes by the impugned proxy forms. Nor was her Honour satisfied with the defendants offer to give undertakings that all forms received by their agent would be lodged in accordance with section 250B. Her Honour concluded that the direction to return the proxy forms to an intermediary of itself raised a serious question as to whether the proposed resolutions would be valid, and the balance of convenience favoured the proposed meetings being enjoined as a disputed election result which was vulnerable to challenge would not be in the interests of any party.

(6) Conclusions

Her Honour's conclusions concerning the form of the instrument appointing proxies and the purpose for which the general meetings were requisitioned are relatively uncontroversial and generally consistent with other authorities on these issues (see for example Fast Scout Ltd v Bergel (2002) 40 ACSR 376, Totally and Permanently Incapacitated Veterans' Association of New South Wales Ltd v Gadd (1996) 28 ACSR 549, NRMA Ltd v Scandrett (2002) 43 ASCR 401). However, her Honour's interpretation of section 250B, and in particular the identification of an implied prohibition on the nomination of an intermediate recipient of proxy forms, represents a significant gloss on the express terms of section 250B, the purpose of which had generally been regarded as promoting the orderly preparation for general meetings by preventing last-minute proxy appointments. It might have been expected that, had the legislature indeed intended to prohibit the lodgement of proxy forms via intermediaries, it would have done so in clearer terms.

The interpretation of section 250B in this way sits uneasily with the general principle that proxy appointments should be treated benevolently so that members seeking to rely on them are not unfairly disenfranchised, a principle recognised and accepted by Dodds-Streeton J and applied in other aspects of the judgment. As this case involved a meeting called under section 249F, her Honour's findings in this particular case did not impinge on this principle, as the result was that the relevant meetings did not occur and the resolutions could be proposed afresh once the defect had been rectified. The dilemma for a court will be significantly more acute if it is required to rule on the validity of proxy forms lodged via an intermediary where a declaration of invalidity would entail the disenfranchisement of those shareholders who had returned the form in this way.

It may also be significant that the impugned direction in the proxy form in this case was squarely inconsistent with section 250B, as it stated that the form was required to be lodged with the third party intermediary in order to be effective. It is interesting to speculate whether a proxy form which fairly disclosed that a member could either lodge the form directly with the company (or its share registry), or duly constitute a nominated third party as agent to do so on its behalf, would have led to the same outcome. If however the principle expressed by her Honour in this case is extended to its logical conclusion, the practice of utilising proxy solicitation agents to receive proxy forms for the purposes of contested general meetings may well be relegated to history.

(C) CREDITORS' SCHEMES OF ARRANGEMENT WITH INTERNATIONAL DIMENSIONS  
(By Heath Lewis, [Clayton Utz](http://www.claytonutz.com))

Glencore Nickel Pty Ltd [2003] WASC 18, Supreme Court of Western Australia, McLure J, 7 February 2003

Anaconda Nickel Holdings Pty Ltd [2003] WASC 19, Supreme Court of Western Australia, McLure J, 7 February 2003

The full texts of the judgments are available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/february/2003wasc0018.htm>  
<http://cclsr.law.unimelb.edu.au/judgments/states/wa/2003/february/2003wasc0019.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

In 1997, Glenmurrin Pty Ltd ("Glenmurrin"), a subsidiary of Glencore Nickel Pty Ltd ("Glencore Nickel") and ultimately of Glencore International AG ("Glencore"), and Murrin Murrin Holdings Pty Ltd ("MMH"), a subsidiary of Anaconda Nickel Holdings Pty Ltd ("ANH") and ultimately of Anaconda Nickel Limited, entered into a joint venture for the development of the Murrin Murrin Nickel and Cobalt Project in Western Australia ("Project"). In order to finance their respective participations in the Project, MMH and Glencore Nickel issued bonds to United States investors ("Anaconda Bonds" and "Glencore Bonds" respectively).

MMH and Glencore Nickel had defaulted on the Anaconda Bonds and the Glencore Bonds respectively. In addition, Glencore Nickel defaulted on its obligations in respect of a working capital facility and MMH defaulted on obligations owed to certain parties under foreign exchange hedging contracts ("FX Contracts").

All of Glencore Nickel's obligations in respect of the Glencore Bonds and the working capital facility ("Glencore Obligations"), and all of MMH's obligations in respect of the Anaconda Bonds and the FX Contracts ("Anaconda Obligations"), were secured by way of charges and mortgages given by Glencore group companies and Anaconda group companies respectively. Prior to the Schemes, more than 75% of the holders of the Glencore Obligations and more than 75% of the holders of the Anaconda Obligations (collectively, "Consenting Holders") agreed not to enforce the securities and to vote in favour of the Glencore Scheme and the Anaconda Scheme respectively.

(2) Schemes of arrangement

Each of Glencore Nickel and Glenmurrin (the latter by virtue of its guarantee obligations) proposed a compromise by way of identical Part 5.1 creditors' schemes of arrangement ("Glencore Schemes"), as did each of MMH and ANH (the latter by reason of its guarantee obligations) ("Anaconda Schemes"). All of the Glencore Schemes and the Anaconda Schemes were dependent on the others becoming effective.

In broad terms, the Glencore Schemes and the Anaconda Schemes (collectively, the "Schemes") involved the extinguishment of secured debt and the discharge of securities in consideration for:

(a) a proportionate share of a cash payment ("Cash Payment"); and

(b) a proportionate beneficial interest in proceeds from pending arbitration and litigation proceedings with Fluor Australia Pty Ltd ("Fluor Arbitration").

(3) Expression of schemes

It is usual that the terms of Part 5.1 schemes be set out in a stand-alone "scheme of arrangement". However, in this case, the terms of the Schemes were defined by reference to specific sections of the explanatory statements relating to the Schemes and to specific clauses of the implementation deeds which regulated the Schemes (the implementation deeds annexed a trust agreement, a litigation deed, a fixed charge and a deed of priority, among other documents).

The provisions of Part 5.1 of the Corporations Act 2001 (Cth) ("Act") make it clear that a scheme may bind the company and its members and creditors but not outsiders. Nevertheless, McLure J confirmed that "[t]here seems to be no reason why, as a matter of form, the terms of the Schemes cannot be recorded in agreements involving outsiders who are required to act to facilitate the implementation of the Schemes: see Re Amcor Ltd (2000) VSC 157; (2000) 34 ACSR 199; Bulong Nickel Pty Ltd [2002] WASC 126".

(4) Classes

McLure J concluded that because the holders of the Glencore Obligations all enjoyed security under the same instrument, ranked pari passu under that instrument and were to receive proportionate entitlements under the Glencore Schemes, there was no need to divide the Glencore scheme creditors into classes.

In relation to the Anaconda Schemes, McLure J concluded that separate classes were not necessary notwithstanding that the instrument governing the Anaconda scheme creditors' interests in securities contemplated that certain assets, namely money standing to the credit of specified bank accounts, would be exclusively available for certain creditors in an event of default. The Court appeared to reach this position on the basis that the class distinction was merely a past potentiality and, given that there were no material funds standing to the credit of the specified accounts, this unrealisable potentiality was not a basis for dividing the Scheme Creditors into classes.

Also in relation to the Anaconda Schemes, McLure J noted that Glencore was a scheme creditor in its capacity as an FX Counterparty (entitled to approximately 1.3% of the Anaconda Scheme debt) and held approximately 34% of the shares in Anaconda. Referring to Re Crusader Ltd (1995) 17 ACSR 336 at 344-345 and Re Jax Marine Pty Ltd [1967] 1 NSWR 145, McLure J concluded that Glencore's capacity as a shareholder in Anaconda did not distinguish Glencore to such a degree that it should be required to vote as a separate class. McLure J appeared to be fortified in this view by the fact that Glencore did not have the ability to influence the outcome of the vote of the Anaconda Schemes given that 79% of scheme creditors had contracted to vote in favour of the Anaconda Schemes.

(5) Voting procedures and definition of scheme creditors

The sole registered holder of both the Glencore Bonds and the Anaconda Bonds was The Depository Trust Company ("DTC"), a firm established to hold such securities and to facilitate trading in those securities. DTC recognised trading in the Bonds as between "Custodians", being banks, brokers and other United States institutional investors who in turn held the Bonds on behalf of "Beneficial Owners". Given that economic ownership of the Bonds resided with the Beneficial Owners and on the basis of the usual practices in the United States, voting arrangements were proposed which required Custodians to solicit and aggregate the votes of Beneficial Owners.

Given the "master voting system" which was proposed and the fact that it was the Beneficial Owners rather than DTC (as the legal owner of the Bonds) who would be casting votes, the Court found it necessary to consider whether the voting arrangements adequately contemplated the votes of the "creditors" as required by the Act. It was noted that there was no definition of "creditor" in the Act. The Court did not accept that the designation of certain entities as "scheme creditors" under the terms of the Schemes was sufficient to dictate a proper entitlement to vote on the Schemes pursuant to Part 5.1 of the Act. In fact, the Court held that at the time of considering whether a meeting of scheme creditors should be convened the definition of "creditor" in the scheme was not definitive.

Rather, the Court concluded that the proposed voting arrangements properly conveyed the votes of creditors on the basis that even though it was the Beneficial Owners who cast a vote, that vote would bind not only them but the legal owner of the Bonds (i.e. DTC) given that DTC and the Custodians were equivalent to bare trustees or nominees.

(6) Jurisdiction/section 304 of the United States Bankruptcy Code

The court considered whether it had jurisdiction to approve the Schemes given that they would compromise rights under the Bonds which were governed by documents regulated by the law of the State of New York. McLure J concurred with Heenan J in Bulong Nickel Pty Ltd [2002] WASC 126 and Bulong Nickel Pty Ltd [2002] WASC 226 regarding the power conferred on an Australian court by Part 5.1 of the Act, in particular that:

"the compulsory variation of the rights between the company and some of it creditors or members, if so approved in accordance with the legislation, is a discharge or variation of those contractual rights in accordance with the law of the forum which, because of its association with insolvency, will be effective notwithstanding that some, or even all, of the obligations between the company debtor and its creditors are governed by a foreign system of law...It follows that I am satisfied that s 411 confers on this Court a power to approve a compromise or arrangement even if the effect of the scheme will be to modify or discharge obligations existing between the company concerned and third parties under a contract which stipulates that it is to be governed by a foreign system of law."

McLure J did not consider the potential for a dissentient or non-participating scheme creditor seeking to enforce rights in respect of the Bonds in the United States to be a ground for refusing to convene the scheme meetings.

In the context of the approval of the Schemes, McLure J noted that it was a term of the Schemes (though not a condition precedent to the Schemes) that applications would be made in the United States under section 304 of the United States Bankruptcy Code to enjoin all scheme creditors from taking action in the United States in relation to any property or rights dealt with under the Schemes ("304 Proceedings"). McLure J held that "it is relevant to take into account the potential risks and consequences of successful claims in the United States after the Schemes come into effect, particularly on the plaintiffs' solvency, and to consider whether alterations or conditions could or should be made or imposed under s 411(6) to address the potential consequences". McLure J noted that although there was a theoretical possibility that a dissentient or non-participating scheme creditor bringing an action in the United States might impact on the solvency of the scheme companies, this risk was affected by:

(a) the likelihood of success of the 304 Proceedings and, even if they are unsuccessful, the likelihood of United States courts giving effect to the orders of the Australian court on grounds of comity; and

(b) whether an order made in the United States which is inconsistent with the Schemes would have any practical financial effect on the scheme companies (bearing in mind that the majority of the scheme companies' assets are located in Australia and that a foreign judgment inconsistent with the approved schemes would not be enforceable in Australia: Vervaeke v Smith [1983] 1 AC 145; Bulong Nickel Pty Ltd [2002] WASC 226).

As a result, McLure J held that it was unnecessary for the Court to make the grant of its approval of the Schemes subject to alterations or conditions under section 411(6) of the Act.

(7) Ancillary order under section 411(16) of the Act

McLure J made an order pursuant to section 411(16) of the Act that further proceedings in any action or other civil proceeding against the scheme companies be restrained except by leave of the Court. Contrary to Adam J in Re Reid Murray Acceptance Ltd [1964] VR 82, McLure J was satisfied that the reference to "further proceeding" in section 411(16) "is to any proceedings whether by action or other civil proceeding (other than the approval proceedings) and whether pending or not" on the basis that "[s]uch a construction is consistent with the purpose of section 411 and is conducive to the orderly and efficient consideration of the proposed Schemes".

(8) Application to amend votes cast

At the second court hearing, counsel for the Consenting Holders applied to the Court for relief in relation to the result of an election relating to the future funding of the Fluor Arbitration ("Fluor Funding Election"). The Fluor Funding Election was an element of the Schemes that required a collective vote that was separate and distinct from the vote to approve the Schemes themselves, though it was cast at the same time. In rejecting the application to vary the votes cast in relation to the Fluor Funding Election, McLure J stated:

"It would only be in exceptional circumstances that the result of a ballot or vote under Pt 5.1 of the Act would be adjusted after it has been declared. It is generally undesirable to undermine the finality associated with the declaration of the result. It may be appropriate to do so where a vote cast before the deadline or the Scheme Meetings had been ignored as a result of an administrative error. However, it is difficult to envisage circumstances in which it would be appropriate to allow a person to change their vote or, alternatively, vote for the first time after the declaration of the poll."

(D) LIQUIDATOR'S CLAWBACK OUTSIDE LIMITATION PERIOD  
(By Felicity Slater and Fiona Boyce, [Clayton Utz](http://www.claytonutz.com))

In the matter of Sutherland v Dexion Pty Limited [2003] NSWSC 24, New South Wales Supreme Court, Barrett J, 10 February 2003

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/february/2003nswsc24.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

An insolvent company goes into administration in 1998. An insolvency practitioner has the management of its affairs from November 1998. More than four years after the administration commenced, the (now) liquidator seeks to recover preferences. In the face of the three year limitation period recommended in the Harmer Report and enacted in section 588FF of the Corporations Act 2001, should he be allowed to do so?

This was the question posed to Barrett J in Sutherland v Dexion Pty Limited [2003] NSWSC 24.

The circumstances were unusual and, his Honour found, not of the nature in which the three year limitation period was intended to preclude commencement of recovery proceedings.

(1) Facts

The case concerned five defendant companies which became the subject of administration under Part 5.3A of the Corporations Act 2001 on 12 October 1998. A deed of company arrangement was entered into on 27 November 1998. The plaintiff, Sutherland, was the deed administrator. Administration was unsuccessful, and the companies were voluntarily wound up on 5 November 2001.

The relation-back day was 12 October 1998 (when administration began). The time within which an application by the liquidator for court orders (on the basis that a transaction of the company is voidable) may be made under section 588FF(1) is three years from the relation-back day, or such longer time as the Court orders on an application by the liquidator within the three years (pursuant to section 588FF(3)). This case arose because the plaintiff did not acquire the status of liquidator until 5 November 2001, outside the three year period.

The plaintiff filed an originating process on 8 November 2002, more than one year after becoming the liquidator, and thirteen months after the end of the three year period specified in section 588FF(3).

(2) Legislation

Section 588FF(3) provides:

"An application under subsection (1) may only be made:

(a) within 3 years after the relation-back day; or

(b) within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years."

The section clearly directs that an application under section 588FF(1) - for orders that transactions be avoided - "may only be made" within three years, unless the liquidator makes a timely application for an extension of the time for seeking avoidance orders. Prima facie, the time limit for such an application is in section 588FF(3)(b), that is, the liquidator must seek the extension within the three years (for example, to allow further investigation).

However, there is a general power in the Court to allow an extension of time limits in section 1322(4)(d) Corporations Act 2001:

"Subject to the following provisions…the Court may… make all or any of the following orders…:

(d) an order extending the period for doing any act…"

Should the Court invoke this power where the section shows a policy of limiting proceedings to three years?

(3) Decision

The circumstances before Barrett J persuaded him that the power should at least be available in the context of section 588FF. The particular circumstance was this: the three year period had already expired before any liquidator was appointed; so unless section 1322 applied, there could never be recovery of preferences.

Barrett J considered this to be sufficient reason to hold that the power was available, and his decision was consistent with his earlier decision in Re Aura Commercial Interiors Pty Ltd (2002) 20 ACLC 904, and another single judge decision of Austin J in Brown v DML Resources Pty Ltd (No 6) (2002) 40 ACSR 669.

His Honour then considered the criteria for deciding whether to exercise the power under section 1322(4)(d), and held that the court must be satisfied that "no substantial injustice has been or is likely to be caused to any person" by the exercise of the power, and "any order made under [the] subsection must be consistent with the policy of the Corporations Law." In this case, his Honour held that, the fact that any persons who may be prejudiced by the making of the order had appeared and been heard, there was no competent applicant for any extension of time before the end of the three year period, and refusal of the order would mean that there would be no possibility of resort to section 588FF(1), meant that it was appropriate to make the section 1322(4)(d) order.

Obtaining an extension of the time within which to seek an extension under section 588FF(3)(b) is only half the battle. Once this has been done, the applicant then has to persuade the Court to grant the extension. Authorities on this are well settled at first instance and appellate level, and can be summarised in a passage from Austin J in Re Green (as liquidator of Australian Resources Ltd) (2002) 41 ACSR 69:

"Considerations relevant to the exercise of the court's discretion under section 588FF(3) were stated by Finn J in Taylor v Woden Constructions Pty Ltd (Federal Court, 23/8/98, unreported). The following propositions, with which I respectfully agree, emerge from that case:

(a) ordinarily, the issues raised on an extension application are threefold:

(i) the explanation for the delay in bringing proceedings;

(ii) a preliminary review of merits of the foreshadowed proceedings - that is, an investigation as to whether such proceedings would be so devoid of prospects that it would be unfair, by granting an extension, to expose the other party to the continuing prospect of suit;

(iii) whether the likely actual prejudice resulting from the grant of an extension is sufficiently substantial to outweigh the case for granting an extension;

(b) where the liquidator's purpose in seeking the extension of time is simply to put himself into a position where he can properly decide whether or not to bring proceedings, a preliminary inquiry into the merits of any consequent proceedings may not always be necessary."

Barrett J then dealt with the application on its particular facts. The only point of note about the facts is that his Honour considered the delay on the part of the liquidator in making the application to be "reasonable."

(E) WHAT IS REQUIRED TO REBUT THE PRESUMPTION OF INSOLVENCY IN A WINDING UP ACTION UNDER SECTION 459P OF THE CORPORATIONS ACT?  
(By Julie Haylett, [Phillips Fox](http://www.phillipsfox.com))

Expile Pty Ltd v Jabb's Excavations Pty Ltd [2003] NSWSC 96, New South Wales Supreme Court, Barrett J, 27 February 2003

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/february/2003nswsc96.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

By originating process the plaintiff, Expile Pty Ltd, claimed an order for the winding up of the defendant, Jabb's Excavations Pty Ltd, in insolvency under section 459P of the Corporations Act. The originating process was filed following non-compliance with a statutory demand served by the plaintiff in respect of a debt of $107,592.50. The debt remained unpaid at the time of the hearing and there had been no attempt by the defendant to have the demand set aside under section 459G on the basis of genuine dispute as to the existence or amount of the debt.

(2) The arguments

It was not disputed that by the operation of section 459C(2)(a) the court must presume that the defendant is insolvent. The defendant accepted that the onus was on it to displace the statutory presumption of insolvency by proof that it is able to pay all its debts as and when they become due and payable.

The plaintiff argued that the evidence was insufficient to displace the statutory presumption. Specifically, the plaintiff sought to call into question the soundness of the financial statements relied upon by the defendant. It did so on the basis that the balance sheets and accounts:

- had not been formally adopted or signed by the defendant's directors;  
- were expressed as no more than special purpose financial reports for the use of the defendant's members only;   
- had not been prepared or presented in a way which would give any external recipient the measure of comfort or assurance that would be derived from formally adopted and audited accounts; and  
- that the main determinant of the accounts was information provided by Mr Kairouz, one of the defendant's only two directors.

The plaintiff also argued that the defendant did not own some of the plant and equipment it claimed it did and that in light of financing arrangements the value of the defendant's interests was also not as claimed.

The defendant argued that its financial statements and the evidence generally showed that it had and continued to have a substantial surplus of assets over liabilities and a history of profitable operation. Its primary submission however was that it was solvent because it had the ability to raise funds in the short term sufficient, when added to immediately available liquid assets, to cover debts due or to become due in the short term.

(3) The proceedings

Justice Barrett held that if the statutory presumption is not displaced by the defendant a winding up order must follow. Further, Barrett J held that the correct approach based on the authorities was to proceed on the basis that the defendant must prove that its assets are such that having regard to its financial position in its entirety, the defendant can in a 'relatively short time' raise through borrowing such an amount which when added to money immediately available would satisfy debts presently due and payable and those that will be due and payable in a 'relatively short time'. His Honour stated that this had been a perfectly acceptable way of establishing solvency since Barwick CJ's judgment in Sandell v Porter (1966) 115 CLR 666.

Barrett J quoted with approval the judgment of Weinberg J in Ace Contractors & Staff Pty Ltd v Westgarth Development Pty Ltd [1999] FCA 728 which sets out the authorities governing the operation of section 459C. Briefly, the principles the authorities establish are as follows:

- The respondent is presumed to be insolvent and as such bears the onus of proving its solvency.   
- In order to discharge that onus the Court should ordinarily be presented with the "fullest and best" evidence of the financial position of the respondent.   
- Unaudited accounts and unverified claims of ownership or valuation are not ordinarily probative of solvency. Nor are bald assertions of solvency arising from a general review of the accounts, even if made by qualified accountants who have detailed knowledge of how those accounts were prepared.   
- There is a distinction between solvency and a surplus of assets. A company may be at the same time insolvent and wealthy. The nature of a company's assets, and its ability to convert those assets into cash within a relatively short time, at least to the extent of meeting all its debts as and when they fall due, must be considered in determining solvency.  
- The adoption of a cash flow test for solvency does not mean that the extent of the company's assets is irrelevant to the inquiry. The credit resources available to the company must also be taken into account.  
- The question of solvency must be assessed at the date of the hearing. However, this does not mean that future events are to be ignored.  
- It is no abuse of process for an applicant to seek to wind up a company presumed to be insolvent by reason of its failure to comply with a statutory demand merely because that company contends that it is solvent, or because there may be alternative means available to the applicant to vindicate its rights.

(4) The decision

Barrett J held that although in some cases the existence of unchallenged and unpaid debts can be evidence of insolvency, in this case the debt could not be regarded as unchallenged even though there had been no moves to have the statutory demand set aside. The debt was clearly disputed by the defendant and accounting entries referred to the debt as such. His Honour also found that although the defendant's accounting and book-keeping systems were unsophisticated they should not be regarded as haphazard and a reasonable measure of confidence could be placed on the financial statements.

Having established that the debt was in dispute and that the defendant's accounts could be relied upon his Honour undertook an accounting exercise and calculated the amount of the debts presently due and payable and those that would become due and payable in the short term. In calculating the total amount of debt his Honour included the plaintiff's disputed debt but did not include a debt that was not payable for at least 12 months.

His Honour then analysed the defendant's claims in respect to the amount of money it contended it could raise in the short term. This exercise involved raising money to pay out a bank security and then re-financing, and recoveries from trade debtors in the ordinary course of business. The evidence that related to the financial benefit inherent in the independent valuations of the defendant's plant and equipment was closely examined.

(5) Conclusion

His Honour held that the evidence led was sufficient to confirm on the balance of probabilities the viability of the financing program put forward by the defendant and was sufficient to warrant a conclusion by the court that the defendant was able to pay its debts as and when they become due and payable.

The presumption of insolvency created by section 459C(2)(a) was therefore displaced by the evidence, which was sufficient to prove that the defendant was able to pay its debts "as and when they become due and payable" (section 95A). As such, the defendant was not an insolvent company as referred to in section 459A and accordingly an order that the defendant be wound up in insolvency could not be made.

(F) OPPRESSIVE CONDUCT AMOUNTING TO BREACH OF TRUST WHERE NO FINANCIAL DETRIMENT HAS BEEN SUFFERED  
(By Michael Jackson, [Phillips Fox](http://www.phillipsfox.com))

McEwen v Combined Coast Cranes Pty Ltd [2002] NSWSC 1227, New South Wales Supreme Court Equity Division, Young CJ, 20 December 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2002/december/2002nswsc1227.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

In June 1996, five parties, Dave McEwen ('Dave') the plaintiff, and Trevor Troy ('Trevor'), Terry Pearce ('Terry'), Ronald Pearce ('Ronald') (each a defendant) and Alan Pearce ('Alan') each of whom operated crane companies, met and decided that they would collectively purchase the goodwill of the business that sub-contracted work to each of them, Central Coast Cranes, from Febpac Pty Ltd.

After obtaining professional accounting advice, Combined Coast Cranes Pty Ltd ('the Company') was incorporated and the parties became its five directors, each having a one fifth share in the Company's equity. The Company then became trustee of The Combined Coast Cranes Unit Trust. The trust property was the assets of the Company, the beneficiaries being the five directors of the Company. Of the 100 units in the trust, each beneficiary held 20 units. Importantly the trust deed included a number of pre-emption clauses.

In July 1996, the Company acquired the business of Central Coast Cranes from Febpac Pty Ltd with each of the five shareholders contributing $10,350. The parties agreed that Trevor would manage the business and the resulting work would be shared equally. The arrangement was designed to ensure that they would all make an even amount of income.

However, by August 1999 relationships between the five had soured with the other four directors voting Dave off the board. Trevor argued that Dave was a disruptive influence who would generally disturb the directors meetings by getting intoxicated. Dave denied this and claimed that his removal from the board was part of a plan to 'starve him out' of the Company altogether.

In September, Alan sold his interests in both the Company and the unit trust to Trevor and Terry. Dave was informed of this two months later. In July the following year, Ron sold both his interests to Trevor and Terry. Both transfers were in breach of the pre-emption provisions. Therefore, at this point in time, Trevor and Terry owned 80% of the Company between them and 80 units in the trust. Dave owned 20% and 20 units respectively.

Difficulties began to emerge in the equal allocation of work due to the range and capabilities of the cranes that were owned by each individual's business. Eventually, in November 2000 Dave was refused work by Trevor on the basis that he was acting in competition with the Company. Trevor maintained that Dave had been receiving jobs and not declaring this to the Company, thus denying the Company its agreed commission. Dave denied this, claiming that all jobs had been declared and the relevant commissions paid. Dave then requested equipment from Central Coast Crane's yard which was subsequently refused by Trevor. Dave commenced proceedings in June 2001, claiming that the above pattern of conduct constituted oppression and seeking damages.

(2) Judgment

Chief Justice Young considered the following issues arising from the statement of claim:

(a) section 232 and section 233 of the Corporations Act 2001 ('the Act');

(b) breach of contract; and

(c) breach of trust.

First, Young CJ dismissed the defendants' argument that the Court lacked jurisdiction to deal with matters arising under contract or the trust deed. His Honour rejected the submission that the Court only had jurisdiction to hear the Federal matter arising under the Act as his Honour was without jurisdiction to deal collectively with the matters arising under the Act, contract and trust. Young CJ held that this was a misapplication of Re Wakim (1999) 198 CLR 511 and that the Court's exercise of federal jurisdiction only meant that there could be no appeal to the Privy Council (even before such appeals were generally abolished).

(a) Corporations Act

Young CJ quickly dismissed the application based upon oppressive conduct in accordance with section 232 and section 233 of the Act. His Honour, following Re Polyresins Pty Ltd (1998) 145 FLR 141, held that upon an application under these sections, the Court could not deal with equitable interests conferred by a trust of which the company was in fact trustee. However, as the statement of claim primarily sought equitable damages in contract, breach of trust and the alleged contravention of the Act, his Honour ruled it was open to the Court to deal with the questions involving contract and trust.

(b) Contract

Young CJ considered that the spoken words relied upon by Dave were consummated in the trust deed which was subsequently drawn up rather than being intended to create a contract. This was evidenced, in his Honour's opinion, by the fact that the form of the trust deed was never the subject of complaint.

(c) Trust

According to the pre-emption provisions, Young CJ held that Dave was entitled to be offered his proportionate amount of the units that Alan (five at $2,500) and Ron (six at $3,333) were selling. Dave would only suffer damage from not being offered the units if the units were worth more today than the amount paid for them by Trevor and Terry in September 1999 and July 2000. Accordingly, his Honour ruled that as the value of the units was now $100 more than originally paid for, Dave would be entitled to receive damages of the same amount. Young CJ held that there was nothing to suggest that the transactions were not at arms length.

Young CJ then dealt with the matter of 'legitimate expectation' within the trust, a concept that applies equally to companies and individuals. Quoting from Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd (2001) 37 ACSR 672 at 683, his Honour concluded that, as a legitimate expectation is not to be inferred from the status quo but rather 'from an agreement or understanding between the parties or an expectation induced by the conduct of the business' there was insufficient evidence to draw such an expectation. The trust deed provided no evidence of an agreement, and his Honour noted that any understanding is only to continue so long as that right is compatible with the general operation of the company. The evidence that Dave was a disruptive influence and that he was acting as a competitor gave weight to the view that no such legitimate expectation had arisen.

Chief Justice Young further stated that if there had been oppressive conduct amounting to breach of trust, it was difficult to remedy that with equitable damages or compensation. It would be difficult for Dave to remain in the enterprise, receive equitable compensation and then allow the conduct to continue whilst still a member. His Honour was of the view that the appropriate remedy would generally be that of injunction. However, an alternate remedy would be for the complainant to elect to get out of the enterprise.

Chief Justice Young considered that the fruits of any oppressive conduct would be reflected in the capital value of the trust units so that the remedy of transfer could be put into play. In this case, Trevor and Terry were willing to purchase Dave's units and he was willing to exit the business and unit trust. As his Honour remarked in Kizquari Pty Ltd v Prestoo Pty Ltd (1993) 10 ACSR 606, where a person has the right to offer their units in a trust to other members, if the value of the trust property has not been affected by the conduct of the defendants, the commencement of the pre-emption procedure will normally give the plaintiff sufficient relief, providing there are buyers, which in these circumstances there were.

The pre-emption provisions contained in the trust deed dictated that upon sale to a fellow unit holder, the proposed purchaser was entitled to receive an independent valuation of the worth of their share. There was no clear evidence as to the value of the Company. Young CJ stated the business had been successful, and taking into account inflation and additions to goodwill it was reasonable to expect the value of the units to be worth more today than when originally purchased in July 1996. Additionally, Trevor's unwillingness to sell for anything equal to or less than the original purchase price of the units gave weight to this. Therefore, his Honour concluded that Dave had not suffered any damage to the value of his units. His Honour stated there had also been no unfair distribution of income on Trevor's or Terry's part.

Accordingly, the plaintiff's claims virtually failed except for the small amount of nominal damages to which he was entitled in relation to the breach of the pre-emption clause. However, as the defendants' conduct was clearly in breach of trust a situation existed where, without compensation, Trevor and Terry would have effectively excluded the first plaintiff from participation in everything expect dividends and retaining the capital value of his units. Young CJ therefore decided that the appropriate order was to dismiss the suit but make no order as to costs.

(G) VARIATION OF ORDERS CONFERRED ON SHAREHOLDERS IN GREAT CENTRAL MINES TAKEOVER  
(By Matthew Baxby, [Mallesons Stephen Jaques](http://www.mallesons.com))

Australian Securities & Investments Commission v Yandal Gold [2003] FCA 77, Federal Court of Australia, Merkel J, 18 February 2003

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/February/2003fca77.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

On 16 June 1999, Merkel J made certain declarations and orders (the "trial orders") in relation to a takeover offer made by Yandal Gold Pty Ltd ("Yandal Gold") for all of the shares in Great Central Mines Limited ("Great Central"), a company listed on the Australian Stock Exchange. The trial orders included certain "avoidance orders", with the effect that:

(a) shareholders who had accepted Yandal Gold's takeover offer would be entitled to withdraw their acceptance of the offer; and

(b) shareholders whose shares had been compulsorily acquired by Yandal Gold would be entitled to give notice of avoidance of the compulsory acquisition.

Under the avoidance orders, shareholders who withdrew their acceptances or avoided compulsory acquisition were required to return the $1.68 consideration they had received. Shareholders who did not withdraw their acceptances or avoid compulsory acquisition were entitled to share in the distribution (on a pro rata basis) of an additional sum of $28.5 million.

Since the making of the trial orders, Yandal Gold and the other respondents (except Edensor Nominees Pty Ltd) ("Newmont respondents") were the subject of a takeover which had resulted in those entities becoming subsidiaries in the Newmont group of mining companies.

The Newmont respondents subsequently sought an order to vary the trial orders by deleting the avoidance orders on the basis of O 35 r 7(2)(f) of the Federal Court Rules 1979 which provides that the court may set aside an order after it has been entered where 'the party in whose favour the order was made consents'. ASIC supported the application of the Newmont respondents, claiming that there was a real risk that former shareholders who exercised an entitlement under the avoidance orders, may do so as a result of confusion, inadvertence or mistake.

(2) Court's jurisdiction to vary the trial orders

The Newmont respondents claimed that because ASIC consented to the deletion of the avoidance orders, the Court had jurisdiction to vary the trial orders if it thought fit. However, the appointed representative of the Great Central shareholders asserted that ASIC was not a party 'in whose favour' the relevant avoidance orders were made, and so the Court lacked the necessary jurisdiction. Merkel J found that the trial orders, including the avoidance orders, were made in favour of ASIC and that the Court has jurisdiction under O 35 r 7(2)(f) to vary those orders. ASIC originally sought the trial orders in pursuance of its function as a regulator charged with, inter alia, administering the Corporations Law. Merkel J did not think it significant that ASIC did not receive a financial benefit from the trial orders.

(3) Exercise of the Court's discretion to vary the trial orders

Merkel J noted that ordinarily, the Court would act on the basis that the Great Central shareholders should themselves decide whether it is in their interests to exercise the rights conferred upon them under the avoidance orders, and the Court would usually decline to delete the avoidance orders if the Great Central shareholders would lose rights as a result. However, Merkel J considered the unusual features of the present case were sufficient to justify the deletion of the avoidance orders. More particularly, Merkel J considered it significant that the evidence before the Court established that the Great Central shares did not have any value, were no longer traded on the ASX and were likely to be de-listed. Merkel J found that the most likely outcome of the exercise by Great Central shareholders of their rights under the avoidance orders would have been the repayment by those shareholders of the $1.68 consideration per share they had received, their reinstatement as Great Central shareholders, the grant of the necessary modification by ASIC to enable compulsory acquisition and then compulsory acquisition by Newmont for fair value which would be no more than a nominal amount. Merkel J concluded that there was no reasonable hypothesis that would result in Great Central shares regaining their value to an amount that might make it rational for a shareholder to return $1.68 and be reinstated as a Great Central shareholder.

Accordingly, Merkel J was satisfied that the deletion of the avoidance orders would not result in any disadvantage to any Great Central shareholder or any other person. To the contrary, Merkel J considered that the Court's refusal to delete the avoidance order might have led some shareholders to conclude that the shares had a value that they did not.

Merkel J referred to the practice by some minority shares to engage in "greenmailing"; that is, holding out for a higher price by reason only of their minority shareholding. However, Merkel J did not regard the loss of opportunity to "greenmail" that may result from the deletion of the avoidance orders as a compelling factor against the Court exercising its discretion to delete those orders.

Merkel J recognised that there was a risk that deletion of the avoidance orders may have had the effect of nullifying accrued rights, particularly in respect of shareholders who had exercised their rights under the avoidance orders prior to the stay of those orders. However, Merkel J was convinced those rights had no value and, in any event, were always subject to the Court exercising its jurisdiction to vary the avoidance orders.

Finally, Merkel J regarded it as significant that ASIC, acting as the regulator in the public interest, had strongly supported the deletion of the avoidance orders sought by the Newmont respondents.

(H) ONE.TEL - EXTENDING THE ROLE OF THE CHAIRMAN?  
(By Rowan Russell and Aadesh Thakkar, [Mallesons Stephen Jaques](http://www.mallesons.com))

Australian Securities and Investments Commission v Rich [2003] NSWSC 85, Supreme Court of New South Wales, Austin J, 24 February 2003

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/february/2003nswsc85.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

In a recent interlocutory decision, Austin J decided that ASIC's claim that a chairman has a higher duty of care than ordinary directors gave rise to a reasonably arguable cause of action against the chairman and therefore should not be struck out summarily. This is an interlocutory decision and the ultimate outcome awaits the trial of the action and final judgment on the matters presented at the trial.

(2) The facts

ASIC sought relief against three executive directors of One.Tel and its non-executive chairman of directors, Greaves, for alleged breach of their statutory duty of care in section 180(1) of the Corporations Act 2001 (Cwlth) ("Corporations Act"). ASIC did not bring similar proceedings against any of the other three non-executive directors of One Tel, Messrs Packer, Murdoch and Adler.

ASIC alleged that in the circumstances pertaining to One.Tel, Mr Greaves had special responsibilities beyond those of the other non-executive directors which led to a higher standard of care and diligence which he failed to fulfil. These responsibilities were by reason of his position as chairman of the board and of the finance and audit committee, and also by reason of his high qualifications (as a qualified chartered accountant), experience (particularly with publicly listed companies) and expertise in relation to the other non-executive directors.

In its statement of claim, ASIC specifically claimed that Greaves had the following responsibilities:

- ensure adequate monitoring of the management and assessment of the financial position and performance of the One.Tel Group and prompt detection of material adverse developments affecting the financial position;  
- the flow of financial information to the board (including information about case reserves, actual segment performance and key transactions);  
- the establishment and maintenance of systems for information flow to the board;  
- the employment of an appropriate Finance Director;  
- ensure the accuracy and reliability of public announcements;  
- the maintenance of cash reserves and group solvency;  
- ensuring that the ASX is notified of any information that may have a material effect on the price or value of the shares of the company; and  
- making recommendations to the board as to prudent management of the group.

Accordingly ASIC alleged that Greaves ought to have noticed the company's month-by-month financial deterioration for the period of January to March 2001. Furthermore, he had failed to ensure that the board adequately assess the financial position of the company, the board had adequate information, that he failed to convene board meeting with sufficient regularity and that he failed to recommend that the company cease trading without a cash injection.

Greaves claimed that as a non-executive director he stood essentially in the same position as the three other non-executive directors, who had not been sued by ASIC. Accordingly, he applied to have the statement of claim struck out under the NSW Supreme Court Rules on the basis that ASIC had not disclosed a reasonable cause of action.

Greaves' principal submission was that the word "responsibilities" in section 180(1) refers only to the specific tasks delegated to the relevant director as part of the distribution of functions of the company, whether such distribution is identified through the company's constitution or by resolution or otherwise. Furthermore, Greaves submitted that except with respect to "ceremonial or procedural matters", such as the chairing of meetings of directors and shareholders, a company chairman has no greater responsibilities or duties than other non?executive directors.

Although ASIC did not claim the additional responsibilities held by Greaves arose solely from Greaves' position as chairman, ASIC did place some weight on this issue.   
ASIC further sought to establish the alleged responsibility of Greaves by the expert evidence of two kinds:

(a) expert opinion evidence of responsibilities ordinarily undertaken by the chairman of publicly listed companies in Australia in the form of affidavits by Roderick Cameron and Richard Warburton; and

(b) the tender of relevant extracts from books, articles and papers by learned commentators describing the customary responsibilities and role of chairman of a publicly listed company.

The written submission of Roderick Cameron suggested that the chairman had specific responsibilities that went beyond that of other members of the board.

(3) Responsibilities of a director of a corporation

Austin J noted Tadgell J's judgment in Commonwealth Bank of Australia v Friedrich which stated that "What constituted the proper performance of the duties of the director of a particular company will be dictated by a host of circumstances including no doubt the type of company, the size and nature of its enterprise, the provision of its articles of association, the composition of its board and the distribution of work between the board and other officers".

Austin J further proceeded to consider cases relating to the evolution of section 180(1) and held that "responsibilities" was a wider concept than submitted by Greaves, and refers to the acquisition of responsibilities not only through specific delegation but also through the way in which work is distributed within the corporation in fact, and the expectations placed by those arrangements on the shoulders of the individual director.

Austin J held that ASIC's pleading was consistent with that concept, and Greaves' qualifications, experience and expertise, and his occupation in the position of "foundation" director, chairman and chairman of the finance and audit committee, were all matters that may make up or contribute to the responsibilities that Greaves had regardless of whether the chairmanship and committee chairmanship were "offices" for the purposes of the first part of section 180(1)(b).

(4) Duties as the chairman of a corporation

Austin J noted that the Corporations Act gives little guidance as to the specific responsibilities of a company chairman, and that the law leaves it to a company's constitution to make provisions for the appointment and functions of a chairman. In addition, Austin J noted that case law on the functions and responsibilities of a chairman is also sparse.

Austin J proceeded to consider the limited case law on the duties of the chairman and noted that the chairman has a specific authority of a procedural kind when chairing meetings of directors or members.

Austin J referred to two judgments which tended to suggest an extended role of the chairman. Mahoney J in Woolworths Ltd v Kelly (1991) 4 ACSR 431 at 445 suggested that "Ordinarily, it is the function of the chairman to settle the agenda of the meetings of the board: at least he exercises a significant influence upon it. He is in a position, in the sense here relevant, to ensure that proposals are brought forward for consideration by the directors at their meetings". Similarly, Rogers J in AWA v Daniels (1992) 7 ACSR 759 at 867 stated that "The chairman is responsible to a greater extent than any other director for the performance of the board as a whole and each member of it. The chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, for formulating the policy of the board and promoting the position of the company. In discharging his or her responsibilities the chairman will co-operate with the managing director if the two positions are separate or otherwise with senior management".

Although these cases tend to suggest that the functions of the chairman go beyond that of ordinary directors, Austin J noted that the role of the chairman was not a central issue in any of the above mentioned cases.

The particular relevance of Austin J's decision is that whilst acknowledging that the existing authorities do not specifically attribute to the chairman any wider non?procedural functions or responsibilities, they do not establish that wider responsibilities may not be imposed on a chairman of a publicly listed company.

Austin J found that the evidence of Roderick Cameron, Richard Warburton and the views of others did not purport to establish, directly, that Greaves had these specific duties on specific occasions; rather it sought to establish his "responsibilities" by reference to this usual practice. Austin J noted that much of the literature of corporate governance is in the form of exhortations and voluntary codes of conduct, which were not suitable to constitute legal duties. Nevertheless Austin J held that this literature was relevant to the ascertainment of the responsibilities to which Greaves was subject during the relevant period.

Accordingly, Austin J held that as whole, ASIC's statement of claim disclosed a reasonable cause of action against Greaves under section 180(1) of the Corporations Act and accordingly that the matter should proceed to trial on the merits.

Although the case does not establish any specific additional roles of the chairman, it does suggest that the role of the chairman may be greater than previously thought. Furthermore, the case indicates that the chairman's role is not merely confined to the role outlined in the constitution or merely limited to the supervision of board meetings.

(5) Conclusion

Austin J's decision endorses existing case law that suggests that the court will examine the actual allocation of responsibilities and the nature of the organisation to determine the obligations which are imposed on a chairman. Accordingly, Austin J's decision is consistent with the suggestion that in publicly listed companies, the duties of the chairman may go further than mere ceremonial, procedural or supervisory roles such as chairing meetings. Austin J's decision should not, however, be seen for more than it is: that ASIC has a reasonably arguable cause of action against Greaves. It remains to be seen whether it is a successful cause of action.

(I) WHAT FACTORS SHOULD BE TAKEN INTO ACCOUNT WHEN ASSESSING THE QUANTUM OF A PECUNIARY PENALTY UNDER THE TRADE PRACTICES ACT?  
(By Fiona Lewandowski, [Corrs Chambers Westgarth](http://www.corrs.com.au))

Schneider Electric (Australia) Pty Ltd v Australian Competition and Consumer Commission [2003] FCAFC 2, Federal Court of Australia, Full Court, Black CJ, Sackville and Merkel JJ,  
14 February 2003

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/february/2003fcafc2.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Introduction

This recent decision of the Full Court of the Federal Court found that pecuniary penalties imposed under the Trade Practices Act 1974 ("the Act") are subject to a range of factors, and that the size of a penalty imposed, although it may differ as between any co-contravening parties who engage in similar conduct, should not be disproportionate, taking into account the differing circumstances of the parties involved. In setting aside the order of the primary Judge, the Full Court (Black CJ, Sackville and Merkel JJ in separate judgments) agreed with the findings of the primary Judge that the contraventions in question were "exceptionally serious", but found that the primary Judge had erred when quantifying the penalty imposed on Schneider Electric (Australia) Pty Ltd ("Schneider").

These proceedings concerned the assessment of penalties imposed under section 76 of the Act for breaches of the restrictive trade practices provisions of the Act. Section 76 allows the Court, once it is satisfied that a contravention has occurred, to order a party to pay a pecuniary penalty, such "as the Court determines to be appropriate" having regard to various matters provided in the section. Section 76 allows the Court to take into account all relevant factors including the nature and extent of the act or omission and any loss or damage suffered as a result, the circumstances in which the act or omission took place and whether the party has previously engaged in similar conduct.

(2) Facts

This case involved an appeal by Schneider from a decision of the Federal Court which imposed upon it a $7 million pecuniary penalty under section 76 of the Act.

The Australian Competition and Consumer Commission ("the ACCC") had commenced proceedings in the Federal Court against Schneider, ABB Power Transmission Pty Ltd, ABB Transmission and Distribution Pty Ltd ("ABB"), Wilson Transformer Company Pty Ltd ("WTC"), AW Tyree Transformers Pty Ltd ("Tyree") and Alstom Australia Limited ("Alstom"), claiming that the parties had engaged in extensive market sharing and price-fixing cartel conduct relating to the distribution of transformers which contravened sub-sections 45(2)(a)(i), (ii) and 45(2)(b)(i) and (ii) of the Act.

Of the parties, Alstom reached an agreement with the ACCC on the quantum of penalties ($1.5 million), which the primary Judge imposed; ABB contested the claims; and WTC, Schneider and Tyree admitted the facts that established their respective contraventions, but did not reach agreement with the ACCC on the quantum of penalties to be imposed. The primary Judge imposed penalties of $7 million (Schneider), $2.5 million (WTC) and $3.5 million (Tyree) respectively. In formulating the quantum of such penalties, the primary Judge was influenced by factors including the "exceptionally serious" nature of the contraventions, the size and profitability of the parties, the parity principle and length of involvement in the contravening conduct, the degree of the market power of each of the parties in the market for distribution transformers and the cooperation of the parties with the investigation.

The primary Judge accepted the principle that where all things are equal, persons concerned in the same crime should receive the same punishment and where things are not equal a due discrimination should be made. The primary Judge compared the circumstances of WTC, Tyree and Schneider, and found that, despite there not being much in the conduct engaged in by the parties that distinguished them, it would not be right to impose the same penalty on each party, considering their differing circumstances and capacity to bear the penalty. In his comparison of the circumstances of each of the parties, the primary Judge was particularly influenced by the fact that WTC and Tyree were small private companies, whereas Schneider was a subsidiary of a large international public company. Accordingly, this was reflected in his decision to impose a much larger penalty on Schneider.

(3) Schneider's claim

Schneider based its appeal on grounds that the primary Judge had:

- misapprehended the facts relating to the benefit it received from its contraventions;  
- erred in principle by taking the size of its parent company into account; and  
- misapprehended, and consequently failed to apply, the parity principle.

(4) Decision

Merkel J delivered the primary judgment with which Black CJ and Sackville J agreed (with Sackville J also making some additional comments).

(a) Miscalculation of benefit from contravention

Merkel J found that the benefits received by parties from their contraventions are plainly relevant to the quantum of the penalty. Schneider and the ACCC had amended the agreed statement of facts by significantly reducing the amount of Schneider's future sales expectations (from $20-25 million to $3.321 million), which the primary Judge had overlooked or was not aware. The Full Court found that the difference in the sales expectation figures was substantial, and was a relevant fact that should have been taken into account in Schneider's favour with respect to the penalty imposed.

(b) Relevance of parent company resources

Merkel J found that the primary Judge had erred by relying on the fact Schneider was a subsidiary of a large international public company in assessing the penalty that should be imposed on Schneider. Merkel J held that although the size of a parent company will be relevant in some situations, such as where the parent bears some responsibility for the subsidiary's conduct, or where it may affect the subsidiary's capacity to meet a substantial pecuniary penalty, it was not a relevant factor in Schneider's situation for three reasons, namely:

- it was never suggested that the parent had any involvement in Schneider's contraventions;  
- Schneider did not put at issue its capacity to bear any penalty that may be imposed; and  
- Schneider operates a substantial business in Australia in its own right.

Although Schneider did not challenge the primary Judge's taking into account of its own size and capacity, Merkel J reiterated that deterrence is a primary objective of section 76 of the Act, and that the size of the contravening corporation (as opposed to the size of the parent) is an important factor to be considered regarding achievement of the objectives of the provision.

Sackville J added that whilst the size of a corporation may affect the seriousness of the contravening conduct, it is the nature of the contravening conduct itself that is the central determinant in an appropriate penalty.

(c) Parity principle

Merkel J found that Schneider was entitled to have the Court take into account the penalties imposed on WTC and Tyree (which had been significantly discounted by the trial judge) and was satisfied that Schneider was entitled to a substantial discount in penalty. Merkel J found that a penalty of $5.5 million was appropriate in this case, having regard to the application of the parity principle and allowances for the size and different circumstances of Schneider. In his decision, Merkel J referred to various decisions which essentially established that the parity principle requires that like should be treated alike but that if there are relevant differences, due allowances should be made for them. Merkel J however, wished to ensure that the reduced penalty would not lose its deterrent value, stating that the application of the parity principle should not result in penalties that are inappropriate to the circumstances of the case, and that it does not follow that if penalties imposed on some parties are inadequate, that the penalties imposed on all parties must also be inadequate.

Merkel J concluded his judgment by stressing that it is particularly important that the Courts distinguish between penalties imposed in situations where the matter has been settled by the ACCC, and situations where the Court is actually required to determine the quantum and appropriateness of the penalty itself. In situations where the Court is considering the ACCC's proposed penalty resulting from a settlement (penalties which he seemed to agree with the primary Judge, were on the low side), the Court is only determining whether the penalty is within the "range" of penalties the Court would consider appropriate.

Sackville J, referring to the parity principle test suggested in the case of NW Frozen Foods v ACCC, found that the parity principle does not necessarily require corporations guilty of similar contraventions of the Act to incur the same or similar penalties, due to the variety of factors operating particular to each case. In this case, Sackville J found that despite Schneider's culpability being somewhat less than either WTC or Tyree, it was justifiable to impose a significantly larger penalty upon Schneider than the other parties, as there had been no issue about Schneider's ability to pay any penalty and as such, it would not offend the parity principle to impose a greater penalty upon a contravener who had the capacity to pay, compared with a party who could be subjected to financial hardship if a similar penalty was imposed.

However, Sackville J qualified these comments by stating that the penalties imposed should not be disproportionate to the other parties, and agreed that the penalty of $5.5 million suggested by Merkel J was appropriate. In Sackville's J view this penalty took into account the seriousness of Schneider's contravention, the benefits it received from its conduct, still met the objective of deterrence, was not disproportionate to the penalties imposed on WTC and Tyree, and was consistent with the penalty imposed on Alstom.

(5) Conclusion

Based on the findings outlined above, the Full Court agreed that the appeal should be allowed, and ordered a reduced penalty of $5.5 million.

This case highlights the approach the Court is willing to take when calculating pecuniary penalties relating to contraventions of the Act. The Full Court has indicated that it is the particular facts and circumstances of a case which will ultimately determine which factors are relevant considerations in determining the quantum of penalties. Deterrence and the level of benefit obtained through contravening conduct will be key factors in determining the quantum of penalties. While parity will be relevant, differences in circumstances between the contravening parties need to be taken into account.

Only in limited and specific circumstances will the size of a company's parent company be a relevant consideration in determining the quantum of a penalty to be imposed on a contravening subsidiary company.

(J) CHANGING THE RULES: MAKING ORDERS UNDER SECTION 447A OF THE CORPORATIONS ACT   
(By Elizabeth O'Donovan, [Deacons](http://www.deacons.com.au))

Love (as liquidator of ACN 077 368 257 Limited) [2003] NSWSC 58, New South Wales Supreme Court, Barrett J, 18 February 2003

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/february/2003nswsc58.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary

The plaintiff was the liquidator of ACN 077 368 257 ("Company") which was subject to a voluntary winding up by the creditors of the Company pursuant to section 446A of the Corporations Act 2001 (Cth) ("Corporations Act") as a consequence of Part 5.3A administration.

The plaintiff sought an order under section 447A of the Corporations Act to dispense with the need for the annual meeting of members and creditors of the company called for by section 508 of the Corporations Act. The plaintiff had previously defaulted under section 508 of the Corporations Act by failing to convene the meeting of members and a meeting of creditors.

The plaintiff also sought an order to deprive members of the opportunity to attend the final meeting for both creditors and members as required by section 509 of the Corporations Act.

Barrett J declined to make the orders sought by the plaintiff in relation to section 508 of the Corporations Act as the only effect of the orders would be to absolve the plaintiff's default under section 508 of the Corporations Act and absolve the plaintiff from any assessment by ASIC pursuant to its powers under section 536 of the Corporations Act.

Barrett J also declined to grant orders to dispense with the requirement for members to attend the section 509 meeting on the basis that there were insufficient grounds to deprive members of their statutory right to attend the meeting. However, Barrett J did make an order which dispensed with the requirement of the regulations to provide notice in writing of the meeting to every member and creditor of the Company.

(2) Findings

Section 447A of the Corporations Act gives the Court general powers to make orders regarding the administration of a company. Accordingly, the plaintiff sought an order pursuant to section 447A to modify section 446A of the Corporations Act in relation to the requirement to hold meetings under section 508 and section 509 of the Corporations Act.

The plaintiff's proposed order provided as follows:

(a) An order that Part 5.3A of the Corporations Act operate in relation to ACN 077 368 257 Limited (in liquidation) as if section 446A had the following additional sub-section:

In the winding up:

(i) section 508 shall not apply; and

(ii) section 509 shall apply as if:

- in sub-section (1), "a meeting of the creditors and members of the company" read "a meeting of the creditors of the company"; and  
- in sub-section (4), "2 creditors and 2 members" read "2 creditors".

(a) Jurisdiction

Barrett J held that the Court did have jurisdiction under section 447A of the Corporations Act to make the orders sought by the plaintiff. Barrett J noted that the availability of section 447A to modify section 446A of the Corporations Act by altering what would otherwise be the prescribed requirements of a winding up was established in Gibbons v LibertyOne Limited [2002] 41 ACSR 442.

Barrett J also remarked that the decision of the High Court in Australasian Memory Pty Ltd v Brian [2000] 20 CLR 270 was authority for the proposition that section 447A of the Corporations Act allowed the making of an order with future effect but in respect of past matters or events of the company. Accordingly, Barrett J went on to consider whether the Court should exercise its discretion and noted that the orders, if granted, would have the following effects:

(i) members and creditors would be deprived of the opportunity to attend any meeting at all under section 508 of the Corporations Act; and

(ii) members would be deprived of the opportunity to attend the final meeting required by section 509 of the Corporations Act to be convened for both members and creditors as soon as the affairs of the company are fully wound up.

(b) Order sought in relation to section 508 of the Corporations Act

Barrett J stated that the object of each annual meeting required by section 508 of the Corporations Act (that is the meeting of members and creditors) is that the liquidator should "lay before" the meeting "an account of his or her acts and dealings and of the conduct of the winding up during" the particular year.

Barrett J noted that even though the plaintiff had reported to the committee of inspection and to the creditors generally in an appropriate way, the plaintiff had failed to comply with the requirements of section 508 of the Corporations Act by his failure to hold a meeting in which both creditors and members were to be informed of the winding up of the Company.

Barrett J held that any provision of the Corporations Act which required a document to be "laid before" a meeting by a particular person impliedly required that there be an opportunity for discussion by way of a meeting. In addition, Barrett J noted the obligation of those involved in the administration of companies to recognise and respect the need to give members or creditors (or both) the opportunity for informed consultation through attendance at meetings required by statute.

Barrett J held that since it was unlikely that there would be another occasion for convening a future section 508 meeting, the only effect of the first part of the order sought by the plaintiff would be to rectify the plaintiff's default under section 508 of the Corporations Act.

(c) Whether the Court should grant an order to absolve the plaintiff from his default under section 508

Section 536 of the Corporations Act provides that ASIC may report to the Court in the event of any misfeasance or omission on the part of the liquidator. In addition, under section 536(3) of the Corporations Act, the Court may require the liquidator to answer any enquiry in relation to the winding up and may direct an investigation to be made of the books of the liquidator.

The plaintiff had notified ASIC of its intention to apply to the Court for orders which would have the effect of absolving the plaintiff from holding a meeting of the Company pursuant to section 508 of the Corporations Act, as well as dispensing with the requirement for members to attend the final section 509 meeting. The plaintiff had inquired whether ASIC wished to oppose the application and ASIC had replied that it did not intend to intervene in the proceedings and it neither consented to nor opposed the plaintiff's application.

Barrett J held that it was not clear that ASIC's letter was written in the knowledge that the effect of the orders the plaintiff intended to seek from the Court would be to excuse himself from pre-existing statutory default.

ASIC has a clear role under section 536 of the Corporations Act where it has reason to believe that the liquidator's statutory compliance systems were defective. Barrett J held that the fact that the plaintiff had failed to comply with the section 508 meeting should have been brought to the attention of ASIC so that it could have considered whether to make enquiry and take any action in the Court pursuant to section 536 of the Corporations Act.

Barrett J held that since the effect of the order sought by the plaintiff would be to absolve the plaintiff from the consequences of past non-compliance and absolve the plaintiff from an assessment by ASIC which should have first been undertaken, it was not appropriate that the orders sought should be made.

(3) Section 509 aspect

Barrett J went on to consider the second part of the order sought by the plaintiff which would modify the requirement to hold a meeting for both members and creditors under section 509 of the Corporations Act. The effect of the order, if granted, would be to exclude the members from the final section 509 meeting.

Barrett J noted that the situation of the Company was one in which the interests being served by the liquidator were really confined to the creditors' interests. Barrett J then cited Austin J in Gibbons v LibertyOne Limited [2002] 41 ACSR 442:

"where it is clear that the members will receive nothing out of the winding up then there should be a total transfer of control to the creditors and a removal of the requirement for a meeting of members would be justifiable."

Barrett J held that Austin J's comments in relation to section 508 of the Corporations Act in the case of a winding up were relevant to section 509 of the Corporations Act. However, Barrett J commented that the only reasonable basis for the exclusion of the members would be some burden or detriment that would outweigh the statutory right of the members to attend the meeting.

Barrett J held that although the interests of the members in the winding up were probably theoretical, this was not sufficient reason to deprive the members of their statutory right to attend the section 509 meeting.

(4) Decision

Barrett J declined to make the first part of the order sought by the plaintiff in relation to section 508 of the Corporations Act as a sufficient case had not been established by the plaintiff for abolishing the statutory right of members to participate in the meeting.

Barrett J also declined to make the second part of the order which would have had the effect of removing the rights of members to participate in the section 509 meeting. However, Barrett J did make an order under section 447A that dispensed with the operation of regulation 5.6.12(1)(b) in relation to the section 509 meeting in the event that the plaintiff sought to amend his originating process to claim such an order.

(K) EXCEPTION TO THE RULE THAT POWERS OF COMPANY OFFICERS ARE SUSPENDED DURING WINDING UP  
(Linda Magnano, [Blake Dawson Waldron](http://www.bdw.com.au))

HVAC Construction (Qld) Pty Ltd v Energy Equipment Engineering Pty Ltd [2002] FCA 1638, Federal Court of Australia, French J, 10 December 2002

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/december/2002fca1638.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Summary

Mr James Kwok, director of Energy Equipment Engineering Pty Ltd ("EEE") filed an urgent motion for review of the District Registrar's decision to wind up EEE in insolvency under the provisions of the Corporations Act 2001. EEE failed to comply with the Statutory Notice of Demand served on EEE by HVAC Constructions Pty Ltd ("HVAC"). Mr Kwok applied for leave of the Court to act on behalf of EEE, to seek review of the District Registrar's decision and for a stay of his orders pending the determination of the review. The Court granted to Mr Kwok leave to act on behalf of the defendant in the stay order. The Court found that no case had been made for the stay order and as a result revoked the leave approval given to Mr Kwok. The motion for review was dismissed unless Mr Kwok lodges with the Registrar a bank guarantee in the sum of $10,000 by way of security of HVAC's costs of the motion, including costs incurred in respect of the claim for interlocutory relief.

(2) Facts

EEE entered into a contract with HVAC for the supply, manufacture and installation of equipment at a power plant at Yatala in Queensland. A dispute arose over payments due under the contract, which resulted in HVAC serving a Creditors Statutory Demand on EEE, pursuant to section 459E of the Corporations Act 2001. HVAC claimed to be owed $526,659.03. The notice required payment within 21 days. After no response from EEE, HVAC filed an application for the winding up of EEE on the grounds it failed to comply with the Statutory Demand.

EEE filed a notice of appearance and outlined the grounds opposing the winding up application, namely:

(a) The defendant is solvent as it is able to pay its debts when they become due.

(b) The defendant seeks leave under section 459S of the Corporations Act 2001, to rely on a genuine dispute as to part of the alleged debt, that is, that EEE admits it owes the sum of $286,920.70, but disputes owing the balance to the sum of $239,738.33.

The District Register upon hearing the winding up application did not believe EEE should have leave under section 459S of the Corporations Act 2001 to oppose the winding up application and found that EEE did not provide sufficient evidence of EEE's solvency. Therefore, he found EEE to be insolvent, because of its failure to comply with the Statutory Demand as well as EEE's failure to pay the admitted part of HVAC's claim. The District Registrar ordered that EEE be wound up in insolvency under the provisions of the Corporations Act and appointed a liquidator.

Mr Kwok, a director of EEE, purporting to act on behalf of EEE, filed an urgent motion for review of the District Registrar's decision under section 35A(5) of the Federal Court Act and for a stay of his orders pending determination of the review. He sought orders for leave under section 471A(1A)(d) of the Corporations Act 2001, to act on behalf of EEE. Section 471A(1) states that while a company is being wound up in insolvency, a person cannot perform or exercise or purport to perform or exercise a function or power as an officer of the company. Section 471A(1A)(d) provides an exception with the approval of the Court.

In support of the application, counsel for EEE told the Court that the undisputed part of the claim could be paid within 48 hours and the disputed balance paid into the court within 2 weeks. Mr Kwok offered no personal undertaking in relation to HVAC's costs of the proposed proceedings.

(3) Findings

French J first considered the issue of whether leave of the Court is required under section 471A(1A)(d), when seeking review of the decision of the District Registrar. French J determined that where a company has been the subject of a winding up order, a director of the company is required to seek approval of the liquidator or the Court when appealing against such an order. However, French J did not exclude the possibility that directors of a company may have standing to appeal against a winding up order in their own names.

French J also addressed the question of whether section 471A could validly restrict the power of an officer of the company, in the name of the company, to seek review by a judge of the District Registrar's order under section 35A(5) of the Federal Court Act. This contention was not argued in this case. French J observed, however, that the combined effect of section 35A and section 471A does not 'compromise the constitutionally required degree of judicial supervision and control of the registrar's delegated jurisdiction'. However, French J qualified this by stating that constitutional matters may be relevant considerations when determining whether approval under section 471A(1A)(d) should be granted.

When determining whether the Court should approve an application for a stay and review of the order, French J listed a number of considerations that should be taken into account:

(a) the protection of the assets of the company;

(b) the director must be invoking the original jurisdiction of the court not the appellate jurisdiction;

(c) any detriment or risk of detriment to creditors or contributories flowing from a stay;

(d) the merits of the proposed review;

(e) the current trading position and solvency of the company;

(f) the prejudice to the company if a stay is not granted; and

(g) the legislative policy against delay to the liquidation process.

French J found that EEE's failure to comply with the Statutory Demand was unconvincing and that the Company must have been aware of the consequences flowing from the Statutory Demand. French J also found that the Company's assumption of risk of non-compliance with the demand may be taken as its incapacity to find the resources necessary to meet even the disputed portion of the debt. No case had been made for the stay order and if such an order is granted it would result in additional delay and expense in the administration of the winding up.

(L) REAL ESTATE CLUB CONSTITUTES MANAGED INVESTMENT SCHEME  
(Danya Linden, [Blake Dawson Waldron](http://www.bdw.com.au))

ASIC v Young [2003] QSC 029, Supreme Court of Queensland, Muir J, 21 February 2003

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/february/2003qsc029.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Facts

Kevin and Kathleen Young (the Primary Respondents) undertook the business of selling real estate property to participants in "The Investors Club" (the Club) which was established as Investors Club Limited, a company limited by guarantee of which the Primary Respondents were directors. The Primary Respondents were also directors of, and had effective control of, Lisson Pty Ltd, Self Help Investors Group Pty Ltd and Club Loans Pty Ltd. These entities were all named as additional respondents to the proceedings.

The Club had no constitution or officeholders. The "membership" of the Club consisted of approximately 60,000 people to whom the Primary Respondents sold or attempted to sell property. Members of the Club were invited to express an interest in purchasing property in developments undertaken by the Primary Respondents by completing an expression of interest form and contributing an initial sum (normally $6,000). The expression of interest form was addressed to The Investors Club Limited but payment was required to be made to Self Help Investors Group Pty Ltd.

Some members subsequently entered into agreements to lend money to Self Help Investors Group Pty Ltd. These loan agreements specified that loan monies would be utilised for activities which benefited members of the Club. The loan moneys were received by Investors Club Limited, Self Help Investors Group Pty Ltd and Club Loans Pty Ltd and lent or provided to the Primary Respondents who used the funds to acquire land with a view to building apartment blocks. A participating Club member was entitled to a 10% discount on the purchase price upon execution of a contract to purchase property in a development. These property development arrangements were described as joint venture projects (each a JVP Scheme).

The Primary Respondents also operated a rental guarantee insurance scheme known as "No Tenant? No Problem! Program" (the NTNP Scheme) whereby they collected contributions and paid contributors compensation if their properties were not rented.

ASIC argued that each JVP Scheme and the NTNP Scheme constituted managed investment schemes within the definition in section 9 of the Corporations Act 2001 (the Act) and were required to be registered under section 601ED of the Act.

(2) Findings

(a) Were these "schemes" in existence?

His Honour accepted the conclusion of Mason J in Australian Softwood Forests Pty Ltd v Attorney General for the State of New South Wales (1981) 148 CLR 121 (at 129) that "all the word 'scheme' requires is that there should be some program or plan or action". There was plainly a program or plan of action involved in a pattern of conduct in which a developer solicits loans from potential purchasers with a view to providing a priority right to purchase property at a discounted price.

(b) Was each JVP Scheme a managed investment scheme?

Under section 9 of the Act, a managed investment scheme is:

"(a) a scheme that has the following features:

(i) people contribute money or money's worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);

(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);

(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions)."

His Honour accepted that the ambiguous wording of the loan documentation, combined with the elusive structure of the Club and its membership, meant that some of the loan agreements could not truly be said to provide for the pooling of funds for a common enterprise. However, the Primary Respondents utilised the money received from participating Club members for a particular development. The members contributed money to the funding of specific developments with a view to securing property in these developments at a discounted purchase price. His Honour concluded that, in these circumstances, the loan moneys were in fact pooled to produce financial benefits.

The requirement of section 9(a)(iii) was satisfied as the day-to-day operation of each JVP Scheme was controlled by the Primary Respondents.

Thus, each JVP Scheme is a managed investment scheme.

(c) Was the NTNP Scheme a managed investment scheme?

The Primary Respondents argued that the NTNP Scheme involved the payment of a sum of money in return for a service or a benefit which Lisson Pty Ltd has a legal obligation to pay and, as such, there was no pooling of funds in a common enterprise.

His Honour rejected this argument and concluded that members of the NTNP Scheme contributed money as consideration for a benefit produced by the Scheme - being the reimbursement of part of lost rental. His Honour also noted that it is clear that the members did not have day-to-day control over the operation of the scheme.

Thus, the NTNP Scheme is a managed investment scheme.

(d) Were the Schemes required to be registered?

The NTNP Scheme had in excess of 20 members and so was required to be registered under section 601ED(1) of the Act. Each JVP Scheme had less than 20 members and, accordingly, is not required to be registered unless "it was promoted by a person, who was, when the scheme was promoted, in the business of promoting managed investments schemes . . ." (section 601ED(1)(b)).

Were the JVP Schemes promoted by a person who was in the business of promoting managed investments schemes? His Honour concluded that "promoted" extends to activities in which a person formulates a scheme such as the JVP Scheme, implements it and solicits others to participant in it. Each JVP Scheme was promoted in association with other similar schemes and with the Primary Respondents having in mind the undertaking of other such schemes. His Honour concluded that the fact that each JVP Scheme constituted only a small part of the Primary Respondents' broader real estate business did not prevent them from being "in the business of promoting" such schemes.

(e) Were the respondents winding-up the JVP Scheme within the meaning of section 601ED(6) of the Act?

The Primary Respondents submitted that they were not required to register the JVP Schemes as they were taking steps to wind up the Scheme and therefore satisfied section 601ED(6)(b) of the Act.

His Honour decided that winding up would involve taking steps to terminate the schemes with a view to discharging liabilities and making the appropriate distribution of assets. He concluded that the facts did not support the Primary Respondents' submission. Accordingly, his Honour decided that the JVP Schemes were required to be registered.

(f) Were the respondents in breach of section 991A(1) of the Act?

Section 991A(1) of the Act prohibits a person from carrying on a financial services business without an Australian Financial Services licence. Under section 766A(1) of the Act, a person provides a "financial service" if the person deals in a financial product. An interest in an unregistered managed investment scheme is, under section 764(1), a financial product for relevant purposes. Under section 9, "interest" includes "a right to benefits produced by the scheme".

His Honour concluded that the Primary Respondents' conduct constituted dealing in managed investment schemes and accordingly, they were in breach of section 991A as a result of carrying on a financial services business without the required licence.

(3) Orders

ASIC sought the appointment of a receiver to wind up the Schemes, injunctions to restrain the respondents from breaching the requirements of the Act and declaratory relief.

His Honour accepted that the JVP Schemes should be brought to an end but concluded that the circumstances did not warrant the appointment of a receiver as the property developments were largely concluded or defunct and there was no evidence that investors' funds were at risk. The parties were invited to agree on a regime to terminate the JVP Schemes and ensure repayment of the loans.

His Honour noted that the NTNP Scheme was used as a promotional tool or "loss leader" and was not profit making overall. His Honour decided that its termination would not be desirable as the termination of the contracts and the withdrawal of rent protection would expose scheme participants to significant risk.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

M Bagric and J Du Plessis, 'Expanding criminal sanctions for corporate crimes - deprivation of right to work and cancellation of education qualifications' (2003) 21 Company and Securities Law Journal 7

Fines are the standard sanctions employed by most Western countries when a corporation has been convicted of a crime. However, some offences committed by corporations are too serious to be dealt with by way of a fine. There is a need to consider other sanctions that can be invoked in order to deter corporate crime. In this article, it is suggested that the focus should be on criminal sanctions against the natural persons who can potentially commit crimes on behalf of a corporation. New sentencing options against those who can potentially commit crimes on behalf of a corporation should include the annulment or suspension of an offender's academic qualifications and the making of orders preventing an offender from working or being enrolled in an educational or vocational pursuit.

A Trichardt, 'Australian green shoes, price stabilisation and IPO's - Part 1' (2003) 21 Company and Securities Law Journal 26

Conduct to support the price of securities, also known as price stabilisation, may either be for the purpose of market manipulation, or for the purpose of protecting innocent investors. As a result, the circumstances under which price stabilisation should be allowed have given rise to problems in practice.

Countries such as the United States and the United Kingdom have adopted price stabilisation rules that allow stabilisation of securities prices to facilitate public offerings subject to specific guidelines and controls. The Committee of European Securities Regulators and the Securities and Futures Commission of Hong Kong have also investigated the issue in an effort to achieve acceptable standards for price stabilisation. In September 2000 the Australian Securities and Investments Commission (ASIC) published an Information Release outlining the circumstances under which a form of price stabilisation involving the so-called Green Shoe option is allowed in the context of initial public offerings. To date, however, ASIC has not issued a formal policy statement in this regard.

This article starts off in Part 1 by delineating market manipulation and price stabilisation. It then discusses price stabilisation and the Green Shoe option generally. Part 1 concludes with a comparative review of international regulatory regimes, in particular those in the United States and the United Kingdom. In Part 2, which will be published in the next issue of this journal, the article reviews the legal position in Australia regarding market manipulation, price stabilisation and the Green Shoe option.

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