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| **Fresh New Look**We have released a fresh new look to your Corporate Law Bulletin. This includes some changes to the layout and design. You will notice that we have made it easier to navigate through the Bulletin. You will now have the option of using a "Brief Contents" as well as a more "Detailed Contents" view. We have also included navigation arrows so that you can move around the bulletin with ease.**Corporate Law Bulletin****Bulletin No. 74, October 2003**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities RegulationPublished by [LAWLEX](http://www.lawlex.com.au" \t "default) on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au" \t "_new), the [Australian Stock Exchange](http://www.asx.com.au" \t "_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au" \t "_new), [Clayton Utz](http://www.claytonutz.com" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au" \t "_new), [Freehills](http://www.freehills.com" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com" \t "_new), [Phillips Fox](http://www.phillipsfox.com" \t "_new).***Use the arrows to navigate easily across the bulletin***= back to Brief Contents = back to top of current section |
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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Ministerial Review Panel report on restoration of confidence in accounting in South Africa** Mr Trevor Manuel, the Minister of Finance of South Africa, appointed a Ministerial Review Panel early in 2003 to assist in the restoration of public confidence and trust in the areas of financial reporting and auditing. On 22 October the Panel released its report detailing recommendations relating to various corporate governance issues, audit control measures, disclosure issues and training of chartered accountants. A summary of the report of the panel can be found at: [http://www.saica.co.za/documents/MINISTERIAL\_PANEL.pdf](http://www.saica.co.za/documents/MINISTERIAL_PANEL.pdf%22%20%5Ct%20%22_new) **1.2 IFAC and International Regulators propose reforms to strengthen audit quality**The international accountancy profession, together with international regulators, have published reforms to improve the quality of standards and practices in auditing and assurance worldwide and to achieve global convergence of high quality standards. Their focus is on strengthening the international auditing and assurance standards process to bolster public confidence in the work of auditors and in the financial reporting process. The reforms are described in a paper entitled "Proposals for Reform," released on 22 October 2003 and developed by the International Federation of Accountants (IFAC) and international regulators with input from IFAC member organizations, regional accountancy organizations and the profession at large. IFAC's Board will present the reform proposals to its Council for approval in November 2003.The objective of the reforms, which are expected to be implemented in early 2004, is to help ensure that IFAC's standard-setting activities reflect the public interest and are consistent with the priorities of the international regulatory community. Key aspects of the reform proposals include the development of a more transparent standard- setting process, particularly with respect to audit and assurance standards, and the provision for greater public and regulatory input into that process. In addition, the proposals call for the establishment of a Public Interest Oversight Board (PIOB) to oversee IFAC's public- interest activities. Members of the PIOB will be selected by the regulatory community.Regulatory and other international groups involved in the development of the proposals include the International Organization for Securities Commissions (IOSCO), Basel Committee on Banking Supervision, European Commission, World Bank, and International Association of Insurance Supervisors, as well as the Financial Stability Forum, which strives to promote international financial stability and improve the functioning of markets.The International Organization of Securities Commissions (IOSCO) recently reported that it "strongly supports IFAC's efforts" to reform its public- interest activities, including the formation of a Public Interest Oversight Board. The Financial Stability Forum (FSF) also indicated its support of the reform proposals, which they view as a positive step in ensuring that the international auditing standard-setting process is responsive to the public interest. The PIOB will comprise 10 members and will focus on IFAC standard-setting activities related to audit and assurance services, independence and other ethics standards. It will also oversee the education standard-setting process and IFAC's member body compliance program.The reform proposals also include recommendations for strengthening and enhancing the transparency of IFAC's governance, expanding the role of Consultative Advisory Groups in standard-setting processes, and formalizing ongoing collaboration between regulators and IFAC to ensure the efficacy of the reforms. The paper is on the [IFAC website](http://www.ifac.org" \t "_new).**1.3 Consultation on EU Financial Conglomerates Directive**On 22 October 2003, the United Kingdom's Treasury and Financial Services Authority jointly published a consultation paper with the United Kingdom Financial Services Authority on the proposed EU Financial Conglomerates Directive.The Directive requires that prudential supervision for companies which straddle the insurance, banking and investment sectors be applied by a single supervisory co-ordinator.Announcing the publication Financial Secretary Ruth Kelly said:"This Directive is a key element in the Financial Service Action Plan and is necessary to ensure that the supervision of corporate groups takes full account of the group as a whole and the individual firms which comprise it. I hope all those with an interest participate in the consultation process."The consultation paper is on the [FSA website](http://www.fsa.gov.uk" \t "_new).**1.4 First RepuTex social responsibility ratings announced**On 13 October 2003, a new annual social responsibility rating of Australia's top 100 companies was released by Reputation Measurement. The rating is called RepuTex. Companies were assessed by 19 community groups in four areas, Corporate Governance, Environmental Impact, Social Impact, and Workplace Practices. The RepuTex Rating Committee oversees the process and comments on the findings.The main results of the rating are:* 54 companies were satisfactory or better
* 36 companies were not satisfactory
* 9 were not rated due to insufficient information (1 company was exempt)
* One company received the "outstanding" rating of AAA, Westpac.
* 10 companies received the "high" AA rating: (in order from 2nd to 11th) IBM Australia, Energex, Australian Postal Corporation, Shell Australia, Alcoa of Australia, Visy Industries, Queensland Rail, BHP Billiton, Coca-Cola Amatil (Australia), Insurance Australia Group.
* The best-performing sectors were mining/metals, utilities, energy, and transport.

Areas of concern* 86 companies were not satisfactory in the Environmental Impact category, 12 companies were satisfactory or better.
* The Insurance sector as a group was not satisfactory in the Corporate Governance category.

RepuTex will be an annual rating. The full 2003 RepuTex Rating results are published at [http://www.reputationmeasurement.com.au](http://www.reputationmeasurement.com.au" \t "_new)**(a) RepuTex ratings results and main findings**Categories: Overall, Corporate Governance, Environmental Impact, Social Impact, Workplace PracticesAAA=Outstanding AA=High A=Satisfactory B=Low C=Very Low D=Inadequate**(i) Company Performance*** 99 companies assessed by the 19 groups (1 company was exempt):
* 54 companies were satisfactory or better
* 36 companies were not satisfactory
* 9 companies were not rated because of insufficient information
* One company, Westpac, received the "outstanding" AAA rating. This rating is consistent with Westpac topping its sector globally in the Dow Jones Sustainability Index.
* 10 companies received the "high" AA rating: (in order from 2nd to 11th) IBM Australia, Energex, Australian Postal Corporation, Shell Australia, Alcoa of Australia, Visy Industries, Queensland Rail, BHP Billiton, Coca-Cola Amatil (Australia), Insurance Australia Group.
* The mining/metals, energy, and transport companies were the best performing companies overall
* The strongest category result was in Corporate Governance; 78 companies were satisfactory or better, 17 were not satisfactory, 4 were not assessed due to insufficient information.
* The weakest category result was in Environmental Impact; 12 companies were satisfactory or better, 86 were not satisfactory, 1 was not rated due to insufficient information.

**(ii) Company Type Performance (Public/Private/Govemment-owned subsidiaries of MNC)*** Government-owned corporations were, overall, the most socially responsible. As a group, they were top in all four categories. Australian Postal Corporation topped two categories. The next best group was local subsidiaries of overseas-listed multinationals. The third and last group was local ASX-listed companies. Private companies were not compared as a group due to insufficient information.

**(iii) Industry Sector Performance**Of the 14 industry sectors:* Nine sectors were satisfactory or better overall; five sectors were not satisfactory overall.
* Metals & Mining was the most socially responsible sector, closely followed by Utilities.
* Media & Hotels, Restaurants & Leisure and Health Care & Pharmaceuticals & Biotechnology were consistently poor performing across all four categories and overall.
* The strongest sector result was in Corporate Governance; 13 sectors were satisfactory or better, one sector, Insurance, was not satisfactory.
* The weakest sector result was in Environment Impact; all 14 sectors were not satisfactory.

**(iv) Main Conclusions*** The corporate social responsibility (csr) agenda is significantly more advanced in the UK, Europe, USA and Canada than in Australia, but there are signs locally that it is solid in several industry sectors and progressing in most sectors.
* Of the four categories assessed, companies are most active and advanced in addressing corporate governance, reflecting the implementation of recent measures to strengthen this area. Companies overall are least active and advanced in addressing Environmental Impact.
* Heavy industrials are the strongest performing sectors in Australia (Metals & Mining, Utilities, Transport). These sectors have demonstrated considerable responsiveness to the concerns of stakeholders and the wider community and have improved the quality of their reporting on a range of social, environmental, workplace and governance issues. These sectors, which have some of the greatest liabilities and risks, are the ones moving most rapidly towards ensuring their operations are economically, socially and environmentally sustainable.
* Of the other sectors, Insurance Australia Group and IBM are clearly leading their industry sectors (the Insurance and Diversified Telecommunication Services and Technology sectors respectively).
* Media & Hotels, Restaurants & Leisure and Health Care & Pharmaceuticals & Biotechnology are clearly the two worst performing sectors. Within these two sectors there does not appear to be any demonstrable awareness of social responsibility management and reporting. There is little evidence of these companies formulating individual social responsibility policies and plans.
* Ownership type of companies has emerged as a factor in social responsibility performance, with government-owned corporations outperforming local subsidiaries of overseas-listed multinationals and ASX-listed companies in all four categories and overall. A significant number of local ASX companies must lift their performance to meet local and international standards.
* Given the collapse of HIH, the Insurance sector's "not satisfactory" result in Corporate Governance is concerning and may require further investigation.

**(b) Comments by RepuTex**The inaugural RepuTex Ratings provide some insight into the current levels of acceptance of the social responsibility agenda within the Australian business community. The strong performance of government corporations reflects the degree of accountability and transparency required of government authorities and the more direct link between these organisations and their community stakeholders. Their good result contradicts the often-held view of the public sector as slow to uptake important global developments and standards of business best practice.The relatively strong performance of local subsidiaries of overseas-listed multinationals, whilst not uniform across this group, is clearly related to the more mature nature of the csr agenda in the UK, Europe and North America. The recently released investigation into corporate sustainability in Australia, the Mays Report (Department of Environment and Heritage, September, 2003), made comment on the nascent nature of csr within the Australian market in comparison with our European and North American counterparts. Whilst some high-profile Australian organisations are still yet to prioritise csr principles, reporting and stakeholder engagement, developments internationally demonstrate the manner in which this agenda has been accepted and incorporated into mainstream business operations. In the UK the tabling of the Corporate Responsibility (CORE) Bill in September of this year follows more than 300 MPs expressing support for comprehensive laws promoting greater corporate accountability. The CORE Bill incorporates provisions for mandatory social reporting for all large UK organisations, compulsory stakeholder engagement and expanding the duties and responsibilities of Directors to incorporate social and environmental factors as well as financial considerations. Several European countries including France, the Netherlands and Denmark already have legislation requiring organisations to produce social as well as financial reports. This growing trend of greater corporate accountability and transparency has also received much attention in North America following the Enron and WorldCom collapses, which precipitated the rapid reform of the Corporate Corruption Bill (Sarbanes /Oxley).By comparison the Australian market has not reacted as swiftly to such developments. While there is a general level of awareness and acceptance of corporate social responsibility many Australian organisations rated by RepuTex in 2003 are only beginning to prioritise social responsibility issues. One area where good progress has been made is in corporate governance. The recent release of new Australian Stock Exchange corporate governance guidelines has generated significant change and development within this area in 2003.The RepuTex 2003 Ratings indicate that the most progressive ASX-listed organisations in terms of their public disclosure and community accountability are by and large those in the highest impact sectors. Heavy industrial, manufacturing and mining organisations have traditionally been subject to the highest level of scrutiny regarding their social and environmental impacts. Whilst these organisations continue to have significant impacts associated with their operations it is apparent that many have moved to integrate community concerns about these impacts into a new framework of operating. This has engendered a culture of greater accountability, transparency and responsibility. This transformation is represented in the 2003 RepuTex Ratings with two large mining organisations, Alcoa of Australia and BHP Billiton, receiving AA ratings, and a further five heavy industrial organisations, BHP Steel, Newmont Australia, Rio Tinto, Amcor and Boral listed in the top 20 performers overall. **1.5 SEC Chairman releases statement regarding late trading and market timing of mutual funds**On 9 October 2003 the United States Securities and Exchange Commission Chairman William H. Donaldson issued the following statement: "Recent allegations regarding the sale of mutual fund shares point to abuses in connection with late trading and market timing of fund shares. Our staff is aggressively investigating these allegations and is committed to holding those responsible for violating the federal securities laws accountable and seeking restitution for mutual fund investors that have been harmed by these abuses. It is clear from information developed thus far that there are additional regulatory actions that the Commission should consider in seeking to eliminate or significantly curb late trading and market timing abuses in the future. Consequently, I have asked our staff to prepare rulemaking initiatives to address these issues for Commission consideration no later than next month. Specifically, these initiatives include the following:**(a) Late trading**The staff is considering new rules and rule amendments designed to prevent late trading abuses. * These amendments would be designed to prevent the circumvention of forward-pricing requirements for purchases and redemptions of fund shares. In preparing one possible amendment, the staff is examining the feasibility of requiring that the fund (rather than an intermediary such as a broker-dealer or other unregulated third party) must receive the order prior to the time the fund prices its shares for an investor to receive that day's price. For most funds, this would mean that the fund would have to receive the order by approximately 4:00 p.m. for the investor to receive that day's price. This would effectively eliminate the potential for late trading through intermediaries that sell fund shares.
* The amendments being considered by the staff also would require funds to have additional procedures and controls in place to prevent late trading and ensure compliance with the new pricing requirements.

**(b) Market timing**The staff also is considering new rules and form amendments that would curb market timing abuses, including rules and form amendments that would:* require explicit disclosure in fund offering documents of market timing policies and procedures;
* require funds to have procedures to comply with representations regarding market timing policies and procedures;
* emphasize the obligation of funds to fair value their securities under certain circumstances to minimize market timing arbitrage opportunities; and
* reinforce the obligation of fund directors to consider the adequacy and effectiveness of fund market timing practices and procedures.

These are not the only measures under consideration. I have asked the staff to consider whether funds should have additional tools to thwart market timing activity and whether additional requirements are necessary to reinforce funds' and advisers' obligations to comply with their fiduciary duties and to prevent the misuse of material, non-public information, including the selective disclosure of portfolio holdings information. As is the SEC's traditional practice, the staff's recommendations will be presented to the Commission and, if approved, will be published for public comment."**1.6 CLERP 9 draft legislation released**On 8 October 2003, the Treasurer released the Corporate Law Economic Reform Program (Audit Reform & Corporate Disclosure) Bill and accompanying commentary for public consultation.The draft Bill generally implements the reforms proposed in the CLERP 9 policy proposal paper (September 2002) and also reflects the outcome of consultations undertaken since the paper's release.In addition, the draft Bill incorporates recommendations of the Ramsay Report (Independence of Australian Company Auditors), the report of the HIH Royal Commission, and takes account of relevant recommendations of the report of the Joint Committee of Public Accounts and Audit (Report 391 Review of Independent Auditing by Registered Company Auditors).The Government is seeking comments from business and the community to ensure that the reforms are effective and achieve optimum outcomes for shareholders and investors. The Bill is intended to be introduced into Parliament in December with commencement from 1 July 2004. Comments on the draft Bill should be sent by 10 November 2003 to:The General ManagerCorporations and Financial Services DivisionDepartment of the TreasuryLangton CrescentPARKES ACT 2600Copies of the Bill and commentary are available at [http://www.treasurer.gov.au](http://www.treasurer.gov.au" \t "_new) or from the [Treasury Website](http://www.treasury.gov.au" \t "_new).Key features of the bill are outlined below:(a) Audit oversight arrangements* The Financial Reporting Council's (FRC) role will be expanded to include oversight of the audit standard setting arrangements. The Auditing and Assurance Standards Board (AUASB) will be reconstituted with a Government appointed Chairman under the oversight of the FRC, similar to the Australian Accounting Standards Board. Auditing standards made by the AUASB will be given legislative backing.
	+ CLERP 9 originally proposed that only 'core' auditing standards be given legislative backing. However, given the views of stakeholders and ASIC that it is not possible to identify a selection of auditing standards that encompass the key issues that are applicable to [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) audits, all standards will have legal backing.
* The FRC will also have an oversight and monitoring function in relation to auditor independence. This role will include advising the Minister on the nature and overall adequacy of the systems and processes used by:
	+ auditors to ensure compliance with independence requirements; and
	+ professional accounting bodies for planning and performing quality assurance reviews of audit work.

**(b) Auditor independence*** The Bill contains a range of measures to enhance auditor independence including:
	+ Introduction of a general standard of independence and a requirement that auditors provide directors with an annual declaration that they have maintained their independence.
	+ Restrictions on specific employment and financial relationships between auditors and their clients.
	+ Restrictions on particular persons joining the audited body as an officer. In this respect the Bill will implement the recommendations of the HIH Royal Commission report:
		- A waiting period of 4 years will apply to partners of an audit firm or directors of an audit company directly involved in the audit of the audited body.
		- A waiting period of 2 years will apply to partners of an audit firm or directors of an audit client not directly involved in the audit of the audited body.
		- A waiting period of 4 years will apply to a professional member of an audit team in relation to the audit of the audited body.
	+ Mandatory auditor rotation after 5 consecutive years with a 2 year cooling off period before a person who has played a 'significant role' in the audit can be reassigned to that audited body.
		- In light of concerns surrounding the impact of this requirement on smaller audit firms and those operating in rural and regional areas, the original CLERP 9 proposal has been modified to allow ASIC to extend the period after which rotation is required to up to 7 consecutive years.
	+ A requirement for listed companies to disclose in their annual directors' report the fees paid to the auditor for each non-audit service, as well as a description of the service. In addition, the annual directors' report of each listed company must include a statement by directors that they are satisfied that the provision of non-audit services does not compromise independence.
		- CLERP 9 originally proposed that disclosure regarding non-audit services be made in relation to 9 specified categories of non-audit services. This requirement has been changed to reflect the recommendations of the HIH Royal Commission report.
	+ A requirement that the lead engagement auditor (or a suitably qualified representative) attend the AGM of a listed client when the auditor's report on the financial statements is tabled and answer questions relevant to the audit.

**(c) Proportionate liability and incorporation of audit firms*** The Bill implements a proportionate liability regime in respect of economic loss or damage to property. This regime is part of a broader framework for professional liability reform being developed by the Commonwealth, States and Territory Treasury Ministers. The amendments are being advanced in consultation with the Ministerial Council on Corporations and the Standing Committee of Attorneys-General.
* Key features of the liability model are:
	+ in applying proportionate liability to a claim, a court will be able to have regard to the comparative responsibility of any wrongdoer who is not a party to the proceedings;
	+ a defendant to a claim to which proportionate liability could apply will be obliged to notify the plaintiff in writing, at the earliest possible time, of the identity and alleged role of any other person(s) of whom the defendant is aware, who could be held liable for the plaintiff's loss or any part of it;
	+ where a defendant fails to discharge the disclosure obligation proposed, the court will have a discretion to order that the defendant pay any or all of the plaintiff's costs, on an indemnity basis or otherwise; and
	+ intentional torts and claims involving fraud will be excluded from the application of proportionate liability.
* The Bill also makes provision for audit firms to incorporate to address concern that the structure of audit firms as partnerships has the effect of making all partners liable for the actions of each of the other partners despite the fact that a partner may not have been involved in the wrongdoing which causes the loss.

**(d) CEO/CFO sign-off*** The Bill requires Chief Executive and Chief Financial Officers of listed entities to make a written declaration to the board of directors that the annual financial statements are in accordance with the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482) and accounting standards, the statements present a true and fair view of the entity's financial position and the financial records of the entity have been kept in accordance with the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). This requirement will not detract from the responsibilities of directors.
	+ While CLERP 9 did not make any policy recommendations on this issue, there has been broad stakeholder support for such a requirement. The Joint Committee of Public Accounts and Audit and a number of submissions received on CLERP 9 supported the introduction of this measure.

**(e) Management discussion and analysis*** In keeping with a recommendation of the HIH Royal Commission, the Bill will require the annual directors' report to include an operating and financial review. The review will contain information that members of the company would reasonably require to make an informed assessment of the operations, financial position, and future strategies of the company.

**(f) Financial Reporting Panel*** The Bill will establish a Financial Reporting Panel to resolve disputes on a non-binding basis between ASIC and companies on whether a company's financial statements have been prepared in accordance with the accounting standards and represent a true and fair view.
	+ While the original CLERP 9 paper did not make any policy recommendations on this issue, there has been substantial support from stakeholders for a dispute resolution body of this nature.

**(g) Protection for employees reporting breaches to ASIC*** The Bill affords qualified privilege and protection from victimisation to company officers and others in relation to disclosures made to ASIC in good faith and on reasonable grounds regarding breaches or suspected breaches of the corporations legislation.

**(h) Registration of auditors*** The Bill provides that persons can be registered as company auditors where:
	+ they meet enhanced educational requirements, including completion of a specialist course in auditing; and
	+ they satisfy the practical experience requirements contained in a competency standard on auditing.
* Auditors will be required to lodge an annual statement, in place of the current triennial reporting requirement.
	+ This change to the original CLERP 9 policy has been made in response to evidence that the triennial reporting requirement does not provide up to date information for surveillance purposes. The Ramsay report endorsed this proposal.
* ASIC will be able to impose conditions on the registration of auditors.
	+ CLERP 9 did not originally propose such a facility. This measure is designed to provide ASIC with greater flexibility in considering applications for registration and to enhance post-registration supervision.

**(i) Continuous disclosure and infringement notices*** Civil liability for a breach of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) continuous disclosure provisions will be extended to individuals involved in a contravention by a disclosing entity.
* ASIC will be given a power to issue an infringement notice containing a financial penalty to a disclosing entity where ASIC has reasonable grounds to believe the entity has breached its continuous disclosure obligations.
	+ The financial penalty specified in the notice will be $33,000, $66,000 or $100,000, depending on the entity's market capitalisation and whether the entity had previously contravened the continuous disclosure provisions.
	+ ASIC will not be able to issue an infringement notice unless it has held a hearing in relation to the matter at which the entity involved must be permitted to give evidence and make submissions.
	+ It is intended that infringement notices only be used in relation to less serious contraventions of the continuous disclosure regime.
* CLERP 9 originally proposed that ASIC have the power to issue infringement notices specifying payment of a fixed financial penalty in relation to contraventions of the continuous disclosure regime.

**(j) Remuneration disclosure*** Details of directors' and executives' remuneration will need to be disclosed in a clearly marked section of the annual directors' report. Shareholders will be able to comment on the content of the report and vote on a non-binding resolution to adopt the remuneration disclosures.
	+ The vote will be advisory only and does not derogate from the responsibilities of directors to determine the remuneration of executives.
* Consistent with the current provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), directors and senior mangers will be required to disclosure information on their remuneration. The disclosure requirements will be extended to apply to the corporate group and in this respect disclosure of the top 5 senior managers in the group will also be required.
	+ The term 'senior manager' does not represent a change in the persons to whom the provisions apply. It merely reflects a technical change to implement the recommendations of the HIH Royal Commission report.
* The Bill also amends the shareholder approval requirements in relation to directors' termination payments. It is proposed that the existing exemptions from the requirement to seek shareholder approval in respect of damages for breach of contract and agreements entered into before a director agrees to hold office will no longer apply where the payments exceed a certain limit. These changes build on proposals originally contained in the Corporations Amendment Bill 2002 (released for public comment in December 2002).

**(k) Managing conflicts of interest*** The Bill introduces a specific licensing obligation for financial services licensees to have adequate arrangements for managing conflicts of interest. This will be supplemented by an ASIC Policy Statement, a draft of which is expected to be released for comment during the Bill's exposure period.
	+ CLERP 9 originally proposed that ASIC provide guidance on the level and manner of disclosure of conflicts of interest required under the duty to provide financial services 'efficiently, honestly and fairly'. The current proposal provides a stronger legislative basis under which ASIC can develop guidance.

**(l) Disclosure of fundraising documents*** The Bill expressly provides that disclosure documents must be presented in a clear, concise and effective manner.
* In relation to Product Disclosure Statements for Continuously Quoted Securities, the Bill will:
	+ permit issuers of managed investment products that are continuously quoted securities to issue shorter or transaction specific Product Disclosure Statements; and
	+ allow ASIC to deny access to these arrangements in relation to issuers that have contravened relevant provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in the past 12 months.
* The Bill also provides an exemption from the requirement to prepare a disclosure document in relation to secondary sales of securities where:
	+ prospectus-like information has been disclosed to the market; or
	+ a prospectus in relation to the same class of securities has been lodged with ASIC.
	+ Similar relief is granted in respect of the Chapter 7 secondary sale provisions.

CLERP 9 originally proposed to align more closely the exemptions from the disclosure regimes that apply to sophisticated investors and wholesale clients under Chapters 6D and 7 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). To allow for a smooth transition to the [Financial Services Reform Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) (FSRA) regime, it was considered that this issue would be more appropriately considered after industry has fully transitioned to the FSRA regime.**1.7 SEC proposes rules to increase proxy access by shareholders**On 8 October 2003 the United States Securities and Exchange Commission approved rule proposals that would require companies to include in their proxy materials the names of nominees for director that are submitted by certain shareholders, as well as disclosure relating to those nominees. The proposals follow the recommendations made by the Division of Corporation Finance in its 15 July staff report, Review of the Proxy Process Regarding the Nomination and Election of Directors. The staff report is available on the Commission's website at [http://www.sec.gov/news/studies/proxyreport.pdf](http://www.sec.gov/news/studies/proxyreport.pdf%22%20%5Ct%20%22_new).The proposed rules would create a requirement for companies subject to the Commission proxy rules, including registered investment companies, to include in their proxy materials the names and certain other information regarding security holder nominees for election as director. The requirement would arise in cases where:* state law establishes the right of a shareholder to nominate a candidate for such an election, and
* one or more specified events has occurred, providing evidence of shareholder dissatisfaction with the effectiveness of the company's proxy process.

The number of nominees about whom a company would be required to include information in its proxy materials would vary depending on the size of its board of directors. Companies having eight or fewer board members would be required to include information regarding one nominee, companies with between nine and 19 board members would be required to include information regarding two nominees, and companies with boards of 20 or more members would be required to include information regarding three nominees.The proposed procedure would require a company to include information regarding a security holder nominee for election as a director where:* state law provides security holders with the right to make such a nomination;
* the procedure is applicable to a particular company (for example, the procedure would not be applicable to foreign issuers);
* the security holders submitting the nomination meet specified eligibility requirements, and
* the nominee meets specified eligibility requirements.

The Commission is soliciting comment on today's proposals for a 60-day period following their publication in the Federal Register. On 8 August 2003, the Commission proposed new rules designed to implement the staff report's other major recommendations:* requiring more robust disclosure of the nominating committee processes of public companies, including the consideration of candidates recommended by shareholders, and
* requiring specific disclosure of the processes by which shareholders may communicate with the directors of the companies in which they invest.

Those rule proposals can be found on the Commission's web site at [http://www.sec.gov/rules/proposed/34-48301.htm](http://www.sec.gov/rules/proposed/34-48301.htm%22%20%5Ct%20%22_new).**1.8 Board Proposes Auditing Standards for Internal Control over Financial Reporting** On 7 October 2003 the United States Public Company Accounting Oversight Board unanimously voted to propose and issue for public comment a standard on an audit of internal control over financial reporting. The Board also unanimously voted to propose and issue for public comment a rule which clearly defines terms used in auditing to assist firms in complying with the standards. The auditing standard, An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements, addresses both the work that is required to audit internal control over financial reporting and the relationship of that audit to the audit of the financial statements. The integrated audit results in two audit opinions: one on internal control over financial reporting and one on the financial statements.Section 404(a) of the Sarbanes-Oxley Act of 2002, and the Securities and Exchange Commission's related implementing rules, require the management of a public company to assess the effectiveness of the company's internal control over financial reporting, as of the end of the company's most recent fiscal year. Section 404 of the Act also requires management to include in the company's annual report to shareholders, management's conclusion as a result of that assessment about whether the company's internal control is effective. Section 404 of the Act, as well as Section 103, directs the PCAOB to establish professional standards governing the independent auditor's attestation, and reporting on, management's assessment of the effectiveness of internal control.Companies considered accelerated filers (seasoned US companies with public float exceeding $75 million) are required to comply with the internal control reporting and disclosure requirements of Section 404 of the Act for fiscal years ending on or after 15 June 2004. Accordingly, auditors engaged to audit the financial statements of such companies for fiscal years ending on or after 15 June 2004, also are required to audit and report on the company's internal control over financial reporting as of the end of such fiscal year. Other companies (including smaller companies, foreign private issuers and companies with only registered debt securities) have until fiscal years ending on or after 15 April 2005, to comply with these internal control reporting and disclosure requirements, and the requirement for audit reporting on internal control is similarly delayed.The Board considered the possible effects of the proposed standard on small and medium-sized companies, noting that internal control is not "one-size-fits-all." The proposed standard requires the auditor to communicate in writing to the company's audit committee all significant deficiencies and material weaknesses of which the auditor is aware. The auditor also is required to communicate in writing to the company's management all internal control deficiencies of which he or she is aware and to notify the audit committee that such communication has been made.The proposed auditing standard identifies a number of circumstances that would be, by definition, significant deficiencies and that also would be a strong indicator that a material weakness exists: * Ineffective oversight of the company's external financial reporting and internal control over financial reporting by the company's audit committee. The proposed auditing standard requires the auditor to evaluate factors related to whether the audit committee is effective, including whether audit committee members act independently from management. Effective oversight by the company's board of directors, including its audit committee, is essential to the company's achievement of its objectives and is an integral part of a company's monitoring of internal control. In addition to requiring the audit committee to oversee the company's external financial reporting and internal control over financial reporting, the Act makes the audit committee directly responsible for the appointment, compensation, and oversight of the work of the auditor. Thus, an ineffective audit committee can have serious detrimental effects on the company and its internal control over financial reporting as well as on the independent audit.
* Material misstatement in the financial statements not initially identified by the company's internal controls. The audit of internal control over financial reporting and the audit of the company's financial statements are an integrated activity and are required by the Act to be a single engagement. The results of the work performed in a financial statement audit provide evidence to support the auditor's conclusions on the effectiveness of internal control, and vice-versa. Therefore, if the auditor discovers a material misstatement in the financial statements as a part of his or her audit of the financial statements, the auditor should consider whether internal control over financial reporting is effective. That the company's internal controls did not first detect the misstatement is a strong indicator that the company's internal control over financial reporting is not effective.
* Significant deficiencies that have been communicated to management and the audit committee but that remain uncorrected after a reasonable period of time. Significant deficiencies in internal control that are not also determined to be material weaknesses, as defined in the proposed auditing standard, are not so severe as to require the auditor to conclude that internal control is ineffective. However, these deficiencies are significant, and the company should correct them. If management does not correct significant deficiencies within a reasonable period of time, that reflects poorly on tone-at-the-top and the control environment. Additionally, the significance of the deficiency can change over time (for example, increases in sales volume or added complexity in sales transaction structures would increase the severity of a significant deficiency affecting sales).

The public comment period on this proposal is 45 days. The rule must be approved by the Securities and Exchange Commission to be effective.The Board also voted on 7 October 2003 to propose Rule 3101, which describes the use of certain terms in the auditing and related professional practice standards to communicate the level of obligation imposed on registered public accounting firms and their associated persons in complying with the standards.PCAOB Rule 3100 requires all registered public accounting firms and their associated persons to comply with the Board's Auditing and Related Professional Practice Standards in connection with the preparation or issuance of any audit report for an issuer, as defined in the Sarbanes-Oxley Act of 2002. Proposed Rule 3101 explains how the Board will refer to, and distinguish among, differing levels of professional obligations in the future standards it issues and in the Board's interim standards (in Rules 3200T, 3300T, 3400T, 3500T, and 3600T). Public comments must be received by 6 November 2003. The rule must be approved by the Securities and Exchange Commission.**1.9 UK boardrooms already responding to the Combined Code**Latest research released in September 2003 by professional services firm Deloitte shows that UK companies are already beginning to respond to the requirements of the revised Combined Code, which incorporates much of the Higgs, Smith and Tyson reports.**(a) Independence**Although the Combined Code does not come into effect until 1 November 2003, there have already been significant changes to boards of FTSE 350 companies. The number of executive directors sitting on FTSE 350 boards has fallen by 8% in 2003. At the same time, the number of non-executive directors (NEDs) has increased by 2.5%, indicating that companies are addressing issues of board balance.However, despite the reduction in the number of executive directors, at least 125 independent NEDs will need to be appointed to 30% of FTSE 350 companies in order to comply fully with the Code, which requires at least half the board to be made up of independent NEDs. This number could be even greater, with the report suggesting that 240 NEDs will not pass the Code's independence criteria because they were appointed more than 10 years ago.The independence requirements are also an issue for board chairman. In the FTSE 350, 30% of chairman are not independent as they also act as executive directors of the company and 12% of chairman are not independent as they have previously held executive positions in the same organisation. But there has been an increase in independent chairmen since 2000 when over half the chairmen in FTSE 100 companies and 40% of chairmen in FTSE 250 companies were executive directors of the company.**(b) Diversity**Deloitte's report also found that boardroom diversity remains an issue. Women continue to be under represented in the boardroom making up only 3% of FTSE 350 executive directors, just a 1% improvement from last year. Currently only one FTSE 100 company has a female chief executive, but six FTSE 350 companies are headed by a woman, compared to four companies in 2002. Of the female executive directors, 40% hold the position of financial director.The past year has seen a greater increase in the number of female non-executive directors. In the FTSE 350, 8% of non-executive directors are women (10% in FTSE 100, 6% in FTSE250) compared to 6% last year. There is only one female non-executive chairman among FTSE 350 companies. Boards do, however, include a broad range of ages. The youngest board member of a FTSE 350 company is 29 years old and the oldest 80 years old.**(c) Transparency**Although companies are now required to disclose much more information relating to executive remuneration in their annual remuneration reports, the level of disclosure still varies considerably. **1.10 Implications of the Growth of Hedge Funds Report**On 29 September 2003, the United States Securities and Exchange Commission released its staff report on the Implications of the Growth of Hedge Funds. The full report is available at [http://www.sec.gov/news/studies/hedgefunds0903.pdf](http://www.sec.gov/news/studies/hedgefunds0903.pdf%22%20%5Ct%20%22_new)The following is extracted from the executive summary. **(a) Background on report of the implications of the growth of hedge funds** At the request of the Commission, the staff has conducted a study of hedge funds, including their investment advisers and other service providers and their investors. The Commission's decision to study the hedge fund industry was based, in large part, on the growth of hedge fund assets coupled with the Commission's lack of information about these investment pools. The hedge fund industry recently has experienced significant growth in both the number of hedge funds and the amount of assets under management. Based on current estimates, 6,000 to 7,000 hedge funds operate in the United States managing approximately $600 to $650 billion in assets. In the next five to ten years, hedge fund assets have been predicted to exceed $1 trillion. The growth in hedge funds has been fuelled primarily by the increased interest of institutional investors such as pension plans, endowments and foundations seeking to diversify their portfolios with investments in vehicles that feature absolute return strategies - flexible investment strategies which hedge fund advisers use to pursue positive returns in both declining and rising securities markets, while generally attempting to protect investment principal. In addition, funds of hedge funds ("FOHF"), which invest substantially all of their assets in other hedge funds, have also fuelled this growth. The study focused on a number of key areas of staff concern, including the recent increase in the number of hedge fund enforcement cases, the role that hedge funds play in the financial markets and the implications of the Commission's limited ability to obtain basic information about hedge funds. The staff also examined the emergence of registered FOHFs - FOHFs that register under the Investment Company Act of 1940 ("Investment Company Act") so that they may offer and sell their securities to a larger number of investors and FOHFs that register under the Investment Company Act and the Securities Act of 1933 ("Securities Act") so that they may offer and sell their securities in the public market. Finally, the staff reviewed hedge fund disclosure and marketing practices, valuation practices and conflicts of interest. **(b) Concerns relating to hedge fund growth** As noted above, the study was, in large part, the result of the Commission's recognition that it lacks information about hedge fund advisers that are not registered under the Advisers Act and the hedge funds that they manage. Although this recognition is not new, the Commission's attention was focused again on the hedge fund industry as a result of the recent growth of the industry and the increase of investments in hedge funds by institutions. Although hedge fund investment advisers are subject to the antifraud provisions of the federal securities laws, they are not subject to any reporting or standardized disclosure requirements, nor are they subject to Commission examination. Consequently, the Commission has only indirect information about these entities and their trading practices and is hampered in its ability to develop regulatory policy as hedge funds become more important participants in our financial markets. The Commission is concerned about the inability to examine hedge fund advisers and evaluate the effect of the strategies used in managing hedge funds on the financial markets. The Commission is also concerned about the lack of applicable regulatory measures necessary to ensure that material information to assist investors in making fully informed investment decisions is available. The Commission's inability to examine hedge fund advisers has the direct effect of putting the Commission in a "wait and see" posture vis-à-vis fraud and other misconduct. The Commission typically is able to take action with respect to such fraud and other misconduct only after it receives relevant information from third parties (for example, investors or service providers), and frequently only after significant losses have occurred. In contrast, the Commission believes that its examination program not only allows the Commission to identify misconduct by registered investment advisers earlier, but it also assists in identifying and possibly preventing certain misconduct from developing into fraud. The Commission is also concerned that some hedge fund investors may not always receive useful information about the investment adviser and its management of the fund. In addition, the Commission believes that disclosure to some hedge fund investors could be improved to address conflicts of interests of hedge fund advisers. One of the Commission's key concerns relates to the manner by which hedge fund advisers value hedge fund assets. The broad discretion that these advisers have to value assets and the lack of independent review over that activity gives rise to questions about whether some hedge funds' portfolio holdings are accurately valued. The Commission's concern not only reflects its recognition of the incentives that may cause an adviser to inaccurately value hedge fund assets, but it also reflects its concern that registered funds that invest their assets in hedge funds may lack access to information that enables them to "fair value" their interests in hedge funds and therefore accurately calculate their net asset value. **(c) Staff recommendations relating to hedge fund advisers, funds of hedge funds and hedge funds:** * the Commission should consider requiring hedge fund advisers to register as investment advisers under the Advisers Act, taking into account whether the benefits outweigh the burdens of registration;
* the Commission and its staff should consider addressing certain valuation, suitability and fee disclosure issues relating to registered FOHFs;
* the Commission should consider permitting general solicitation in fund offerings limited to qualified purchasers;
* the staffs of the Commission and the NASD should monitor closely capital introduction services provided by broker-dealers;
* the Commission should encourage the hedge fund industry to embrace and further develop best practices;
* the Commission should continue its efforts to improve investor education regarding hedge; and
* the commission should consider issuing a concept release to examine the wider use of hedge fund.

**1.11 Shareholders' rights in DLCs**On 29 September 2003, the Australian Council of Superannuation Investors ("ACSI") called on the Federal Government to undertake a comprehensive policy review of the major governance issues that it argues seriously weaken key shareholder rights in dual listed company structures.ACSI is calling for this action in response to research commissioned from leading commercial barrister and listed Company Director SEK Hulme QC. Some of the concerns discussed in the paper include:**(a) Removal of directors** The DLC structure makes it much more difficult, if not impossible, for shareholders to remove directors if the board opposes such action.**(b) Obstacles to takeovers**The traditional sanction available to the market for non-performing companies is a takeover. If the dual listed company does not support a takeover bid, it will be inherently difficult to pursue. That is evidenced by the speculation regarding a GE takeover of Brambles and recognition in the market that a hostile bid for a dual listed company is very difficult. A successful bid would require acceptance by two different sets of shareholders in two different jurisdictions.The DLC Board also has discretionary powers in a takeover that do not exist in 'normal' single listed companies. Takeover arrangements for DLCs need further consideration given the nature of the structure that cuts across at least two jurisdictions. Current DLC arrangements could also increase the risk of litigation, causing a disgruntled bidder to pursue legal action to seek to overcome any perceived or actual impediments.A summary of the paper is on the [ACSI website](http://www.acsi.org.au" \t "_new).**1.12 SEC Issues Policy Statement on Business Continuity Planning for Trading Markets**On 26 September 2003 the United States Securities and Exchange Commission issued a Policy Statement setting forth its view that self-regulatory organizations operating trading markets (SRO Markets) and electronic communication networks (ECNs) should apply certain basic principles in their business continuity planning. The Commission also requests comments on the Policy Statement.The principles outlined in the Policy Statement include planning for the resumption of trading no later than the next business day following a wide-scale disruption, geographic diversity between primary and backup sites, assuring the full resilience of important shared information systems (such as the consolidated market data stream), and confirming the effectiveness of backup arrangements through testing. Each SRO Market and ECN should implement plans reflecting these principles as soon as practicable, and strive to do so by the end of 2004. Commission staff intends to engage in an ongoing and individualized dialogue with each SRO Market and ECN to discuss application of these principles in a manner most appropriate for the particular trading market.The Commission believes it important for the SRO Markets and ECNs to take concrete steps to strengthen their resilience to address the continuing, serious risks to the US financial system posed by the post 11 September environment. To date, the trading markets have made significant progress in increasing the robustness of their business continuity plans. By applying the principles outlined in the Policy Statement, the Commission believes the SRO Markets and ECNs will better assure their own resilience and that of the US financial system.The Policy Statement can be accessed on the SEC's web site at [http://www.sec.gov/rules/policy/34-48545.htm](http://www.sec.gov/rules/policy/34-48545.htm%22%20%5Ct%20%22_new)**1.13 Independent Directors Crucial to Corporate Governance: Hong Kong report**On 18 September 2003, the Hong Kong Institute of Company Secretaries (the Institute) released its report on Independent Non-Executive Directors (INEDs) titled "The Duties and Responsibilities of Independent Non-Executive Directors of Hong Kong Listed Companies".The report details the findings of a survey conducted by the Institute of 75 companies listed on the Main Board of The Hong Kong Stock Exchange as at 7 November 2002. Recognizing the likely difference in characteristics between companies of varying sizes, the sample was broken down into 3 categories according to market capitalisation. The report highlighted that 47% of the companies surveyed had only two INEDs. Soon to be introduced amendments to the Listing Rules will require listed companies to have at least three INEDs. While 69% of the higher capitalised companies would comply, the percentage of INEDs for lower capitalised companies' drops to 13%. Other findings include:* The average age of an INED is 58 years but those of smaller capitalised companies are younger while almost 40% of INEDs of higher capitalised companies are older than 60 years.
* Only 5% of all INEDs are female and 87% of companies have all male boards, no company surveyed had more than 2 female INEDs.
* The average length of existing service was 6.7 years, but 7% of INEDs have already served more than 20 years.

**1.14 UK House of Commons Trade and Industry report: Rewards for Failure**On 16 September 2003, the United Kingdom House of Commons Trade and Industry Committee released its report on severance pay for company executives. The report sought consultation on whether, and if so what, new measures might be required to tackle excessive 'golden parachutes' for the outgoing executives of poorly performing companies. In the course of the inquiry evidence was taken from the Investment ManagementAssociation (IMA); the Institute of Directors (IoD); the Work Foundation; the Association of British Insurers (ABI); the National Association of Pension Funds (NAPF); the Confederation of British Industry (CBI); and the Trades Union Congress (TUC). In addition the Committee received written submissions from thirteen organisations and individuals. The report concluded:* Witnesses were in no doubt that there is a genuine problem of contracts that provide for excessive severance packages for directors who have failed to improve the performance of their company. Whilst the examples of GSK or Marconi are exceptional in their scale, they clearly represent the tip of the iceberg. Directors of large companies should expect remuneration commensurate with the level of responsibility they have and the relatively precarious nature of their employment. A lengthy and successful tenure will also inevitably be reflected in high rewards and, potentially, a sizable severance package. However, the increases in salary and bonuses that directors have experienced in recent years, on which severance packages are based, have not been a reflection of tougher performance targets or better company performance. It would appear that executives have been rewarded not only for success but for failure as well.
* The Committee is not convinced that the current scale of executives' severance packages is a product of competition for scarce talent in an international market. Executives in the UK are paid more than those in any country other than the USA, where executive pay is so much greater that there seems little prospect of recruitment from there on a large scale.
* The Committee would hope that the recent examples of shareholder revolt and the wider public concern generated by the instances of rewards for failure would prompt all companies to look hard at the way in which executives' contracts are constructed.
* The Committee can see no reason why, in principle, the notice periods of executives should be any different from those of the rest of the population. UK executives are already well remunerated and have become increasingly so over recent years. Many other areas of employment can be considered as risky but do not have the benefit of such high salaries. The Committee urges companies not only to adopt one year contracts, other than in exceptional circumstances, but also to specify separately the notice period, in order to bring the notice periods of executives more closely into line with those of their other employees.
* Phased payments are clearly a means by which severance pay can be reduced. Departed executives will receive payments only for the period during which they are out of work and the obligation to mitigate loss means that they should not be able to remain idle whilst waiting for the full value of the severance package to be paid.
* However, the full benefits of phased payments can be realised only if the obligation to mitigate loss is strictly enforced. The Committee was told that the general principle is enshrined in common law and yet, it seems, it is inconsistently applied. The Committee would expect companies to enforce the duty to mitigate losses properly and to make the phased payments only whilst the recipient remains out of work.
* If the targets upon which bonuses are based are set at a sufficiently challenging level, and an executive is being removed for underperformance, the Committee cannot see how significant performance-related elements of the remuneration package can legitimately be included in the severance package. Given the seemingly endless rise in the value of elements other than basic pay in executives' total remuneration, the problem of excessive rewards for failure is unlikely to be solved unless companies address this issue properly.

A full copy of the report is available at:[http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/914/914.pdf](http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/914/914.pdf%22%20%5Ct%20%22_new)**1.15 Study finds empirical evidence of a correlation between corporate risk quality and financial performance**There is a strong correlation between companies' risk quality and financial performance, according to a new study released on 16 September 2003 of 438 publicly quoted companies across a broad range of industries. The study, 'Improving Risk Quality to Drive Value,' conducted by Oxford Metrica, an independent internationally recognised strategic advisory firm, analysed a global portfolio of firms that comprised a total market capitalisation of US$3.4 trillion (£2.1 trillion). The findings reveal that companies with high risk quality have low cash flow volatility, a core value driver. Additionally, the study concludes that risk quality is a strategic issue and a key characteristic of a value-creating firm, as well as an essential aspect of effective corporate governance procedures. 'Risk Mark' - a benchmarking system created by commercial and industrial property insurer FM Global for evaluating a firm's risk quality and relative probability for loss compared with that of thousands of other firms in various industries - provided Oxford Metrica with a data source for the research. The premise of the study is that a company need not experience a disruption to its business to demonstrate the value of investing in risk quality. Furthermore, it indicates that diligently following property risk improvement procedures is a characteristic of value-creating firms. In order to evaluate the risk management investment decision in a shareholder value framework, the research first defines what is meant by 'value' and identifies core drivers. Second, the metrics of risk and value used in the study are defined, and third, the relationship between risk quality and financial performance is demonstrated and measured. Finally, the study portfolio is analysed in a broader context to establish the generalisability of results. In the context of the study, risk quality is defined in terms of property risk management. It is driven by the core operational activities of a business, the physical location of those activities and how they are managed and protected. The executive summary of the study results is available at:[http://www.fmglobal.com/pdfs/oxfordmetrica.pdf](http://www.fmglobal.com/pdfs/oxfordmetrica.pdf%22%20%5Ct%20%22_new)**1.16 CBI unveils guidelines on severance packages**In its response to the UK Department of Trade and Industry consultation on termination payments for directors, on 16 September 2003, the Confederation of British Industry (CBI) unveiled guidelines on directors' severance packages. They recommend immediate disclosure of contractual terms and conditions, one year rolling contracts, part-payment in shares and regular contractual reviews. They also outline ways of handling the different elements of severance packages - basic pay, earned bonus and pensions. **(a) Best Practice Guidelines**i. Key contractual terms should be announced to shareholders immediately after the parties are committed to each other and severance details should also be announced after agreement between the company and the individual.ii. Details of directors' contracts are often made public in company annual reports which may not be published for some months after an appointment has been made. The CBI recommends that key details of directors' contracts are made available at the earliest opportunity, so shareholders know speedily exactly what commitments have been made. Severance terms should be similarly announced. iii. The terminology of each clause in the contract must be clear to ensure the reader can determine the precise nature of the agreed terms and conditions, and confusing terms like 'guaranteed bonus' should be avoided.iv. Severance entitlements should be restricted to basic pay, earned bonus and pensions accrual only in line with pay. They should take account of the individual's circumstances and opportunity to mitigate loss by finding another job.Contracts should provide for the usual payment of severance, unless there are special circumstances which are clearly explained to shareholders, to be by monthly payments until the end of an agreed period or until another job is obtained, whichever is earlier. Payments under share or other equity based incentive plans should be made under normal scheme rules and not special departure conditions. Any attempt to enhance pension payments outside contracted entitlement should require specific shareholder approval.v. In normal circumstances, directors should have contracts no longer than one year to help minimise the cost of severance. It is, however, recognised that circumstances do sometimes exist which dictate a longer initial contract.vi. Within two years newly appointed directors should have terms and conditions which are in line with those of incumbent Board directors.New directors may need to be tempted away from existing secure positions so an additional amount of initial contractual security may be needed but the CBI recommends that those contracts are brought into line within two years of recruitment.vii. To strengthen the alignment between shareholders and company directors the CBI recommends that a proportion of remuneration should be directed into shares bought on the open market which should be held for three years. **1.17 New US survey shows Sarbanes-Oxley Act has increased effectiveness of audit committees and corporate governance**On 8 September 2003 James H Quigley chief executive officer of Deloitte & Touche LLP, told an audience at the National Press Club in Washington DC that the Sarbanes-Oxley Act of 2002 is having a positive effect on corporate governance, causing audit committees to meet more frequently and for greater duration.As of 3 September, Deloitte researchers had received responses from 66 of the firm's top clients on a range of corporate governance issues to determine how they are weathering the changing business climate, including regulatory changes, over the past year. The client survey conducted by Deloitte also asked leaders how Sarbanes-Oxley was affecting audit committees.The Deloitte survey showed that audit committees are meeting more frequently than they did prior to passage of Sarbanes-Oxley. Of the 66 companies surveyed, the number of audit committees meeting more than six times per year increased from 11 companies prior to the passage of Sarbanes-Oxley to 39 following the enactment of the legislation.The time spent in committee sessions has also risen significantly. Half the companies surveyed met for less than one hour per meeting prior to Sarbanes-Oxley. Post Sarbanes-Oxley, the number of committees meeting less than one hour dropped to 10 percent of the survey participants.The responses came largely from manufacturing, consumer, and financial services companies. The majority of responses came from companies with revenues of US$1 billion to US$5 billion (48 percent) or more than US$10 billion (26 percent). **1.18 Corporate Law Judgments Milestone**Since September 1999, the Centre for Corporate Law and Securities Regulation at the University of Melbourne website has offered a comprehensive database of corporate law judgments delivered by all courts of all Australian jurisdictions since that date. In October this year, the website added its 2,000th judgment to the site. The database features a flexible search screen that enables practitioners, students and the general public to search for cases according to date, judge, court, case name, keywords or phrase. The Law Institute Library recently reviewed the Corporate Law Judgments site and described it as "a great alternative to AustLII for locating corporate law decisions". **1.19 Study of voting levels in UK companies**Pension Investment Research Consultants' (PIRC) annual proxy voting survey for AGMs held by FTSE All Share companies between August 2002 and July 2003 (545 respondents), has found that the substantial increase in average voting levels shown last year has not continued despite the introduction of the CREST electronic voting platform and the weight of regulatory pressure towards encouraging shareholder activism. * The average voting level for FTSE 350 companies this year was around 55% with the average voting level for FTSE All Share companies at 53%.
* These figures are negatively affected by the investment company sector (average voting level 24%) If these 77 companies are excluded from the calculation, then the average voting level at FTSE350 companies rises to nearly 58% and for FTSE All Share companies to just over 56%.
* There is a marked difference between voting levels at FTSE100 companies where the average is some 53% and FTSE MidCap turnout (the next largest 250 companies) where PIRC recorded an average figure over 61%. The difference is most likely attributable to the comparatively high non-UK ownership of UK listed equity at larger companies as major institutions are less likely to vote their international portfolios due to the difficulties of cross border voting. According to government statistics released in July 2003, 32.1% of UK equity is now held outside the UK and 91.5% of this overseas investment is held in FTSE100 companies.
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| **2. Recent ASIC Developments** |
| **2.1 ASIC class order provides relief to allow multi-issuer PDS** On 23 October 2003, the Australian Securities and Investments Commission (ASIC) released a new Class Order declaration [CO 03/0876], relating to the preparation of a product disclosure statement ("PDS") under s.1013A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("the Act") by multiple issuers.The Class Order relief permits a PDS to be prepared by more than one issuer under s.1013A of the Act where:* the issuers are related bodies corporate and continue to be related bodies corporate for so long as the interests in the financial products are being offered and issued under a single PDS;
* the financial products offered in a single PDS document are of the same kind. For example, it would be permissible to prepare a multi-issuer PDS in relation to all unlisted managed investment products, all superannuation products, all life insurance products, or all general insurance products but not any combination of these products;
* the relationship between the issuers and products is disclosed;
* the financial products offered under a single PDS are either all unlisted or all listed; and
* the PDS provisions in Part 7.9 of the Act apply to all of the financial products offered by the issuers in the PDS. (Note that this requirement does not preclude the combination of a prospectus and a PDS for offers of stapled securities)

ASIC has adopted this approach to promote commercial efficiency and flexibility for related issuers in a conglomerate group, whilst maintaining the safeguards afforded to consumers under the Act.By requiring the PDS to relate to a particular kind of financial product, ASIC believes that consumers will be better able to compare the merits (and relative costs) of like products offered by various issuers within a corporate group. There is less likelihood that consumers may be confused about the benefits and risks of a group's products when they are of the same kind. ASIC recognises that there may be some circumstances where related issuers may wish to use a single PDS for different kinds of financial product. In these situations, ASIC will consider granting relief on a case-by-case basis.A copy of the Class Order can be obtained from the ASIC's Infoline by calling 1300 300 630 or from the ASIC website at [http://www.asic.gov.au/co](http://www.asic.gov.au/co%22%20%5Ct%20%22_new)For further information contact:Pamela McAlisterFSR Director - Legal & TechnicalTelephone: 03 9280 3450Mobile: 0402 426 956**2.2 Amended Pro Forma 209: AFS licence conditions**On 22 October 2003, the Australian Securities and Investments Commission (ASIC) reissued Pro Forma 209 Australian financial services licence conditions (PF 209). The amendments to PF 209 are a result of the introduction of new regulations and changes to ASIC policy, including Policy Statement 166 Licensing: Financial requirements (PS 166) and Policy Statement 175 Licensing: Financial product advisers - Conduct and disclosure (PS 175). These changes come into effect immediately.The following summary explains the nature and purpose of each amendment. Australian financial services (AFS) licensees who wish to take advantage of the changes outlined below must apply for a variation to their AFS licence using ASIC form FS03, requesting that the revised versions of all of the conditions and definitions listed below be imposed.PF 209 and form FS03 are available via the Financial Services homepage on the ASIC website at [http://www.asic.gov.au/fs](http://www.asic.gov.au/fs%22%20%5Ct%20%22_new).**(a) Summary of Amendments to PF 209****(i) Authorisation**Condition 1: There are new authorisations to cover licensees who provide financial services in relation to consumer credit insurance only.The life insurance product authorisations have been expanded to include any products issued by a Registered Life Insurance Company that are backed by one or more of its statutory funds. **(ii) Base level financial requirements**Condition 11: The amendment provides a licensee with an additional means of meeting the 3-month cash flow requirement in lieu of Option 1 or Option 2.A licensee is now exempted from the requirement to prepare 3-monthly cash flow projections where an eligible provider provides an enforceable and unqualified commitment to pay an unlimited amount in respect of the licensee's obligations for a period of 3 months. ASIC will also amend Parts F and G of PS 166 to reflect this change.**(iii) Financial requirements for foreign exchange dealers**Condition 18: This condition has been amended to reflect changes to financial requirements imposed on foreign exchange dealers applying for an AFS licence.ASIC has changed its policy under PS 166 to permit all foreign exchange dealers to comply with an adjusted surplus liquid funds (ASLF) requirement reflecting Part F of PS 166 as an alternative to the $10 million tier one capital requirements under Part G. **(iv) Financial requirements for licensee transacting with clients** Condition 20: Minor amendment to add the word "monetary" before the word "liabilities" in the first line of the condition.**(v) Audit opinion on financial requirements**Condition 26: Adjusted to reflect changes to condition 11 and forthcoming changes to PS 166 in relation to the areas covered under the audit for the cash needs requirement of Base Level Financial Requirements. **(vi) External dispute resolution schemes**Condition 30: The purpose of this amendment is to exempt a licensee from the requirement to be a member of an External Dispute Resolution Scheme (EDRS) until 11 March 2004, to the extent that there is no EDRS in place that covers complaints relating to the type of financial service provided by the licensee. **(vii) Agreement with holder of financial product on trust**Condition 32: This has been amended to exempt licensees who appoint sub-custodians from some of the requirements under the condition, where the licensee demonstrates by documentary evidence that compliance with these requirements is not practicable. **(viii) Protection of underlying land in primary production**Condition 43: ASIC has amended this condition for licensees of timber plantation schemes, to allow them up to 9 months after the issue of interests in the scheme to register the investors' interests in the land under State or Territory land titles law. The purpose of the amendment is to ensure that the registration requirement imposed by this licence condition does not have the potential to deprive investors in timber plantation schemes of the benefits of the 12-month prepayment rule introduced by Treasury into taxation legislation in 2002. **(ix) Stockbroker responsibility for subsidiary companies**Condition 55: This is a new condition that will apply to a stockbroker who elects to take responsibility for the acts and omissions of a subsidiary nominee company who provides custody services on its behalf.**(x) Retention of financial services guides, statements of advice and material relating to personal advice**Condition 56: This is a new condition that will be imposed on all licensees and will apply where a licensee provides financial product advice to retail clients. The condition applies the record keeping requirements set out in PS 175.**(b) Definitions*** consumer credit insurance - new definition to apply to licensees who are authorised to provide financial services in relation to consumer credit insurance only
* financial assets - definition amended so that it is now consistent with the definition of financial assets set out in Policy Statement 130 Managed investments: Licensing (PS 130)

**2.3 ASIC releases version 4 of eLicensing and AFS licensing kit**On 21 October 2003, the Australian Securities and Investments Commission (ASIC) released version 4 of the eLicensing system, together with an updated version of the Australian financial services (AFS) Licensing Kit, for entities wishing to apply for an AFS licence before the end of the two-year transition period on 10 March 2004.Version 4 takes into consideration the widening of eligibility to apply for an AFS licence under the streamlining process following regulations made on 11 March 2003, and other recent changes to regulations. It also takes into account recent ASIC Class Orders CO 03/645: FSR Act transition - regulated activities - deposit products and insurance products and CO 03/705: Non-cash payment facilities - licensing exemption.The release of Version 4 follows recent updates to ASIC's industry guides, which are designed to assist applicants choose the right authorisations and assessment process when applying for an AFS licence. These guides incorporate the version 4 changes and provide further clarification of ASIC's operational processes.Applicants who have started preparing their applications in version 2 should be aware that they will not be able to submit those applications after 21 October 2003. However, applicants who have started in version 3 will not have to start their applications again.More information on the eLicensing system and the AFS Licensing Kit, as well asongoing licensee obligations, is available via the Applying for an AFS licence page at [http://www.asic.gov.au/afsl](http://www.asic.gov.au/afsl%22%20%5Ct%20%22_new)**2.4 ASIC provides overview of applications for relief under FSRA**On 10 October 2003, the Australian Securities and Investments Commission (ASIC) provided an overview of its decisions in some recent applications for relief from the licensing, conduct and disclosure provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) as amended by the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default) (FSRA).ASIC has released this information both to illustrate examples of the sorts of matters where it has provided relief, and to make the manner in which ASIC has responded to specific matters fully transparent. The overview also includes examples of the circumstances in which ASIC has refused relief.'ASIC intends to issue these overviews at least twice-yearly to assist industry in understanding our approach to regulation under the FSRA regime', ASIC Director of Financial Services Regulation (Legal and Technical Operations), Ms Pamela McAlister said.'While each application for relief is considered on a case-by-case basis, this overview provides some guidance on the circumstances in which ASIC will consider granting relief. However, potential applicants should not assume that ASIC will provide relief in the future in similar cases, as each relief application depends on the unique facts and circumstances of the case', Ms McAlister saidASIC's general policy is to only consider granting relief from the requirements of Chapter 7 of the Act to address atypical or unforeseen circumstances and unintended consequences of those provisions. The criteria that ASIC will apply in considering applications for relief are most recently outlined in Information Release 03-29: ASIC issues additional guidance for FSR relief applicants and in Policy Statement 167: Licensing: Discretionary powers and transition and Policy Statement 169: Disclosure: Discretionary powers and transition.ASIC is required to publish a copy of each exemption and modification instrument issued in the Gazette, which is available from the [ASIC website](http://www.asic.gov.au" \t "_new).**2.5 Guide for AFS licensees on compliance**On 9 October 2003, the Australian Securities and Investments Commission (ASIC) released a new licensing guide "Meeting the financial requirements for your AFS licence: Compliance with Policy Statement 166".The guide has been prepared by ASIC licensing analysts in conjunction with accounting experts, and explains how applicants for an Australian financial services (AFS) licence can comply with Policy Statement 166: Licensing: Financial requirements (PS 166).ASIC has developed this guide following requests for assistance from industry participants. It is designed to provide practical guidance to licence applicants, licensees, accountants and auditors about how to meet their obligations under PS 166, and the financial requirements under an AFS licence.A copy of the guide can be obtained via the 'Applying for an AFS licence' page on the ASIC website, [http://www.asic.gov.au/afsl](http://www.asic.gov.au/afsl%22%20%5Ct%20%22_new) or by emailing ASIC's Infoline on infoline@asic.gov.au or calling 1300 300 630.**2.6 ASIC provides limited relief for certain foreign financial services**On Wednesday 1 October 2003, the Australian Securities and Investments Commission (ASIC) issued four class orders providing technical relief from certain obligations for foreign financial services in certain circumstances. The relief has been provided in response to two main industry concerns: whether the new financial services reform (FSR) regime applies in some cases to certain providers of foreign financial services or products, and the degree of duplication of obligations under the FSR regime where a service provider is sufficiently regulated in another jurisdiction.The class orders cover the following areas: * modification of the financial statement and financial record requirements as they apply to foreign authorised deposit-taking institutions (ADIs) [CO 03/823];
* dealing in derivatives or foreign exchange contracts by foreign ADIs that otherwise limit their activities to banking business (ie deposit-taking and lending) for wholesale clients [CO 03/823];
* clarification of when the licensing provisions apply to wholesale financial service providers who have only a limited connection to Australia [CO 03/824];
* clarification of when the licensing provisions apply where financial products are held by people who move to Australia after acquiring the product [CO 03/825]; and
* exemption from the requirement to keep market related records for transactions with foreign wholesale clients on overseas markets [CO 03/826].

Copies of the class orders can be obtained from ASIC's Infoline by calling 1300 300 630, or from the [ASIC website](http://www.asic.gov.au" \t "_new).**2.7 Additional guidance for FSR relief applications** On 2 October 2003, the Australian Securities and Investments Commission (ASIC) announced that it is providing additional guidance on the factors it considers when assessing applications for relief from the licensing or disclosure provisions of the financial services reform (FSR) regime.The additional guidance is provided in amendments to ASIC Policy Statement 167: Licensing: Discretionary powers and transition [PS 167] and Policy Statement 169: Disclosure: Discretionary powers and transition [PS 169].Although ASIC's general policy approach in PS 167 and PS 169 remains unchanged, guidance has been added to Sections A of these policies, which expands the list of typical factors that may be relevant to ASIC in deciding whether to exercise its relief powers on a partial or complete basis. These additional factors include the following: * financial products - whether a reasonable person would think that the predominant purpose of the product is not of a financial nature;
* financial services - whether a reasonable person would think that the predominant purpose of the products to which the service relates is not of a financial nature;
* whether the service or product is subject to adequate alternative regulation;
* whether the likelihood and extent of potential consumer detriment resulting from the proposed relief is minimal; and
* whether the service or product is only provided to wholesale clients.

Copies of the amended policy statements PS 167 and PS 169 are available from [ASIC's website](http://www.asic.gov.au" \t "_new), or ASIC's Infoline on 1300 300 630.**2.8 Amendment to ASIC Policy Statement 166 Financial requirements - foreign exchange dealers**On 25 September 2003, the Australian Securities and Investments Commission (ASIC) announced changes to the financial requirements to be imposed on foreign exchange dealers applying for an Australian Financial services (AFS) licence. ASIC will amend Part F and Part G of ASIC Policy Statement 166: Licensing - Financial Requirements (PS 166). ASIC will also amend its Pro Forma 209 (Australian Financial Services Licence conditions) to reflect the changes.Under the changes, which take immediate effect, ASIC will now permit all foreign exchange dealers to elect whether to comply with an adjusted surplus liquid funds (ASLF) requirement reflecting Part F of PS 166, or the $10 million tier one capital requirements under Part G of PS 166. Foreign exchange dealers must make their selection when applying for an AFS licence. ASIC will impose the appropriate licence conditions, reflecting the applicant's selection, for all new AFS licences. Foreign exchange dealers who already hold an AFS licence which includes a condition requiring them to comply with the $10 million tier one capital requirement may apply to ASIC for a variation of their licence conditions if they wish to comply with Part F of PS 166.The changes mean that a foreign exchange dealer who has the ASLF required by Section F of PS 166 will not necessarily be required to hold $10 million of tier one capital, as currently required by Part G of PS 166. Foreign exchange dealers who are regulated by the Australian Prudential Regulation Authority (APRA) will continue to be excluded from compliance with PS 166.**(a) Background**Presently, Part G of PS 166 imposes a $10 million tier one capital requirement on foreign exchange dealers who enter into foreign exchange contracts as principal in Australia, where the counterparty to the foreign exchange contract is not: * an authorised deposit-taking institution (ADI); or
* a person required under their AFS licence to maintain $10 million of tier one capital; or
* a person authorised to deal in foreign exchange pursuant to a pre-FSR authorisation pursuant to Regulation 38A of the [Banking (Foreign Exchange) Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8538" \t "default).

Part F of PS 166 currently deals with the financial requirements for licensees transacting with clients as principal. Under Part F, licensees must maintain an amount of adjusted surplus liquid funds (ASLF) where their actual or contingent liabilities are equal to or greater than $100,000. Under Part F, the ASLF amount to be maintained equates to the sum of:* $50,000; plus
* 5 per cent of adjusted liabilities between $1 million and $100 million; plus
* 0.5 per cent of adjusted liabilities for any amount of adjusted liabilities exceeding $100 million, up to a maximum ASLF of $100 million.

Under the changes to PS 166, the Part G $10 million financial requirement will not apply if the licensee elects to comply with Part F and the ASLF requirement is satisfied. Thus, a licensee who deals in foreign exchange contracts, as principal, with retail client counterparties in Australia may meet the financial requirements of either Part G or Part F of PS 166 (unless either Part would not ordinarily apply to them, for example, because the liability referred to in Part F is less than $100,000). |
| **3. Recent ASX Developments** |
| **3.1 ASX calls for comment on proposed Listing Rule amendments** On 20 October 2003, the Australian Stock Exchange released its Exposure Draft of proposed Listing Rule changes that are designed to deliver greater flexibility to companies wishing to raise capital.The release of the proposed changes follows an extensive consideration of current market practices and an examination of procedures in place in offshore, increasingly accessible markets and a review of the extent to which the market has changed over the 13 years since these procedures were last overhauled.It is proposed to offer companies a wider and better choice between inclusive capital raising programs such as pro rata issues and share purchase plans, and less inclusive forms of capital raising such as placements. This will allow the development of capital raising strategies tailored to the individual requirements of the particular listed entity and the needs of that entity's investors.Among the amendments, ASX proposes increasing the percentage of issued capital that may be issued without investor approval from 15 percent to 20 percent per annum. In addition, it is proposed to reduce from 40 to 23 business days the timetable for both renounceable and nonrenounceable pro rata issues, thereby removing one of the principal impediments to raising capital in this way. It is also proposed that investors be allowed to confer a general mandate on an entity to issue securities for a period of up to 13 months (enabling it to be reconsidered at subsequent annual general meetings.The Exposure Draft is available at [http://www.asx.com.au/about/pdf/CapitalRaising.pdf](http://www.asx.com.au/about/pdf/CapitalRaising.pdf%22%20%5Ct%20%22_new)ASX is seeking comments from all interested parties by 30 November.**3.2 Implementation Review Group**The Implementation Review Group ("IRG"), the review body with the task of considering the implementation of the ASX Corporate Governance Council's Principles of Good Corporate Governance and Best Practice Recommendations, met on 16 October 2003 to consider the scope of its role and its approach.The IRG committed to providing practical and balanced feedback to the ASX Corporate Governance Council on the experience of listed companies in 'if not, why not' reporting against the recommendations of the Council and the experience of investors in assessing the new level of disclosure. Based upon its analysis and feedback received, the IRG will make recommendations to the Council to clarify or enhance the new guidelines, where necessary. The IRG will also consider the extent of change in the governance approaches of listed entities that has occurred as a result of the new guidelines.The IRG strongly endorses the flexible disclosure-based approach taken by the Council, enabling companies to adopt a governance regime appropriate to their circumstances, including allowing departure from the recommendations, and saw this as complementing proposed and existing legislation in this area. The role of the IRG is to suggest any opportunities to improve and clarify this disclosure framework. The IRG will be undertaking discussions with listed companies and investment market participants to ensure that a broad range of feedback is captured. As part of this consultation, the IRG considers that it is important to attract direct feedback from directors, chairmen, company secretaries and other relevant contributors from listed companies, investors and analysts.The IRG is particularly interested in receiving comment in relation the following issues:From Listed Entities:* particular areas of difficulty in relation to any of the recommendations;
* suggestions for enhancements to or clarifications of the guidelines;
* areas where the scope and extent of disclosure expected is unclear;
* any gaps or omissions in the Principles and Recommendations;
* how the opportunity to depart from the recommendations and to explain this departure is perceived;
* to what extent listed entities are making changes to meet the new guidelines;
* any resourcing issues, particularly for smaller companies.

From Investors:* how the governance information disclosed by listed entities is being used;
* opportunities to enhance the usefulness of governance disclosures;
* suggestions for enhancements to or clarifications of the guidelines;
* whether investors are satisfied with explanations of departures from the recommendations;
* any gaps or omissions in the Principles and Recommendations.

Comments should be provided in writing to the IRG Secretariat, (details below) or direct contact is invited with the members of the IRG:* Peter Abraham;
* Geoff Ashton;
* Graham Bradley;
* Rick Crabb;
* Erik Mather;
* Tom Pockett;
* Ian Pollard;
* Jerome Vitale.

IRG Secretariat: c/o Tanya DaveyAustralian Stock ExchangeTelephone: (02) 9227 0989Facsimile: (02) 9227 0436Email: tanya.davey@asx.com.au**3.3 ASXSR Annual Report 2003** On 30 September 2003, the ASX Supervisory Review Pty Ltd (ASXSR) released its Annual Report to the ASX Board for the twelve months ended 30 June 2003. ASXSR is the independent review body within the ASX Group whose board is comprised of a majority of independent non-executive directors.The report sets out the findings of ASXSR arising out of its review of ASX supervisory activities and the funding of these activities for the twelve months to 30 June 2003, which are:* the ASX policies and procedures for those areas with supervisory activities were adequate to support the ASX Group in complying with its specific statutory obligations as a licensed market operator and clearing house under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), with the exception of the CHESS policies and procedures which ASXSR was unable to form a view largely as a result of ASX's restructuring of clearing and settlement operations;
* the level of funding and resources devoted by the ASX Group to its supervisory activities was sufficient and substantial;
* ASX had in place and maintained appropriate controls and arrangements for commercial and employee conflicts of interest; and
* the procedures in place governing Review Group Entity and Review Participant oversight and their respective operation in practice were satisfactory.

ASXSR is therefore of the opinion that the ASX Group met appropriate standards in the conduct of its supervisory activities and conducted its supervisory activities ethically and responsibly.The report includes details of the conflict handling role played by ASXSR in ASX supervisory decisions, and considers the complex matter of ASX technology and supervision.A copy of the report is available on [ASXSR's website](http://www.asxsr.com.au" \t "_new). |
| **4. Recent Takeovers Panel Matters** |
| **4.1 Prudential Investment Company of Australia Limited - Panel sets aside ASIC decision** On 21 October 2003, the Takeovers Panel announced that it had decided to set aside a decision made by the Australian Securities & Investments Commission (ASIC) to refuse an application by Fexco Investments Australia Limited (FIA), Fexco Money Transfer Limited, FEXCO, Mr Geoff Bell and Mr Peter Jess (together the Applicants) in relation to FIA's takeover bid (the Joint Bid) for Prudential Investment Company of Australia Limited (PICA). The Joint Bid was made by FIA on behalf of all of the Applicants.**(a) Background**To permit them to make the Joint Bid, the Applicants sought, and obtained, relief (the Original Relief) from ASIC on 19 May 2003 from section 606 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The Original Relief included a condition (the ASIC Condition) which required the bid to be subject to a non-waivable defeating condition (the Bid Condition) to operate if acceptances are not received from at least 50.1% of PICA shareholders not associated with the Applicants at the commencement of the bid period (the Head Count Test).On 28 August 2003 ASIC revoked the Original Relief and replaced it with relief (the Current Relief) which still included the ASIC Condition, but also allowed the Applicants to disregard, when determining compliance with the Bid Condition, a large number of very small parcels which appeared to be the result of share-splitting.In the context of the application for the Current Relief, ASIC staff offered to consider an application to amend the Original Relief so that the ASIC Condition would be satisfied if Fexco received acceptances for 50.1% of the PICA shares in respect of which the Applicants did not have a relevant interest at the commencement of the bid period (the Share Count Test). The Applicants declined that offer on the basis that at the time they did not consider that such a condition would be satisfied.On 11 September 2003, Fexco sought a modification to the Current Relief to allow the ASIC Condition to be based on a Share Count Test. By that time, the circumstances which caused the Applicants to decline ASIC's earlier offer to consider such a modification had changed. The application (the Application) in the Panel proceedings was to review ASIC's refusal to amend the Current Relief, to replace the Head Count Test with a Share Count Test.**(b) The Panel's decision**The Panel has decided that the Application can be upheld on either of two bases.**(i) First basis - Satisfaction of the policy behind the imposition of the ASIC Condition**ASIC's policy in relation to joint bids is set out in ASIC Media Release [01/295].That document indicates that the ASIC Condition is imposed to ensure that joint bids proceed at a price that a majority of the target shareholders regard as acceptable and to prevent joint bidders taking control at less than a fair price. In the Panel's view, that policy justification has been fulfilled in relation to the Joint Bid since the inference that the bid is fully priced is supported by the following:* the Joint Bid has been accepted by shareholders holding approximately 83.5% of the shares to which offers made under the bid related (that is, excluding the shares held by the Applicants);
* there was a rival bidder for control of PICA (LKM Capital Limited), after whose emergence an auction for control developed in which the Applicants eventually offered the highest price. The rival bidder received acceptances for only 0.44% of the shares in PICA;
* the report by an independent expert appointed by PICA, in particular the fact that the price now offered under the Joint Bid is 30% greater than the high end of the valuation by the independent expert; and
* holders of 64% of the marketable parcels of shares subject to the Joint Bid have accepted the bid.

The satisfaction of the policy behind the ASIC Condition supports the grant of the relief requested in the Application. On the basis of the figures provided to the Panel, the Bid Condition would have been satisfied if it had been based on the Share Count Test.**(ii) The second basis - Exclusion of lost and abandoned shareholdings**The Application was also supported by the logic of the superseded ASIC PolicyStatement 98 (even if procedures laid down in that policy statement have not been followed precisely). That policy statement addressed the way in which lost and abandoned shareholdings were to be dealt with in determining compliance with a test similar to the Head Count Test in the former provisions in the Corporations Law relating to compulsory acquisition of shares following a takeover bid.The evidence concerning lost and abandoned shareholdings provided by the Applicants and PICA supported an inference that more than half of the non-associated shareholders (after taking into account the aggregation relief granted by ASIC) who are aware of the bid have accepted it. The information supporting this finding was not provided to ASIC by the Applicants when they made their original application. However, the Panel has decided that the grant of the relief requested by the Applicants on this basis was nevertheless appropriate. In particular, the Panel is of the view that if the Head Count Test is used as the basis for the ASIC Condition, then it is appropriate to exclude lost and abandoned shareholdings and to aggregate any instances of share splitting when calculating compliance with that condition. **(iii) The market integrity principle**ASIC submitted that the Joint Bid had proceeded for too long on the basis of the inclusion of the Bid Condition, and that the Bid Condition was non-waivable, for it to be changed now. For that reason, changing either of these aspects of the Joint Bid would adversely impact on an efficient, competitive and informed market for PICA shares.However, the Panel is of the view that the 'market integrity' principle is not offended by its decision to allow the Joint Bid to be declared free of the Bid Condition. The application of that policy to the Bid Condition arose solely because of ASIC's own requirement that the Bid Condition be included in the Joint Bid and that it not be able to be waived, and was not said to be based on any statement of independent intention on the part of the Applicants. The Panel considers that the Bid Condition and its non-waivable nature was an expression of ASIC's policy and would be understood by the market to be capable of change according to the dictates of proper policy. Consequently, the Bid Condition always was one which could be amended or omitted with ASIC's consent, should policy require. The Panel considers that both ASIC and the market should have recognised this.No evidence was provided to the Panel that any shareholder acted to their detriment in reliance on the non-waivability of the Bid Condition being immutable.**(iv) Relief granted by the Panel**As the grant of relief can be supported on the basis of either of the alternatives referred to above, the Panel considers that it makes little difference whether the relief takes the form of allowing the bidder to replace the Bid Condition with a condition which is already satisfied, or simply removes the ASIC Condition from the Current Relief. In the circumstances, the Panel has decided to set aside the ASIC decision which is the subject of the Application. The Panel proposes to vary the Current Relief to omit the ASIC Condition which will allow the Applicants to announce that the bid is free of its defeating conditions. On the basis of the information provided to the Panel it understands that if the Joint Bid becomes free of all defeating conditions then FIA will be able to proceed to compulsory acquisition of the remaining shares in PICA.The decision will have no effect on any rights people may have in damages under section 670A or 1041H of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), because of the Applicants' conduct in relation to the condition.**(c) The Panel**The sitting Panel comprised Andrew Knox (sitting President), Karen Wood (deputy President) and Elizabeth Alexander. The sitting Panel will post its reasons for decision on the Panel's website when they have been finalized.**4.2 Conclusion of proceedings relating to National Can Industries Limited**On 17 October 2003, the Panel advised that it had concluded the proceeding (the Proceeding) arising from the application (the Application) made by Visy Industrial Packaging Holdings Pty Ltd (VIPH) on 19 September 2003 in relation to the affairs of National Can Industries Limited (NCI). The Proceeding concluded following acceptance by the Panel of undertakings provided by NCI and ESK Holdings Pty Ltd (ESK). VIPH, a substantial shareholder in NCI alleged that unacceptable circumstances arose from the implementation agreement and other agreements in relation to a proposal under which ESK would acquire control of NCI under private agreements with Tyrrell family members and companies and a scheme of arrangement with other shareholders. It sought a declaration of unacceptable circumstances, orders to set aside the agreements and repayment of a break fee and variation of a modification provided by ASIC.**(a) Break Fees** VIPH alleged that unacceptable circumstances arose as a result of NCI's entry into an agreement to pay ESK a reimbursement fee of $1 million (First Break Fee) in the event that any of the independent directors withdrew their support for a proposed scheme of arrangement (the First Scheme). The Break Fee was paid by NCI to ESK upon the independent directors of NCI withdrawing their recommendation for the First Scheme after receiving the report of an independent expert that the First Scheme was not in the best interests of shareholders and the market price of NCI shares had substantially exceeded the offer price.ESK then proposed a further scheme (the Current Scheme) on the same terms as the First Scheme, but at a higher price. The independent directors recommended this Current Scheme and agreed to the payment of a further fee of $100,000 if they withdrew their support for the Current Scheme (Second Break Fee).The Application contended that the payment of the First Break Fee tended to inhibit an efficient, competitive and informed market in shares in NCI. Any break fee may inhibit an efficient market in shares in the relevant company, depending on its impact on declared and prospective bidders for the company. The Panel's Guidance Note on Lock-Up Devices (GN7) deals with when break fees are unacceptable because of their adverse effect on market efficiency.Any adverse effect of this fee on the efficiency of the market in shares in NCI is marginal. The fee was 1% of the value of the company, an amount specified in GN7 as immaterial to competition for control. The Panel rejected submissions that the 1% benchmark was inapplicable in these circumstances because the ESK proposal related to a scheme of arrangement, or because the Tyrrell family interests already hold over half of the shares in NCI.The First Break Fee corresponded to amounts actually and not unreasonably paid as the costs of putting a corporate opportunity before shareholders. The fact that the Tyrrell family hold over 50% of the shares in NCI and favour the ESK proposal does not mean that the ESK proposal will succeed, but it makes it difficult for any rival proposal to succeed.Although the effect of payment of the First Break Fee on market efficiency was marginal, the Panel found that the payment of the fee in these circumstances was unacceptable because it affected a proposed acquisition of a substantial interest and resulted from a decision of the Board of NCI which in the Panel's view was not appropriate in the circumstances of the ESK proposal. The agreement to pay the First Break Fee was inappropriate because:* ESK was a related party of the Tyrrell family, who have a controlling interest in NCI,
* the initiative for the ESK proposal lay with ESK, not with NCI, and it does not appear that there was any urgency about the proposal from NCI's point of view,
* the independent directors agreed to pay the fee before they had full information,
* the payment of the fee tended to inhibit competition in the market for control of shares in NCI; and
* the obligation to pay the fee was not triggered by rejection of the ESK proposal by shareholders, but by a decision of any one of the independent directors to withdraw their initial recommendation of the proposal. This trigger tends to fetter the ability of the directors to carry out their duties.

**(b) VIPH alleged that the payment contravened Chapter 2E of the Corporations Act (related party transactions)**The Panel does not suggest that there was any want of good faith on the part of the independent directors, and notes that they in fact withdrew their recommendation of the original ESK proposal, when the independent expert reported that it was not in the interests of shareholders other than the Tyrrell family interests.The Panel dealt with these issues by:* obtaining an undertaking from ESK to increase the consideration payable under the Current Scheme to give effect to the ESK proposal by 1.5 cents/share, which is the amount by which the payment of the First Break Fee depleted the assets of NCI. This ensures that shareholders are not adversely affected by the payment of the First Break Fee, if they approve the Current Scheme. In the experience of the Panel, shareholders in general prefer that an issue of this kind be resolved by increasing the bid rather than by restitution to the company; and
* obtaining an undertaking from ESK to repay the First Break Fee if a rival bid is announced before the Current Scheme meeting and is eventually successful. This ensures that if a rival bid succeeds, NCI's assets will not have been depleted by the payment of the First Break Fee, overcoming any adverse effect of the fee on that rival bid. If shareholders do not approve the Current Scheme, ESK is not required to repay the First Break Fee. Given the related party aspect of the fee, it is appropriate for this outcome to be decided by the shareholders, not the Board. Had the fee been above the 1% threshold in GN7 or had it in any other way been excessive or materially affected the market in shares in NCI, it would clearly have required separate ratification by shareholders. As the fee is immaterial under that guideline, it is appropriate for approval to take the form of making it depend on the outcome of the scheme meeting.

The Panel also accepted an undertaking from ESK that it would not accept payment from NCI of the Second Break Fee and an undertaking from NCI that it would not pay all or any part of the Second Break Fee. The Panel is concerned that the payment of break fees, such as the First Break Fee, does not adversely affect the efficiency of the Australian market in shares in companies subject to Chapter 6 generally, not just NCI. That market would be adversely affected by a perception that break fees could be paid in inappropriate circumstances and not be required to be re-paid, provided the fee was paid before there was any intervention. Fees paid in privatisation transactions, while not objectionable per se, are of particular concern in this regard.This decision sets a precedent in enforcement of standards in transactions related to bids, in that transactions which are immaterial as to amount may nonetheless be found to be unacceptable because of the circumstances in which they are entered into, and in requiring a break fee to depend on a shareholder vote.These undertakings have overcome the adverse effects of the payment of the First Break Fee on competition and efficiency in the market for shares in NCI and generally. In the Panel's view, that is as far as a Takeovers Panel should take this particular matter. If the Board's decision to agree to the fee, or to pay the fee, is open to challenge in the Courts, the interaction between this decision and section 659C of the Act will not prevent an action being brought to recover back the amount of the fee.**(c) Disclosure of substantial holdings/association**In its Application, VIPH alleged breach of section 606 (the 20% threshold) resulting from dealings between the Tyrrell family interests and breaches of the substantial holder notice provisions of the Act due to a discrepancy in the disclosure of voting power in NCI disclosed in two substantial holder notices lodged on behalf of Tyrrell Investments Pty Limited (TI). VIPH further alleged that the relationship and dealings between the Tyrrell family interests suggest an association amounting to unacceptable circumstances. The Panel considered the substantial holding notices lodged with NCI and ASX by TI on its own behalf and, apparently, on behalf of various other Tyrrell companies and family members both in November 2000 and in July and September this year. It obtained a detailed and helpful witness statement from Mr Michael Tyrrell describing the Tyrrell family shareholding structure as it related to NCI. As a result of this, the Panel indicated to Mr Tyrrell that it was concerned that the existing substantial holding notices did not accurately indicate the persons who are substantial holders in NCI in relation to the Tyrrell family shareholding or the reason that those persons have voting power in NCI. Following this, TI lodged, on 15 October substantial holding notices correcting and replacing those lodged in July and September. In the Panel's opinion and on the basis of the material available to it, these replacement notices appear to describe the relevant position more accurately.This information also overcame VIPH's concern that the consolidation of the Tyrrell family interests which is foreshadowed in the July and September notices (or related agreements) would lead (or had already led) to contraventions of section 606 of the Act. This concern in essence arose from the failure to disclose in the original July and September notices certain associations between Tyrrell family members and companies. The November 2000 notice disclosed that the Tyrrell family members and companies were then associated. The 15 October 2003 notices disclosed that they were associated because they had entered into agreements to implement the Tyrrell consolidation, which were attached to the notices and which were entered into after ASIC granted a modification of subsection 609(7), which is discussed below. Since no shares were acquired by negotiating or making those agreements, under subsection 609(7) or the ASIC modification, the Panel was satisfied that the Tyrrell consolidation did not contravene section 606.The Panel also formed the view that, notwithstanding the previous deficiencies in disclosure of substantial holdings in relation to the Tyrrell family shareholdings, not only in substantial holding notices but also, for example, in annual reports, the market had not at any time been significantly misled -- at all times, the market appears to have taken the same view of the Tyrrell family shareholding as was disclosed in theNovember 2000 notice and as the Panel formed following its review of the position; that is, that the Tyrrell family shareholders were associated and their shareholding was effectively a "block". As a result of this and of the improved disclosure created by the lodging of the replacement substantial holding notices, the Panel considered that no unacceptable circumstances warranting its intervention remained in relation to the substantial holding disclosures or the association of the Tyrrell family interests.**(d) ASIC Modification**The Application sought an order that ASIC's decision on 21 July 2003 to grant an ASIC modification (ASIC Modification) to vary subsection 609(7) of the Act to disregard the relevant interests in shares which arose from agreements for the Tyrrell consolidation, conditional on approval of the scheme of arrangement proposed by ESK, be set aside or be varied to impose a condition similar to the conditions referred to in ASIC's policy on joint bids.The Panel formed the view that the ASIC Modification was soundly based in policy. The ASIC Modification made exemptions to allow the Tyrrell consolidation conditional on the outcome of the vote on the scheme of arrangement. Where otherwise prohibited transactions are permitted subject to shareholder consent, whether as a result of ASIC relief or otherwise, the Panel considers that it is essential that shareholders receive complete disclosure about the exempt transactions to ensure that shareholders are fully aware of the consequences of their vote. In the case of a scheme of arrangement, this disclosure will typically be in the explanatory statement in relation to the scheme issued by the relevant company (here, NCI). That document is lodged with and reviewed by ASIC and is then the subject of further scrutiny by the Court. The Panel was concerned not to trespass on areas of responsibility of ASIC and the Court. Accordingly, the Panel indicated to the parties that it considered that the terms of the Tyrrell consolidation should be the subject of disclosure to the scheme meeting, commensurate with the requirements of the item 7 of section 611 (acquisitions approved by shareholders). The Panel obtained assurances by NCI that appropriate disclosure would be made of those matters in the explanatory statement and that it would be reviewed and commented upon by the independent expert and by ASIC that it would conduct its review of the documents bearing in mind the Panel's observations. On this basis, the Panel considered that no unacceptable circumstances had arisen or were threatened which necessitated its intervention.**(e) The Panel**The sitting Panel comprised Andrew Lumsden (sitting President), Anthony Burgess and Denis Byrne. The Panel will post its reasons for this decision on its [website](http://www.takeovers.gov.au/) when they have been settled.**4.3 Grand Hotel Group: Panel declines to commence proceedings**On 13 October 2003 the Panel announced that it had declined to commence proceedings in relation to an application by Grand Hotel Group (GHG) dated 30 September 2003 alleging unacceptable circumstances in relation to the affairs of GHG.First, GHG submitted that there were deficiencies with a Notice of Meeting given to members of the Grand Hotel Trust (GHT) for the purposes of a meeting called by Parker Global Strategies LLC for 22 October 2003. The purpose of that meeting is to remove the current responsible entity of GHT and appoint Hotel Capital Partners Ltd (HCP) in its place. Second, GHG submitted that various substantial holding notices (Notices) lodged by HCP and Touraust Corporation Pty Ltd (the entity which operates most GHT hotels) under Chapter 6C were defective. Specifically, GHG submitted that the Notices provided insufficient information about the nature of each entity's relationship with PGS.The Panel has declined to commence proceedings on the Notice of Meeting issue. It considers that in the current circumstances, the Notice of Meeting (and more generally the meeting to which it relates) do not relate to a control transaction for the purposes of Chapter 6 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). Chapter 6 is essentially concerned with situations in which control of the general meeting is changed, by acquiring relevant interests in securities. Chapter 6 is not designed to prevent members from using their votes to replace the management of companies and trusts, unless they contravene section 606 (the 20% threshold). Such arrangements may further require disclosure under Chapter 6C. The Application does not allege that the meeting of GHT members involves either a change in the voting power of any holder, or the acquisition of relevant interests in securities.The Panel was initially inclined to commence proceedings in relation to the Notices. It was concerned about the limited nature of the information provided by each of HCP and Touraust about their relationship with PGS. However, the Panel has now received draft letters by HCP and Touraust to GHG which adequately supplement the information provided in the Notices. The Panel expects GHG to release these letters to the Australian Stock Exchange. Accordingly, there are no further issues for the Panel to address, and the Panel has decided to dismiss the application without conducting proceedings. The sitting Panel comprised Peter Scott (sitting President), Ian Ramsay (deputy President) and Scott Reid.**4.4 Listed trust and managed investment scheme mergers: Panel releases draft guidance note**On 29 September 2003 the Takeovers Panel released for public comment a draft Guidance Note on mergers of listed unit trusts and other listed managed investment schemes.The draft Guidance Note, which was foreshadowed in the Panel's decision inColonial First State Group 01 [2002] ATP 15, discusses the Panel's views on"Trust Schemes", defined in the note as mergers and takeovers of listed trusts (including other kinds of listed managed investment schemes) by amending their constitutions (eg trust deeds). The Panel considers that Trust Schemes come within the Panel's power under Part 6.10 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Act).The Panel notes that a dispute over whether a Trust Scheme would give rise to unacceptable circumstances may lead to an application to the Panel, but similar issues may also arise in the context of an application to ASIC for a modification of the Act to facilitate a Trust Scheme or in an application for review of an ASIC decision to grant or refuse such a modification. The Panel indicates that there is no basis to assert that a takeover of a trust may only be conducted by way of a Chapter 6 takeover just because takeovers of trusts are now regulated under Chapter 6 of the Act. However, any merger should be done through a mechanism which is clearly effective, in a way that is harmonious with the principles and protections of Chapter 6 and not be a device to avoid the operation of any provision of Chapter 6.The Guidance Note proposes guidelines on applying the principles in section 602 of the Act to prevent unacceptable circumstances occurring in relation to a takeover of a trust under a Trust Scheme. Conducting a Trust Scheme contrary to the Panel's guidelines may constitute unacceptable circumstances.The Panel's note suggests specific guidance with respect to the:* application to Trust Schemes of the relevant requirements of the Act, Regulations, and ASIC policy for a members' scheme of arrangement;
* documentation for a Trust Scheme including the need for an independent expert's report;
* appropriate voting practices for Trust Schemes;
* appropriate disclosure required in a notice of meeting for a Trust Scheme, which should correspond with that in the explanatory statement of a scheme of arrangement, or both the bidder's and the target's statement for a takeover bid under Chapter 6 and should also satisfy common law disclosure requirements;
* disclosure of collateral benefits, especially ones that involve inequality of treatment and the requirement for relevant undertakings;
* recording telephone calls to unit holders; and
* withdrawal of an announced Trust Scheme without good reason.

The draft Guidance Note is available on the panel's website at:[http://www.takeovers.gov.au/Content/consultation/consultation.asp](http://www.takeovers.gov.au/Content/consultation/consultation.asp%22%20%5Ct%20%22_new)Comments on the draft Guidance Note are invited by Friday 7 November 2003 and may be sent by post, fax or email to:George Durbridge,Director, Takeovers PanelTelephone: +61 3 9655 3553 george.durbridge@takeovers.gov.au**4.5 Selwyn Mines Ltd (Receivers and Managers Appointed) - Panel Declines Application**On 25 September 2003 the Takeovers Panel advised that it has decided not to conduct proceedings with respect to the application made by Hillgrove Gold Limited (HGO) in relation to Selwyn Mines Limited (SLN).On 6 September 2003, HGO and Grange Resources Limited (GRR) announced their intention to make an off-market scrip bid for all of the fully paid ordinary shares in SLN (Bid). To date HGO and GRR have not released a bidder's statement.In its application to the Panel HGO alleged unacceptable circumstances in relation to the failure of the Receivers and Managers (Receivers) of Selwyn Mines Limited (Receivers and Managers Appointed) (SLN) to provide information to the directors of SLN in order to enable them to understand the legal status of negotiations between the Receivers and a third party purchaser (Ivanhoe Mines Limited and Mineral Resources Limited) of SLN's assets.HGO sought an order restraining the Receivers from completing the sale of the assets to the third party. The Panel decided that no case had been established for restraining this sale because of the possibility of the HGO/GRR Bid being made, the sale not being frustrating action to forestall that bid.The Panel decided that, with no bidder's statement having been lodged and no target's statement being due for some weeks, it would be premature to declare that unacceptable circumstances now exist because information which may be required to be included in the target's statement is not yet available to the directors of SLN. It noted that when and if the directors have a present need of information regarding the sale of the assets in order to make a recommendation to the shareholders, the situation may be different.The Panel was provided with certain information by the parties, and requested additional information. On the basis of the information before it, the Panel concluded that it would be unable to declare that unacceptable circumstances had arisen and accordingly it declined to conduct proceedings.The Panel will post its full reasons for this decision on its [website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) when they have been settled.The sitting Panel was Ian Ramsay (sitting President), Michael Ashforth (sitting deputy President) and Celia Searle. |
| **5. Recent Corporate Law Decisions** |
| **5.1 Constitutionality and exhaustiveness of the compulsory acquisition provisions of the Corporations Act** (By Michelle Tesoriero, Lawyer, Blake Dawson Waldron) Energex Ltd v Elkington [2003] QCA 430, Supreme Court of Queensland, Court of Appeal, de Jersey CJ, Jerrard JA and Helman J, 3 October 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/october/2003qca430.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/october/2003qca430.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Introduction**This case involved a constitutional challenge to the provisions of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (Cth) which allow a holder of at least 90% by value of the shares in a company to compulsorily acquire the remaining shares at "fair value". The case also involved an argument as to whether section 667C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), which sets out the method of valuing shares in the context of a compulsory acquisition, is exhaustive of the matters that should be taken into account. **(b) Facts**The constitution of Allgas Energy Ltd (the Company) provided for ordinary and preference shares. The total value of the ordinary share capital of the Company represented 99.85% of the Company's total value. The balance of 0.15% represented the value of the preference shares.Energex Ltd ("the respondent") held all of the ordinary shares, and 58.5% of the preference shares in the Company.Accordingly, the respondent held full beneficial interest in 90% by value of all of the shares in the Company. The respondent sought to avail itself of section 664A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and compulsorily acquire all of the Company's preference shares held by others.In accordance with the section, the respondent issued compulsory acquisition notices which offered preference shareholders $2.05 per share. More than 10% of the shareholders whose preference shares were the subject of the compulsory acquisition objected to the acquisition under section 664E, forcing the respondent to apply to the court for approval of the acquisitions under section 664F.The respondent was required to establish that the terms of the compulsory acquisition notice gave a "fair value" for the securities (section 664F(3)). The respondent relied on the report of an expert appointed by ASIC to argue that the terms represented a fair value of the securities.**(c) The constitutionality of the compulsory acquisition provisions** The primary judge rejected the argument that the compulsory acquisition provisions were unconstitutional, relying on the authority of the Court of Appeal's decision in Pauls Ltd v Elkington (2001) 189 ALR 551 (Pauls).In the present case, the appellants argued that the compulsory acquisition provisions were unconstitutional and that the decision in Pauls was wrong and should not be followed. The appellants submitted that acquisition of property was the sole or dominant purpose of the compulsory acquisition provisions and accordingly, attracted the constraint of section 51(xxxi) of the Constitution.De Jersey CJ (with whom the other judges agreed) held that Pauls was a recent decision of the Court of Appeal and should be followed unless demonstrably wrong. His Honour referred to a series of authority that rejected a constitutional challenge on the validity of these provisions. His Honour held that the authorities state that the provisions do not provide for acquisition on terms which are other than just.**(d) Determining the fair value of the securities**In approving the compulsory acquisition at first instance, the primary judge relied on section 667C which provides for the valuation of securities in such circumstances. Broadly, that section provides that in determining what is fair value, it is necessary to assess the value of the company as a whole and:* allocate that value among the classes of issued securities in the company (taking into account the relative financial risk and voting and distribution rights of the classes); and
* allocate the value of each class pro rata among the securities in that class (without allowing for a premium or applying a discount for particular securities in that class).

The appellant argued that the approach in section 667C was not exhaustively catalogued in the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). On this basis, the appellant argued that the primary judge erred in:* holding that the "synergies" which may be achieved following acquisition of all shares should not be included in the section 667C assessment (relying on the case of Goodyear Australia (2002) 167 FLR 1);
* excluding as irrelevant offers previously made on the market in attempts to acquire the outstanding preference shares.

De Jersey CJ refused to accept the argument in relation to synergies. His Honour held that no court had relied on the Goodyear case and found that making allowance for this consideration was excluded by previous authority.Responding to the appellant's argument in relation to the value of previous offers, the primary judge referred to section (2) of section 667C which specifically requires any valuation under the section to take into account any transactions within the preceding 6 months. The court held that this section was irrelevant as no transactions involving the preference shares had occurred in the preceding 6 months.The appellant further argued that the ASIC appointed expert, in determining fair value, had not allowed for the voting rights attaching to the preference shares or a premium for control.De Jersey CJ rejected these arguments on the basis of the facts of the case and the authority of the Pauls case.The appellant argued that in assessing the value of a company as a whole, the value should reflect "any special value for a particular purchaser". His Honour referred to previous authority which held that the compulsory acquisition provisions do not refer to the value of the company to any particular person.**(e) Costs**Section 664F(4) provides that a party in the position of the respondent was required to bear the costs of the proceedings unless a court finds that any other party has acted improperly, vexatiously or unreasonably. The appellants argued against the trial judge's finding that the appellants acted unreasonably, which had the effect of reducing the costs otherwise allowed to them. The Court found the trial judge's approach to be open and justified and refused to interfere with the trial judge's exercise of discretion in relation to costs.**5.2 Contravention of the Corporations Act did not invalidate resolutions of shareholders and creditors for the voluntary winding up of a company as the contravention caused no substantial injustice**(By Nghi Tran, Phillips Fox)Re: Aprais P/L (in liquidation) [2003] QSC 329, Supreme Court of Queensland, Holmes J, 30 September 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/september/2003qsc329.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/september/2003qsc329.htm%22%20%5Ct%20%22_new)or [http://cclsr.law.law.unimelb.edu.au/judgments](http://cclsr.law.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Facts**The applicant, Maria Carmela Twin, was, at all material times, one of two directors of Aprais Pty Ltd ('the company'). The other director was her husband. Mr and Mrs Twin each owned one of the two ordinary shares of the company. The respondent was the Deputy Commissioner of Taxation. On 24 February 2002, the applicant received a director's penalty notice from the respondent, pursuant to section 222 AOE of the [Income Tax Assessment Act 1936](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "default). The director's penalty notice rendered the applicant liable for unremitted withholdings in the sum of $45,290 unless a winding up of the company was commenced within 14 days. In April 2002, the respondent commenced proceedings against the applicant to recover the unremitted withholdings, alleging that the requisite winding up of the company had not occurred. In February 2003 the respondent sought summary judgment on its claim. That application for summary judgment was adjourned to permit the present application to be brought. The present application was relevant to the summary judgment application because it would determine whether the winding up of the company was commenced within the 14 days required by section 222 AOE. Section 513B of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('the Act'), deems the company's winding up to have commenced on the day it resolves by special resolution that it be wound up.The present application by the applicant sought declarations that resolutions for the voluntary winding up of Aprais Pty Ltd, allegedly passed on 8 March 2002, firstly by an extraordinary general meeting of the company and secondly by a meeting of creditors, were not invalid by reason of contraventions of the Act ('the Act'). The applicant also sought a declaration that the winding up of the company commenced on that date. The respondent opposed the making of the declarations on the grounds that the applicant had no standing to bring the application, that the resolutions for the winding up of the company passed at the meetings on 8 March were irregular, and that any order with the effect of validating the resolutions would cause the respondent substantial injustice. If it was determined that the resolutions for the voluntary winding up of the company passed on 8 March 2002 were valid and that the applicant would not be liable for the unremitted withholdings, the winding up of the company would have commenced within the required 14 days.**(b) The applicant's standing**Section 1322(4) of the Act permits the court 'on application by any interested person' to make orders of the kind sought by the applicant. The respondent argued that the applicant was not an interested person for the purposes of the section because she sought the declarations to advantage herself in the summary judgment application made by the respondent, rather than to protect any rights held by her as a director or shareholder of the company.In determining the issue of standing, Holmes J referred to the decision of Austin J in Allatech Pty Ltd v Construction Management Group Pty Ltd [2002] NSWSC 757 and concluded that a real financial interest in the result sufficed to confer standing as an 'interested person', although the nature and extent of that interest may be a significant determinant of other issues relevant to whether an order should be made. Holmes J held that the applicant was an 'interested person' within the meaning of section 1322(4) because her liability for unremitted withholdings was directly dependent on whether the resolutions of the meetings of members and creditors were invalidated by contraventions of the Act.**(c) Irregularities in contravention of the Corporations Act in relation to the extraordinary general meeting**The respondent detailed a number of irregularities, which in its submission, should have rendered invalid the resolutions passed both at the extraordinary general meeting and at the meeting of creditors. Holmes J found that irregularities in contravention of the Act had occurred in relation to the resolutions passed by the shareholders and creditors. However, Holmes J held that these irregularities did not invalidate the resolutions passed, subject to any questions of substantial injustice.Holmes J found that the following irregularities had occurred in relation to the extraordinary general meeting of shareholders:* The applicant had not consented to short notice prior to the extraordinary meeting. Section 249H(1) of the Act requires 21 days notice for a meeting of the company's members, but section 249H(2) permits shorter notice if members with at least 95% of the votes which may be cast at the meeting agree beforehand. Holmes J held that a consent to short notice given before the commencement of the meeting satisfies the requirement in section 249H(2). The consent to shorter notice does not need to be given before the giving of the notice. From the evidence it seemed that the applicant's consent to short notice was not given prior to the meeting. Only Mr Twin signed the consent to short notice, on 27 February 2002.
* The extraordinary general meeting was not held at the address nominated in the notice.
* The requisite number of members did not vote at the extraordinary general meeting. Holmes J found that the applicant did not participate in the meeting, although she agreed with its outcome. The formalities were not observed, but there was mutual assent to the resolution.

Holmes J concluded that it was a proper case for the application of the 'Duomatic principle':'Where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'Because Mr and Mrs Twin were the only shareholders and agreed to the course of action, then notwithstanding any contraventions of the Act as to the time or place of the meeting, Holmes J declared the resolution and meeting of shareholders not invalid, subject to any question of substantial injustice.**(d) Irregularities in contravention of the Act in relation to the creditors meetingHolmes J found that the following irregularities had occurred in relation to the meeting of creditors*** The creditors had not been given at least 7 days notice by post, as required by section 497(2)(a). Rather notice was given by facsimile, one day short of the 7 days required.
* The advertising requirement in section 497(2)(d), of publication in a daily newspaper circulating in that state in which the company carried on business, was not met.
* A copy of the notice of meeting and accompanying documents were not lodged, as required by section 497(2)(c), with ASIC at least 7 days before the meeting date.

Holmes J held that the irregularities in relation to the resolutions passed by the shareholders and creditors were procedural in nature and therefore a declaration under section 1322(4) was appropriate, as long as the further requirement in section 13226(c) was met - 'that no substantial injustice has been caused or is likely to be caused to any person'.**(e) Substantial injustice**Holmes J held that no substantial injustice had been caused or was likely to be caused to the respondent by the irregularities or a declaration validating the irregularities. Had the respondent received notice in the correct form and attended the meeting of 8 March 2003, the respondent would have voted for the winding up, but for a different liquidator. **(f) Conclusion**The applicant and her husband as shareholders and directors of the company had not complied with the formal requirements for the passing of resolutions to wind up the company. Notwithstanding the irregularities, Holmes J held that the irregularities did not invalidate the resolutions passed by the shareholders and creditors. Holmes J was satisfied that the irregularities had not caused any substantial injustice to the respondent, therefore made the declarations sought by the applicant. The effect of the declaration was that the winding up of the company had been commenced within the 14 days prescribed by section 222 AOE. The applicant and her husband were not liable for unremitted withholdings in the sum of $45,290. **5.3 Abuse of voluntary administration provisions** (By Ron Schaffer and Alaister Young, Clayton Utz)Blacktown City Council v Macarthur Telecommunications Pty Ltd [2003] NSWSC 883, Supreme Court of NSW, Barrett J, 26 September 2003The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc883.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc883.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)The [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("the Act") gives the Court a general supervisory power to intervene where the external administration provisions under Part 5.3A of the Act are abused for ulterior motives.The case of Blacktown City Council v Macarthur Telecommunications Pty Ltd clearly shows the Court will intervene in the external administration procedures of companies where those procedures are abused and this is done in bad faith. In a case which highlights the difference between the Australian system of managing external administration of companies and that of the UK and the USA, Blacktown City Council ("Blacktown") successfully sought orders that the voluntary administration of Macarthur Telecommunications Pty Ltd ("Macarthur") cease and that it be wound up in insolvency.**(a) Facts**Blacktown and Macarthur were embroiled in two actions in the District Court of New South Wales in which Blacktown sued Macarthur for negligence relating to the giving of faulty advice. At 8.36pm on the last business day before the hearing was due to begin, Macarthur gave notice to Blacktown that it had no assets, was not trading and was "in the process of appointing an administrator". This had the effect of staying the District Court proceedings on the basis that section 440D(1) of the Act relevantly provides that:"[d]uring the administration of the company, a proceeding in a Court against the company ... cannot be begun or proceeded with, except:* with the administrator's written consent; or
* with leave of the Court and in accordance with such terms (if any) as the Court imposes."

On 1 September 2003 Macarthur's sole director and shareholder, Mr Cullen, wrote to the administrator of the company outlining a proposal for a deed of company arrangement ("the deed"). The deed contemplated a payment of $50,000 by Mr Cullen, to form a "deed fund" for the benefit of creditors and the costs of administration. On 3 September 2003 the administrator prepared a report to creditors indicating that they could expect to receive a mere few cents in the dollar pursuant to the deed. Macarthur had only three creditors:* Mr Cullen, in respect of his loan to the company of $95,000,
* Macarthur's accountants, who were owed $5,500 and
* Macarthur's solicitors, who were owed $237,449.

These debts did not appear on the last of the company's balance sheets.Macarthur's financial statements showed two important facts. First, the company had not traded since at least 1 July 2001 and secondly that at 30 June 2002 Macarthur's total liabilities of $96,200 were more than double its total assets of $44,223, leaving the Court in no doubt that the company was insolvent.**(b) Issues to be considered**Blacktown brought proceedings to terminate the administration. The main issue to be considered by Justice Barrett was whether it was appropriate to exercise the Court's discretion, conferred by section 447A of the Act, to terminate Macarthur's voluntary administration. Under section 447A, this discretion was only open to the Court if, among other things, the Court decided that entering into voluntary administration by Macarthur was a mechanism with which to abuse the provisions of Part 5.3A.Although this discretion is a wide one, prevailing Australian jurisprudence (Cawthorn v Keira Constructions Pty Ltd (1994) 13 ACSR 337 at 341) takes the view that in the absence of bad faith companies should freely be able to enter into administration without the cumbersome intervention of the judiciary.**(c) The Court's findings**In order to determine whether an abuse of process had occurred, his Honour first considered the effect of the deed. It would free Macarthur from its substantial debts, as the three creditors would be likely to accept the few cents in the dollar. This was based on a finding that "it may be inferred that a meeting of creditors is likely to determine matters predominantly from the selfish point of view of [Mr Cullen]", especially as the professional fees of Macarthur's accountants and solicitors may well have been underwritten by Mr Cullen himself. A second, albeit unlikely, consequence of the deed was that it might return Macarthur to "the mainstream of commercial life". The most troubling consequence of this for the Court was that Macarthur would not be wound up and that Macarthur, and its sole director, would be spared the investigative eye of a liquidator. The Court found that the administration of Macarthur, as well as the deed proposal, was engineered by Mr Cullen in a "clear and deliberate, but not subtle, attempt to stave off the District Court hearing" and was designed to "forestall the obvious and inevitable fate of insolvent winding up, in which the conduct of Mr Cullen will come under scrutiny by reference to the insolvent trading provisions" of the Act. The Court found that there was "at least a strong inference" that Macarthur had incurred debts while insolvent. Although the question of whether Mr Cullen had allowed Macarthur to trade while insolvent in contravention of Division 3 of Part 5.7B of the Act was not an issue before the Court, it was noted that had insolvent trading indeed incurred, Mr Cullen may have been liable to pay civil penalties or, if actual dishonesty occurred, convicted of a statutory offence.The Court ultimately found that Mr Cullen abused the external administration provisions of the Act by attempting to install a procedure "substantially compliant to his will as an alternative to the rigours of winding up". Upon this finding, the Court embarked upon a rare exercise of its general supervisory function in the external administration procedures of corporations. The Court ordered, under section 447A(1) that the voluntary administration end and that Macarthur be wound up in insolvency.**(d) Voluntary administration cannot be used for ulterior motives**Although this case is a relatively rare example of the Court exercising its statutory power to order the cessation of a company's external administration, this decision is a stark reminder that although the Act facilitates companies entering into voluntary administration without the Court's approval, voluntary administration cannot be used in an attempt to avoid the duty of directors to prevent the company from trading while insolvent or as a mere attempt to avoid court proceedings.This decision highlights the way in which Australian corporate governance under the Act differs from Part 1 of the Insolvency Act 1986 (UK) and Chapter 11 of the US Bankruptcy Code in the regulation of the entering into of external administration by companies. In the UK the sanction of the Court is required if a company is to enter into voluntary administration, while in the US there are lengthy and cumbersome judicially supervised provisions for the reorganisation of financially ailing companies. Under the UK regime the conduct of Macarthur may have been stopped earlier, obviating the need for Blacktown to seek an order that the voluntary administration end. Having said that, however, it is worth noting that requiring the Court's sanction before a company could enter into voluntary administration, or taking the US approach of allowing the drawn out process of external administration, would ultimately increase costs, resulting in a diminution of the amount of funds recoverable by creditors.One other issue worth noting arises from the Court's comment that voluntary administration would avoid the appointment of a liquidator and hence a liquidator's investigation of potential insolvent trading claims. This is, of course correct, but it also should be remembered that ASIC can initiate insolvent trading actions against directors even if their company is in administration or subject to a deed of company arrangement. The most prominent example of this is the Water Wheel case (Australian Securities and Investments Commission v Plymin [2003] VSC 123). **5.4 Minimum subscription requirements for managed investment schemes**(By Carolyn Pugsley, Articled Clerk, Freehills)Spangaro v Corporate Investment Australia Funds Management Ltd [2003] FCA 1025, Federal Court of Australia, Finkelstein J, 26 September 2003 The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/september/2003fca1025.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2003/september/2003fca1025.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_blank)**(a) Facts**The first defendant, Corporate Investment Australia Funds Management Ltd (CIAFM) was the responsible entity for a managed investment scheme known as the Australian Cotton Project (Project). The object of the Australian Cotton Project was to develop land for cotton production and to grow and harvest cotton for sale. The second defendant, Australian Cotton Ltd (in liquidation) (ACL), entered into a contract to purchase the Project land. The third defendant, Cardinal Financial Securities Ltd (in liquidation) (Cardinal), was appointed custodian for the Project. Capital was required to fund both the purchase of the land by ACL, and the management of the project by CIAFM. A prospectus was issued inviting applicants to subscribe for interests in the Project, at a cost of $7,570 per interest. CIAFM offered to sell up to 1,200 interests in the Project, with a minimum subscription of 200 interests. The prospectus stated: 'If the minimum subscription is not reached by 30 June 1999, all will be returned to subscriber'. Each applicant was also required to subscribe for at least 6,000 ACL shares, which could be either fully paid at $0.50 per share, or partly paid to $0.32 per share. The plaintiff, Mr Spangaro, decided to apply for six interests in the Project and 36,000 partly paid ACL shares. The total amount Mr Spangaro was required to pay for the interests and shares was $56,940; $45,420 in respect of the interests and $11,520 for the shares. Mr Spangaro delivered a cheque for $25,120 to CIAFM, which was deposited into the "Application Monies Bank Account" maintained by Cardinal. Mr Spangaro, along with most of the other applicants, borrowed the balance of his application money from Bridging Credit Pty Ltd (Bridging Credit). In total, Bridging Credits contributed $3,189,690 on behalf of the applicants. On 30 June 1999, Mr White, the managing director of CIAFM and the fifth defendant, wrote a letter to the managing director of Cardinal confirming that the minimum number of subscriptions had been reached and instructing Cardinal to transfer the application money into an account maintained by CIAFM. Cardinal complied with this instruction and transferred the money on 1 July 1999. Mr Spangaro brought an action against the defendants on his own account and on behalf of other participants in the Project. He alleged that: (i) the minimum subscription for interests in the Project was not reached by 30 June 1999; (ii) because the minimum subscription was not reached, Cardinal held the subscription money on trust for the applicants; (iii) by instead paying the subscription money to CIAFM, Cardinal acted in breach of trust and was liable to make compensation for that breach; and (iv) in receiving the subscription money, CIAFM received an unjust enrichment for which it was liable to make restitution. Mr Spangaro's allegations raised legal issues regarding the meaning of the term "minimum subscription" and the division of responsibility in respect of a managed investment scheme between the responsible entity and the appointed custodian. **(b) Was the minimum subscription reached by 30 June 1999?**Justice Finkelstein observed that, in order to determine whether the minimum subscription for the Project had been reached by 30 June 1999, it was first necessary to ascertain the meaning to be given to the expression "minimum subscription" as it was used in the prospectus. He made note of two opposing views on the meaning of this expression in respect of share issues. Under the orthodox view, a minimum subscription for shares is not reached until the price of the shares is actually received by the company: the making of a conditional payment by the delivery of a cheque will not suffice. This view was the accepted position in Australia for many years, until the [Corporate Law Economic Reform Program Act 1999 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) (CLERP Act). Under the more flexible view adopted by the CLERP Act, a minimum subscription condition is satisfied by the receipt of applications for that number of securities together with promises to pay for them. Justice Finkelstein found that, while there was 'much to be said in favour of adopting a strict meaning of "subscribe" when dealing with subscriptions for interests in a managed investment scheme', the Project prospectus and constitution gave a more flexible meaning to the expression "minimum subscription". According to those documents, the minimum subscription for the Project would be satisfied upon receipt by CIAFM of applications for 200 interests together with the requisite cheques, namely cheques with a total face value of $1,514,000. Mr Spangaro did not question CIAFM's evidence that it had received applications for 490 interests (well in excess of the minimum 200 required) by 30 June 1999. He did, however, challenge Mr White's assertion that CIAFM had received cheques with a total face value of $3,709,300 by 30 June 1999. Mr Spangaro argued that the Bridging Credit cheque for $3,189,690 had not been received by CIAFM on 30 June 1999 and that, on this basis, the minimum subscription requirement of cheques with a face value of $1,514,000 had not been met. Based on the evidence before him, Justice Finkelstein held that the Bridging Credit cheque was not delivered by 30 June 1999 and that the minimum subscription requirement had not been achieved. The prospectus therefore required that the subscription money be returned to the applicants. **(c) Did Cardinal hold the application money on trust for the applicants?**Mr Spangaro argued that upon failure to achieve the minimum subscription for interests in the Project by 30 June 1999, Cardinal held the application money on trust for the applicants. Justice Finkelstein noted that the existence of a trust will depend on whether that is what was intended by the promisor. Based on the Project prospectus and constitution, he found it was intended that Cardinal would hold the application money on trust for the applicants until the minimum subscription was reached. Cardinal sought to resist the finding of a trust in favour of the applicants on two bases. First, it argued that its Custody Agreement with CIAFM was inconsistent with such a conclusion. The relevant section of the Custody Agreement stated that nothing in it 'evidences or constitutes…Cardinal as a trustee of the Project Property'. Alternatively, Cardinal relied on section 601FC(2) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), which provides that a responsible entity holds scheme property on trust for scheme members. Cardinal argued that, based on section 601FC(2), it simply held the application money as agent for the true trustee, CIAFM. Justice Finkelstein dismissed both of Cardinal's arguments. He held that because the Project did not come into existence until the minimum subscription was reached, there was no Project (or scheme) property upon which the clauses cited by Cardinal could operate. He therefore concluded that, as at 1 July 1999, Cardinal held the application money on trust for the applicants and that Cardinal had acted in breach of the trust by paying the application money to CIAFM without the applicants' authority. **(d) Was CIAFM unjustly enriched?**Mr Spangaro claimed that CIAFM had been unjustly enriched at his expense, as it had retained the amounts paid for the interests. Justice Finkelstein accepted that the facts clearly established an enrichment in favour of CIAFM. He noted that Mr Spangaro's claim was unusual, as it was being brought against a third party (CIAFM) rather than directly against the party to whom payment was made (Cardinal). Nevertheless, he held that this was not a barrier to the claim, based on the authority of Lipman Gorman v Karpnale Ltd [1991] 2 AC 548. Justice Finkelstein found that the enrichment to CIAFM fell within one of the recognised categories of unjust enrichment, as money had been paid for a consideration which failed. Mr Spangaro therefore succeeded in his claim against CIAFM. **(e) Was CIAFM liable as a constructive trustee?**Although no argument was advanced by Mr Spangaro on this basis, Justice Finkelstein went on to consider whether CIAFM could also be liable to Mr Spangaro (and the other applicants) as a constructive trustee of the application money. He focused on whether CIAFM could be liable based on the doctrine of "knowing receipt", articulated by Lord Selbourne in Barnes v Addey (1874) LR 9 Ch App 244. Justice Finkelstein expressed his opinion that an action based on "knowing receipt" will succeed if 'the defendant possessed at least knowledge of the circumstances which would indicate to an honest and reasonable person that the property received is trust property'. He concluded that, had Mr Spangaro brought a claim against CIAFM based on knowing receipt, Mr White's degree of knowledge at the time he wrote the letter of 30 June 1999 would have been sufficient to render CIAFM liable. **5.5 AAT amends ASIC's decision to prohibit a company from relying on the special prospectus content rules**(By Seeyan Lee, Solicitor, Corrs Chambers Westgarth)Captech Group Limited and Australian Securities and Investments Commission [2003] AATA 964, Administrative Appeals Tribunal, Mr RP Handley, Deputy President, 26 September 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/aata/2003/september/2003aata964.htm](http://cclsr.law.unimelb.edu.au/judgments/states/aata/2003/september/2003aata964.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) The relevant law**Section 713(6) of the [Corporations Act 2001(Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Corporations Act") provides that ASIC may determine that a Company may not rely on this section to use a short-form prospectus in new capital raising activities, if ASIC is satisfied that the company has contravened provisions under Chapter 2M - Financial Reports and Audits of the Corporations Act in the previous 12 months.**(b) AAT's decision**ASIC made a section 716(3) determination against Integrated Investment Group Limited (formerly known as Captech Group Limited) ("Captech"), disallowing Captech from using a short-form prospectus for capital raising activities for 12 months. The AAT varied ASIC's decision and ordered that a three-month exemption be applied to Captech instead, due to Captech's particular circumstances. **(c) The facts**Captech is a listed company and is required to lodge with ASIC audited financial reports ("Reports") each half-year period. Section 320(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires that these reports be filed with ASIC 75 days after the end of each half-year period.Captech failed to lodge the Reports for the half-year ending on 30 December 2002 on time. On 22 April 2003, Captech sought and was granted an extension of time to file the Reports with ASIC by 31 May 2003. Captech did not lodge its Reports with ASIC by 31 May 2003. On 2 June 2003, an ASIC officer sent an internal memo to the ASIC delegate, who was responsible for making the relevant determination, recommending that a section 713(6) determination be made against Captech for its failure to lodge its Reports by 31 May 2003. Captech ultimately lodged its 31 December 2002 Reports with ASIC on 4 June 2003.On 5 June 2003, the ASIC delegate made a section 713(6) determination against Captech, as recommended by the ASIC officer, precluding Captech from relying on section 713 for 12 months, until 5 June 2004.On 1 July 2003, Captech lodged an application with the AAT to review the decision made by ASIC on 5 June 2003. The issue before the AAT was whether or not ASIC had exercised its power under section 713(6) unreasonably.**(d) The reasons for the AAT's decisions**The AAT, in conducting its review, stands in the shoes of the original decision-maker, in this case ASIC. Its main role is to review the process used by the original decision-maker to reach its decision. In this case, the AAT concluded that ASIC did not follow its own policies in exercising its powers under section 713(6). It is part of ASIC's policy under section 713(6) to offer an entity in breach of its disclosing obligations under this section an opportunity to make submissions to ASIC that "despite its failure to comply with the above obligations, the market is fully informed." To demonstrate this, the entity must:* make adequate disclosures of material information to the market; and
* allow an adequate period of trading (of not less than three months) of its securities to enable the market to absorb the relevant disclosures.

Relevantly, in its review process, the AAT also referred to the advice given by ASIC's action officer to the ASIC delegate that stated that:"… if a company lodged the requirement documents within 5 business days of the date required under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), it may be appropriate to provide for a reduced exclusion period of 3 months… in the absence of such a serious breakdown [of internal compliance controls], a 3 month period may be sufficient time to ensure that the company has its compliance controls in order…and that the market has absorbed these disclosures…"In this case, the AAT accepted the evidence from Captech that:* its delay in lodgement of its Reports arose as a result of the restructuring of its business and its management which had been ongoing since October 2002;
* its failures to comply with its disclosure obligations are not indicative of a breakdown of its internal compliance controls but was a consequence of internal turmoil in the company;
* its turmoil has been resolved and it is now looking for new business opportunities; and
* it did make an effort to comply with its disclosure requirements by lodging its reports within 3 business days of the expiration of the lodgement period.

Thus, the AAT concluded that, having regard to Captech's particular circumstances, ASIC should have made a determination based on its own policies to impose a three month exclusion period on Captech instead of a 12 month period.The AAT varied ASIC's decision and decided that Captech may not rely on section 713 for three months ending on 5 September 2003.**5.6 Reinstatement of deregistered company - issues arising under the Workers Compensation Act** (By Elizabeth O'Donovan, Deacons)WorkCover New South Wales v Picton Truck and Trailer Repairs Pty Ltd (de-registered) [2003] NSWSC 859, New South Wales Supreme Court, Gzell J, 18 September 2003The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc859.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc859.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Summary** The plaintiff, WorkCover New South Wales, applied to the court under section 601AH(2) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) for an order for ASIC to reinstate the defendant which was a deregistered company (Company). Section 601AH (2) of the [Corporations Act 2001 (Act)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), provides that the court may make an order that ASIC reinstate the registration of a company if:* an application for reinstatement is made to the court by a person aggrieved by the deregistration; and
* the court is satisfied that it is just that the company's registration be reinstated.

The plaintiff's application was dismissed on the basis that the plaintiff could not establish that he was a "person aggrieved" under section 601AH (2) of the Act nor would it be just in the circumstances to reinstate the Company where reinstatement would increase the debt of the Company.**(b) Facts**The creditors of the Company had resolved that the Company should be wound up on the grounds that it was insolvent and the Company was subsequently deregistered. Prior to the Company being covered by a worker's compensation policy of insurance, a workman, who was an employee of the Company, sued the plaintiff under the uninsured liability and indemnity scheme in Div 6 of Pt 4 of the [Workers Compensation Act 1987](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3831" \t "default). The plaintiff was ordered to pay compensation to the workman. The plaintiff then brought proceedings against the Company whom it believed to be the employer of the workman.The plaintiff subsequently discovered that the Company was the employer and the plaintiff was put on notice that there were some liquidity problems with the Company. However, the plaintiff did not make further inquiries and did not lodge a proof of debt against the Company. The plaintiff then sought reimbursement personally from Mr Aiken, the former director of the Company. The plaintiff alleged that Mr Aicken was a "culpable director" in terms of section 145A(1) of the [Workers Compensation Act 1987](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3831" \t "default), since he was the director of the Company when it did not have a policy of insurance covering it for liability for injury to the workman. Under section 145A(1) of the [Workers Compensation Act 1987](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3831" \t "default), liability for a claim for reimbursement against a director of a corporation will only arise if a notice has been served on the corporation.Therefore, the plaintiff sought reinstatement of the Company in order to serve a notice on the defendant to support its claim for reimbursement against the defendant.**(c) Law**In order to successfully apply for reinstatement of a company under section 601AH (2) of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), the plaintiff had to establish that it was a person aggrieved by deregistration of the defendant and that it was just to reinstate the Company. An aggrieved person has been given a wide interpretation by the courts. The applicant must have "a genuine grievance because an order has been made which prejudicially affects his interests": Attorney General of Gambia v N Jie [1961] AC 617.Gzell J held that it would not be just to reinstate a company when such reinstatement would increase its debt and cited Payne v Wizard Industries Pty Ltd (1997) 24 ACSR 277.Gzell J also stated that depending on the circumstances, it was in the public interest for the plaintiff to recover workers' compensation payments made on behalf of uninsured employers and to recover these payments from directors where the company is unable to pay. **(d) Decision**Gzell J held that since the plaintiff did not have a relevant interest at the time of the Company's deregistration, the plaintiff was not a "person aggrieved" for the purposes of section 601AH(2) of the Act as the plaintiff did not suffer any injury or damage in a legal sense as a consequence of the defendant's deregistration. Gzell J also formed the view that it would not be just in the circumstances to reinstate an insolvent company where such reinstatement would increase the Company's debt.Gzell J held that any consideration given to the public interest was negated by the unexplained delay by the plaintiff when it was put on notice of the potential insolvency of the Company. It was the plaintiff's delay which meant that it failed to have a legal interest in the deregistration of the Company.**5.7 Non-fulfilment of conditions under an order setting aside a statutory demand**(By Corinna Elliott, Mallesons Stephen Jaques)Asia Pacific Glass Pty Limited v Sindea Trading Co Pty Ltd [2003] NSWSC 845, New South Wales Supreme Court, Barrett J, 12 September 2003 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc845.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc845.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Background**A statutory demand had previously been issued by the defendant against the plaintiff. On 23 April 2003, Barrett J made an order (under sections 459H and 459M of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)) as follows:"Order that the statutory demand…be set aside on condition that the plaintiff, not later than 31 May 2003, commence in a court of competent jurisdiction (and file and serve originating process containing or accompanied by particulars of claim and in damages in respect of) the legal proceedings" they had alluded to in one of their affidavits.Satisfaction of the condition to which the order was subject required, at the least, that three things occur not later than 31 May 2003:* commencement of legal proceedings of the relevant description;
* filing and service of an appropriate originating process; and
* the communication (either in the originating process itself or in something accompanying it) of "particulars of claim and of damages" in respect of the proceedings.

None of these three things had occurred on or before 31 May 2003. Therefore the condition attached to the order of 23 April 2003 was not satisfied according to its terms.On 2 June 2003, the plaintiff filed a statement of claim against the defendant in essence pleading the existence and breach of certain contracts. The plaintiff's solicitor claimed that on 3 June 2003 he forwarded a copy of the statement of claim to the defendant's solicitors at their document exchange box and that the firm declined to accept service on behalf of the defendant. Thereafter, the solicitor claimed that he had effected service by posting a copy to the defendant's registered office on 20 June 2003.**(b) The interlocutory process**On 10 September 2003, the plaintiff sought a variation of the order made on 23 April 2003 under Part 40 rule 9 of the [Supreme Court Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11562" \t "default). The precise order sought by the plaintiff was:"An order varying the terms of order 1 made by the Court on 23 April 2003 to the extent that the time within which the condition attaching to the order is required to be satisfied be extended from 31 May 2003 until 20 June 2003."**(c) The law**Section 459G - Company may apply (1) A company may apply to the Court for an order setting aside a statutory demand served on the company. (2) An application may only be made within 21 days after the demand is so served. (3) An application is made in accordance with this section only if, within those 21 days:(a) an affidavit supporting the application is filed with the Court; and (b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company. Section 459H - Determination of application where there is a dispute or offsetting claim (1) This section applies where, on an application under section 459G, the Court is satisfied of either or both of the following:(a) that there is a genuine dispute between the company and the respondent about the existence or amount of a debt to which the demand relates; (b) that the company has an offsetting claim. (2) The Court must calculate the substantiated amount of the demand in accordance with the formula:Admitted total - offsetting totalwhere: admitted total means: (a) the admitted amount of the debt; or (b) the total of the respective admitted amounts of the debts; as the case requires, to which the demand relates. offsetting total means: (a) if the Court is satisfied that the company has only one offsetting claim-the amount of that claim; or (b) if the Court is satisfied that the company has 2 or more offsetting claims-the total of the amounts of those claims; or (c) otherwise-a nil amount. (3) If the substantiated amount is less than the statutory minimum, the Court must, by order, set aside the demand. (4) If the substantiated amount is at least as great as the statutory minimum, the Court may make an order:(a) varying the demand as specified in the order; and (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the company. (5) In this section:admitted amount, in relation to a debt, means: (a) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the existence of the debt-a nil amount; or (b) if the Court is satisfied that there is a genuine dispute between the company and the respondent about the amount of the debt-so much of that amount as the Court is satisfied is not the subject of such a dispute; or (c) otherwise-the amount of the debt. offsetting claim means a genuine claim that the company has against the respondent by way of counterclaim, set-off or cross-demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates). respondent means the person who served the demand on the company. (6) This section has effect subject to section 459J. Section 459M - Order subject to conditions An order under section 459H or 459J may be made subject to conditions. **(d) The decision**The [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) does not refer to the consequences of non-fulfilment of a condition imposed pursuant to s 459M. In an obiter dictum in Australian Vineyard Management Ltd v Madden [1998] NSWSC 84, when referring to an order setting aside a statutory demand, Young J (as he was then) stated:"Of course, if the conditions are not complied with, the statutory demand will continue to stand."In Natcraft Pty Ltd v WIN Television Pty Ltd [2003] 1 QDR 196, Muir J, with whom Atkinson J agreed, regarded a section 459H order made subject to a section 459M condition as "conditional" in the sense referred to by Lord Denning MR in Wickman Machine Tool Sales Ltd v Schuler [1972] 2 All ER 1173. That is, so that the legal force or effect of the order is made to depend on fulfilment of the condition.The [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) is silent on this issue; consequently the [Supreme Court Rules](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11562" \t "default) apply. Part 42 rule 11 of the Supreme Court Rules states:"Where a person is entitled under a judgment subject to the fulfilment of a condition, and there is a failure to fulfil the condition, then, unless the Court otherwise orders:(a) he shall lose the benefit of the judgment, and(b) any other person interested may take any steps which:(i) are warranted by the judgment, or(ii) might have been taken if the judgment had not been entered or the order had not been made."Therefore, the failure of the plaintiff to comply with the condition subject to which the order of 23 April 2003 was made means that the beneficial effect of that order in favour of the plaintiff ceased, so that the statutory demand could no longer be regarded as "set aside".Against this background the Court had to consider whether Part 40 rule 9 enables it to vary the order of 23 April 2003 in such a way to restore to the plaintiff the benefit of setting aside of the statutory demand despite non-compliance with the condition upon which the order was made and, if so, whether, in the exercise of discretion, the court should do so.As the above analysis shows, the order continued to stand. However, under Part 40 rule 9 an application for an order varying the terms of the original order amounts to an application for an order setting aside the statutory demand. Yet, section 459G(2) says that an application to the court for an order setting aside a statutory demand "may only be made" within 21 days after the demand is served. The decided cases show this specification to be strict. The discretion to extend the time specification was therefore not available.The interlocutory process filed on 10 September was dismissed.**5.8 Fiduciary and statutory duties of resigning directors**(by Phillips Fox)Southern Real Estate Pty Ltd v Valerie Dellow & Wayne Arnold [2003] SASC 318, Supreme Court of South Australia, Full Court, Debelle, Nyland and Lander JJ, 10 September 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2003/september/2003sasc318.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2003/september/2003sasc318.htm%22%20%5Ct%20%22_new)or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)This case was an appeal involving an exploration of the principles of fiduciary and statutory duties owed by a director of a company to the company in the context of resigning from the directorship to establish a business in direct competition with the company.**(a) Facts**The material facts of the case were as follows. The Respondent, whilst a director and employee of Southern Real Estate Pty Ltd ('the Company'), formed an intention to resign as a director of the Company and start up her own real estate business which would compete directly with the Company. While still acting as a director of the Company, she took a number of preparatory steps to establish her competing business and enable it to commence immediately upon her resignation from the Company, such as printing stationery, purchasing a computer and most significantly, compiling a list of almost half of the client details of the Company and preparing letters to those clients informing them of her departure and inviting them to call her. Subsequently, 57 clients or the Company transferred their business.It was accepted by the trial judge that the Respondent had not posted the letters until the day following her resignation and that she had not used any confidential information belonging to the Company but had relied solely on her own memory to construct the list. It was further accepted that she held a genuine belief that she was entitled to solicit clients in the way that she did, as illustrated by the fact that she did not conceal her intentions from her co-directors at the time of her resignation. The trial judge held that the Respondent was liable to the Company for breaching her duties as a director of the Company, but did not indicate the basis on which he made that finding. With respect to the assessment of damages, he held that, on the basis that it would have taken the Respondent about 1 month to compile the list after she had left the Company, her breach of duties as a director meant that she recruited the 57 clients 1 month earlier than she would have if she had compiled the list after her resignation. His honour went on to calculate damages on the basis of one twelfth of the total commission those clients would have generated for the Company in one year, being $2,598 (plus interest).The Company appealed the trial judge's decision in relation to both the grounds on which the Respondent was held liable (or lack of) and the method by which damages were assessed. The Respondent brought a cross appeal against the finding that she had breached her duties to the Company.**(b) Decision on appeal** On appeal, Justice Debelle (with whom Justices Nyland and Lander agreed) confirmed that, as a director of the Company, the Respondent was subject to both fiduciary and statutory duties to act in good faith and in the best interests of the Company, implicit in which were duties to not allow her personal interests to conflict with her duty to the Company and not to improperly use or divulge information obtained as a director to gain advantage for herself or others.His Honour held that the Respondent's conduct in preparing the list of customers whilst a director of the Company with the intention of using it once she had resigned as a director was a clear breach of her duty to act in good faith and in the best interests of the Company. His Honour went on to say that the forming of a firm intention to resign from the Company to establish a business in direct competition with it was to act to her own advantage and to the detriment of the Company in a manner where there was a manifest conflict between her duty to the Company and her personal interest. His Honour considered this to be compounded by her being in a position to act pre-emptively to the detriment of the Company.His Honour did not consider it necessary to examine in detail the question of when a former director of a Company may begin to compete with that Company, but referred to the case of Robb v Green [1985] 2 QB 1, which is authority for the proposition that a director may not solicit the custom of clients whilst a director and until after the expiry of a reasonable period post resignation. In assessing the damages payable, His Honour noted that the object of equitable compensation is to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation (Nocton v Lord Ashburton [1914] AC 932), with it being necessary to first establish a sufficient connection between the equitable compensation claim and the breach of fiduciary duty. His Honour found that the loss in this case, being a substantial reduction in the number of the Company's clients, was caused by the Respondent's conduct. Accordingly, His Honour found that the Respondent was liable to restore the Company to the position in which it would have been had she not acted in breach of her duties.His Honour calculated damages based on the annual return of the clients applying a multiplier to reflect the real value of the list of clients. A deduction of one third was allowed to account for the degree of personal goodwill established by the Respondent and the part she had played in initially building up the list of clients.Interestingly, His Honour excluded clients who transferred their business after 30 June 2002 (being approximately 2 and a half months after the Respondent resigned), presumably considering this to represent a 'reasonable period' during which she remained subject to her duties to the Company post resignation. **5.9 Trading under a Deed of Company Arrangement without warning the public**(By Ann Blake, Law Clerk, Freehills)In the matter of Multelink Aust. Ltd (Admin Appt) [2003] NSWSC 836, New South Wales Supreme Court, Bryson J, 10 September 2003The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc836.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc836.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Facts**Multelink Aust. Ltd was a company which operated throughout Australia. It purchased telecommunication services in bulk from large companies such as Telstra and Optus and on sold those services to residential and business customers. Approximately 80% of its revenue came from pre paying customers in that the company received payments in advance of rendering its services. Multelink passed into administration in June 2003 when Mr Woodgate was appointed administrator pursuant to a resolution of its Board of Directors under section 236A of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). The second creditors meeting was adjourned to enable consideration of any proposals for a Deed of Company Arrangement. The directors of Multelink were prepared to propose a Deed of Company Arrangement; but only if Mr Woodgate obtained a court order that the company would not be required to have the words "Subject to Deed of Company Arrangement" after its name in every public document and negotiable instrument as required under section 450E(1).**(b) The arguments raised** The primary concern of the company was that the words "Subject to Deed of Company Arrangement" in all public documents would have an adverse affect on the company's business and hamper its ability to compete in the telecommunications industry. The negative stigma that would attach, especially when taken with the recent collapse of One.Tel and other large corporations, meant the company was of the belief that the public would be disinclined to do business with the company.In Re Brashs Pty Ltd (1994) 15 ACSR 477 Justice Hayne had held that section 447A (1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) allowed the Court to dispense with the requirement in section 450E (1).**(c) Court refusal**In refusing to grant the order Justice Bryson noted that the requirement for special notification of the company's circumstances in section 450(1) is primarily for the benefit and protection of persons who deal with the company and become creditors while the company trades under the Deed of Company Arrangement. It is not to protect existing creditors of the company or other persons interested in its affairs. As such, it would not be just for the court to grant the order as it would impose risks on persons who come to deal with the company as they would not be told of the risks that exist from the company's carrying on business under the Deed of Company Arrangement. The court was not prepared to allow the company to test its commercial prospects in the future under the Deed of Company Arrangement at the expense of the warning to the public which would normally be in place.**5.10 Liability of a principal (licensed securities dealer) for an agent's representations**(By Sarah-Jane Morris, Mallesons Stephen Jaques)Prospect Industries v Anscor Pty Ltd [2003] QSC 296, Supreme Court of Queensland, Philippides J, 10 September 2003The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/september/2003qsc296.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2003/september/2003qsc296.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**(a) Background**The Wattle Group was an unlicensed investment scheme operated by Geoffrey Dexter which raised more than $160 million from over 2700 Australian investors. The scheme involved Dexter obtaining unsecured loan funds from investors on the promise of high rates of return. Investors were told their funds were on-loaned on a short-term basis to provide this return. Instead, the scheme paid interest and refunds to investors entirely out of the incoming funds of new investors entering the scheme. ASIC ended the scheme and on 7 May 2001 Dexter was convicted of multiple fraud charges and jailed for 10 years.**(b) Facts**Count Financial Group ("Count") (the third defendant), was a licensed securities dealer and personal financial planner. In 1993, Russell Woodrow (the fourth defendant) was appointed to act as a representative of Count for the provision of investment advice and financial services pursuant to a written representative agreement ("the Count Agreement") and acted as such until the end of 1995. He also held a proper authority for Count in this period. From March 1995, Woodrow began working part-time as a 'business development consultant' with Count, where he was responsible, amongst other things, for assisting the various accounting practices that had Count business in promoting Count products and ensuring financial advice was sound. Woodrow was permitted to operate his own business. The Count Agreement required reference to be made on Woodrow's stationary to Count's business name and address, the fact that Count was licensed and that Woodrow was an authorised representative of Count.By late April 1995, Woodrow had invested $100,000 in the Wattle Group through his company Hinatorie. He also made an arrangement through Hinatorie with Robert Corbett's (the second defendant) company ANZCorp (which later became Anscor, the first defendant), to earn commissions on investments he introduced into the Wattle Group. In a series of meetings and conversations, Woodrow and Corbett encouraged the plaintiff, Prospect Industries Pty Ltd ("Prospect"), through its director Robert Hope, to invest in the Wattle Group. Between 1995 and 1997, Prospect invested $400,000 in the Wattle Group. **(c) Representations**In 1995, two meetings were held and attended by Hope, Corbett and Woodrow, among others, for the purpose of discussing possible investments in the Wattle Group ("the 1995 meetings). Philippides J found that the following representations were made to Prospect, through Hope, at these meetings and that Woodrow participated in making these: * Wattle operated a business of providing short term loans, typically 30 to 60 days;
* borrowers accepted by Wattle were those in need of bridging finance or other short-term loans, who were able to provide adequate security for the loans, and who were willing to pay high fees over a short period;
* borrowers were typically people introduced by solicitors, accountants, insurance brokers and finance brokers;
* loans by Wattle were made on security provided by the borrowers;
* Wattle's role was to ensure the security was adequate;
* the risk for the investor was low because of the assets provided by the borrowers by way of security;
* investments in the Wattle Group were safe and viable;
* Wattle had a business strategy not to take in more than $6m to $9m from investors, so as to ensure it did not over extend its ability to make secure loans; and
* Wattle had been making loans for 6 years and there had never been a default on a loan or alternatively that no investor had lost money on a loan.

In mid June 1996, Hope phoned Woodrow with concerns arising from an advertisement in the Courier Mail seeking information about Corbett ("the mid-1996 conversation"). Hope had spoken to a private investigator whose details were in the advertisement who advised Hope that he was acting for some people in Perth who had been "dudded" by Corbett and who wanted to let others know Corbett was not reputable. Her Honour found that the following representations had been made by Woodrow during this conversation: * Hope should not have any real concern about his investment in the Wattle Group;
* Prospect's involvement with the Wattle scheme was safe; and
* Dexter was of good character, and the assets were in Dexter's name.

Philippides J found that all of these representations were false, and misleading and deceptive under the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default). Woodrow was negligent in making these representations and had no reasonable basis for doing so. **(d) Reliance**Philippides J accepted that Prospect, through Hope, had relied on the representations made at the 1995 meetings and in the mid 1996-conversation. Hope was induced to invest by the representations as to the returns to be generated, the nature of the investments made by the Wattle Group, and the fact that the Wattle Group administered the loans, which Hope understood to mean that the Wattle Group vetted the security to be provided and placed a ceiling on the funds invested in the scheme. Her Honour also found that Prospect, through Hope, was induced by the 1996 representations not to withdraw the investments already made and to make two further investments.**(e) Liability of Count for Woodrow's actions**Prospect settled with all defendants with the exception of Count. Prospect alleged that in making the investments, Prospect, through Hope, relied on the advice of Woodrow, who acted with the actual or ostensible authority of Count. Philippides J found that Woodrow had no actual authority from Count to make the representations he did. Under the Count Agreement, Woodrow was only permitted to recommend products approved by Count. Count did not recommend an investment in the Wattle Group.Her Honour also found that Woodrow had no ostensible authority from Count to make the representations. At common law, the question is whether acts of the principal constituted a representation that an agent had a particular authority and were reasonably so understood by the third party. Prospect argued that, as Count allowed Woodrow to have business cards identifying him as an authorised representative of Count, who were stated to be "financial planners", there was a holding out to Prospect of Woodrow's agency to deal with financial planning matters.Philippides J did not accept that there was a relevant holding out by Count by virtue of the Count business card, and did not accept that Hope understood Woodrow to be representing Count at any relevant time. Her Honour accepted Woodrow's evidence that he indicated when handing his business card to Hope that he was not present on Count's behalf and also accepted that Hope understood Woodrow and Corbett were with ANZCorp. Accordingly, she found that there was no estoppel arising against Count on the basis of the principle of apparent authority. Even if there had been a holding out by reason of the business card, Philippides J did not accept that Hope relied on any representation by Count as to Woodrow's authority, nor that this was an inducing factor in the investments (or his failure to withdraw the investments). In the mid 1996 conversation, Hope did not ask whether Woodrow was still involved with Count, nor did Hope at any stage seek information as to the nature of Count's involvement with the Wattle Group. In discussing the risks of investing in the Wattle Scheme with a fellow investor (and acquaintance), Hope did not indicate he was comforted in the scheme because Woodrow represented Count. In making the investments, Hope was influenced solely by the representations made as to the nature of the investment, including the lucrative returns to investors. When Hope called Woodrow in mid 1996, he did so to seek Woodrow's own views on Corbett, and not because he understood Woodrow represented Count and placed value and reliance on obtaining Count's views.**(f) Conclusions**Philippides J concluded that as Woodrow had no actual nor ostensible authority to act on Count's behalf, Count was not liable:* for Woodrow's representations concerning the Wattle Group at common law;
* by virtue of section 84(2)(a) of the [Trade Practices Act 1974 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "defult), by which a body corporate is deemed to have engaged in the conduct engaged in on its behalf by its servant or agent, provided this conduct is within the scope of the latter's actual or apparent authority;
* under section 817 of the former Corporations Law, by which a principal was liable to a third party in respect of conduct engaged in by another as a representative of the principal, where a representative was one either employed by, or acting for the principal in connection with a business (sections 9 and 94). Woodrow's conduct was neither carried out as an employee nor agent of Count, nor in connection with Count's business, nor on Count's behalf;
* under section 819 of the former Corporations Law, by which a principal was liable for, inter alia, the conduct of a representative, where a third person acted (or omitted to act) because s/he believed in good faith that the representative engaged in that conduct on behalf of another in connection with an investment advice business, whether or not that conduct was within the representative's scope of employment or authority. It could not be said here that Woodrow's advice was "in connection with" Count's investment advice business, and nor did Hope make the investments because he believed Woodrow was acting on Count's behalf in making representations about Wattle;
* for contravention of sections 849 or 851 of the former Corporations Law, which concerned recommendations made by a "securities adviser", which included a "securities representative of a dealer". The conduct was not carried out by Woodrow as a securities representative of Count;
* for Woodrow's misleading and deceptive conduct in breach of section 995(2) of the former Corporations Law, which prohibited misleading or deceptive conduct by a person in connection with any dealing in securities; and
* to pay damages for contravening former sections 1018 (prohibition on offering securities of a corporation without first registering a prospectus), 1064 (prohibition on anyone other than a public company offering for purchase a prescribed interest) and 1065 (prohibition on offering a prescribed interest for purchase without an approved deed) of the former Corporations Law. In recommending investments in Wattle, Woodrow did not act with Count's actual or ostensible authority.

NOTE:Section 1018 of the former Corporations Law became section 707 by virtue of the [Corporate Law Economic Reform Program Act 1999 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) and was later repealed by the [Financial Services Reform Act (2001)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default), along with sections 817, 819, 849, 851, and 995 of the former Corporations Law. Sections 1064 and 1065 were repealed by the [Managed Investments Act 1998 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5794" \t "default).Division 6 of Part 7.6 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) deals with the liability of financial services licensees for the conduct of representatives and section 995 is now section 1041H of the Corporations Act. Part 6D.2 of the Corporations Act contains disclosure requirements for investors about securities and Division 1 of Part 6D.3 contains associated prohibitions and liabilities.**5.11 Court rewrites "oppressive" constitution** (By Nicholas Mavrakis and Veronica Holloway, Clayton Utz)In the matter of Sutherland v NRMA [2003] NSWSC 829, New South Wales Supreme Court, Campbell J, 4 September 2003 (revised 15 September 2003)The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc829.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2003/september/2003nswsc829.htm%22%20%5Ct%20%22_new) or [http://cclsr.law.unimelb.edu.au/judgments](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)The New South Wales Supreme Court uses the oppression remedy to amend a company's constitution. **(a) Facts**Mr Sutherland wished to nominate as a director of the NRMA. Mr Sutherland was 70 years old and would turn 71 in September. However, clauses 64A and 85A of the NRMA constitution contained age restrictions on the age of persons eligible to be a candidate for an election as a director. A person was ineligible to be a candidate in an election if they were aged 71 or older at the close of the nominations or if that person's 71st birthday was due to occur in that year - as Mr Sutherland's 71st birthday was.The background to these age restrictions is section 201C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) which had, until 11 April 2003 when the provision was repealed, imposed restrictions on the ability of persons aged 72 or over to be appointed or to act as a director of a public company. **(b) Orders sought by Mr Sutherland against the NRMA**Mr Sutherland originally made a complaint to the Anti-Discrimination Board of New South Wales to the effect that he was being discriminated against on the grounds of age. The Board found that it was unable to resolve Mr Sutherland's complaint as the NRMA was obliged to operate in accordance with the provisions of its constitution. The NRMA suggested to Mr Sutherland that he make a Court application to invoke the oppressive conduct provisions of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) so that the Court could amend the constitution of the NRMA to remove the offending clauses.**(c) Does the Court have power to amend a company's constitution?**The Court held that it had the power to amend the NRMA constitution under sections 232 and 233(1) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default). These sections provide:Section 232 - The Court may make an order under section 233 if(a) the conduct of a company's affairs; or...(c) a resolution ... of members ... of a company; is...(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or any other capacity.Section 233(1) - The Court can make any order under this section that it considers appropriate in relation to the company, including an order: ...(b) that the company's existing constitution be modified or repealed. ..".The Court found that it was perfectly legitimate for the NRMA to refuse Mr Sutherland's request to be nominated as a director, as it was required to comply with its constitution even though it may have recognised that its action in doing so was oppressive to, unfairly prejudicial to or unfairly discriminatory against Mr Sutherland. The Court held that clauses 64A and 85A were prima facie oppressive to, unfairly prejudicial to or unfairly discriminatory to Mr Sutherland, a NRMA member and others of his age in breach of section 232, on two bases:* the NRMA's action in refusing Mr Sutherland's application was oppressive; and
* the resolution which inserted these provisions in the Constitution, given the repeal of section 201C was oppressive.

The Court amended the NRMA constitution to remove clauses 64A and 85A and was influenced by the following factors:* the NRMA had already put forward a proposal for a new constitution which did not include clauses 64A and 85A or their equivalent;
* there was no objection to the orders sought by Mr Sutherland; and
* the NRMA did not oppose Mr Sutherland's application, and agreed that the clauses fell within the Courts jurisdiction provided by section 232.

**(d) Comment**The fact that the NRMA did not oppose Mr Sutherland's application to invoke the Court's jurisdiction to amend its constitution was obviously a factor the Court took into consideration.In Professor Ramsay's review of Australian oppression cases up to December 1997 only 4.5% of available judgments showed that oppression was established with the consent of the parties. Overall the courts held oppression was established in 40.9% of the judgments. See Ramsay, I, "An Empirical Study of the Use of the Oppression Remedy" (1999) 27 Australian Business Law Review 23 at 28. Ramsay studied approximately 88 Federal and State oppression judgments, both reported and unreported, of prior oppression remedies in Australia - section 186 Australian Uniform Companies Act 1961, section 320 Companies Code, section 260 Corporations Law and section 246AA Corporations Law. |
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