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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Seminar (Sydney and Melbourne) – Shareholder meetings – key issues and developments**Company meetings are in the spotlight for many reasons including:         new regulatory requirements (such as the shareholder advisory vote on the directors’ remuneration report);         increasing activism by institutional investors;         activists calling meetings taking advantage of the rule which allows 100 shareholders to call a meeting of shareholders; and          calls to follow what has recently occurred in the US and mandate disclosure of voting by institutional investors. This seminar brings together well known speakers to discuss important developments relating to meetings.**SPEAKERS**Andrew Lumsden - Corrs Chambers WestgarthStephen Mayne - Crikey.com.auJohn McCombe - Corrs Chambers WestgarthMervyn Peacock - AMPKathryn Watt - Vanguard Investments Australia Ltd**Dates**November 9, 2004, Melbourne seminarNovember 18,  2004, Sydney seminarFor more information (including a registration form), please go to  [http://cclsr.law.unimelb.edu.au/news/](http://cclsr.law.unimelb.edu.au/news/%22%20%5Ct%20%22_new)or phone 03-83445281 (Centre for Corporate Law and Securities Regulation)**1.2 The Melbourne Law School 2005 graduate law program**Commercial and corporate law provides the framework for business transactions. The Melbourne University Graduate Law Program offers diversity, quality and the opportunity to specialise in key areas of law including Commercial and Corporate Law and Banking and Financial Services Law.Highlights of the 2005 program include: 130 subjects, 25 of which are completely new, 33 interlinked coursework degrees and diplomas, expert tuition blending theory and practice, an intensive teaching format (offering convenience for interstate and overseas based students), 37 visiting international Faculty, a stimulating graduate student cohort and maximum use of information technology.Some of the 130 subjects offered in 2005 are:Accounting for Commercial LawyersAdvanced Construction ClaimsAdvanced Construction ContractsAdvanced EvidenceAdvanced LitigationAlternative Dispute ResolutionAsian Comparative Tax Law SystemsAustralian International TaxationAustralian Tax Treaties and Transfer PricingCapital Gains Tax: Problems in PracticeCommercial Information and the LawCommunications LawCompetition Law and Intellectual PropertyConstruction Arbitration and LitigationConstruction ContractsCopyright LawCorporate Governance and Directors’ DutiesCorporate Insolvency and ReconstructionCorporate TaxationDesign and Construct: Specialised Construction ContractsDesigns Law and PracticeDeveloping Countries and the WTODispute Resolution in the Cyberspace EraElectronic Banking and PaymentsElectronic Commerce LawEntertainment LawEquity and CommerceFinancial Sector Compliance ManagementFinancial Sector RegulationGoods and Services Tax PrinciplesInsurance LitigationInsurance RegulationIntellectual Property in the Digital AgeIntellectual Property Law and DevelopmentInternational and Comparative Copyright LawInternational and Comparative Patent LawInternational Commercial ArbitrationInternational Financial System: Law and PracticeInternational Financial Transactions: Law and PracticeInternational Issues in Intellectual PropertyInternational Regulation of BiotechnologyInternational Sale of GoodsInternational Securities RegulationInternational Trade LawInterpretation and Validity of Patent SpecificationsLaw and Economic Reform in AsiaLaw of Secured FinanceLicensing Law and Technology TransferManaged Investments LawManaging ClientsManaging Knowledge in Legal ServicesManaging People in Legal ServicesManaging Resources and ProcessesMarket Power and Competition LawNative Title Law and PracticePatent LawPatent PracticePetroleum LawPrinciples of Corporate FinancePrinciples of Corporate LawProject FinanceProof in LitigationRacing Industry Law and RegulationRecent Developments in Contract RemediesRegulation and the LawRights and Liabilities in ConstructionSecuritisationShareholders’ RemediesSports Marketing LawStrategic Management in Legal ServicesSuperannuation LawTax AdministrationTax LitigationTaxation of Business and Investment Income ATaxation of Business and Investment Income B Taxation of Consolidated GroupsTaxation of Financial InstrumentsTaxation of Overseas EntitiesTaxation of Small and Medium EnterprisesTaxation of SuperannuationTrade and EnvironmentTrade Mark PracticeTrade Marks and Unfair CompetitionWater LawWorld Trade Organisation: Basic PrinciplesWTO Disputes Resolution and Case Law For more information: [http://graduate.law.unimelb.edu.au/](http://graduate.law.unimelb.edu.au/%22%20%5Ct%20%22_new)**1.3** **Enhanced corporate governance guidelines issued by IFSA**On 21 October 2004 the Investment and Financial Services Association (IFSA), which represents Australia’s largest institutional investors, published the new edition of the IFSA Blue Book. It contains a number of significant changes as a result of amendments to the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and the release by the ASX Corporate Governance Council of its 'Principles of Good Corporate Governance and Best Practice Recommendations'.The significant new additions cover:• [Corporate Law Economic Reform (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) amendments• incorporation of ASX Corporate Governance Council Best Practice Recommendations• ‘pre-nuptial’ agreement disclosure for Directors• banning of non-recourse loans• changes to statement on Beneficial Shareholder Information• ban on proxy ‘renting’• proxy voting StandardUnder the IFSA best practice regime, fund managers will be voting on all resolutions, whereas previously, this requirement was on material resolutions only. Proxy voting will now be required to be disclosed on all resolutions and a new IFSA Standard requires member companies to publish an annual proxy voting summary on their website.The Blue Book, formally known as IFSA Guidance Note No.2: ‘Corporate Governance: A guide for Investment Managers and Corporations’*,* is published by IFSA to assist its members to pursue an active role in monitoring the corporate governance responsibilities of the companies in which they invest. IFSA’s members manage approximately $725 billion on behalf of superannuation members and retail clients. IFSA members’ investment in the domestic market accounts for about 25% of the capitalisation of the Australian Stock Exchange (ASX). Fund managers are significant shareholders in Australian listed companies on behalf of over 9 million Australians. As major shareholders, IFSA members are in a position to promote improved company performance that provides positive benefits to all shareholders and the economy as a whole. The 5th edition of the Guidance Note is issued by IFSA to assist its members to provide leadership in promoting matters central to the interests of all shareholders. It also takes into account changes to the law and practice since the 4th edition Reprint issued in March 2003.The Blue Book is available online at the [IFSA website](http://www.ifsa.com.au" \t "_new).**1.4 2004 global competitiveness report**On 13 October 2004 the World Economic Forum published the Global Competitiveness Report 2004. The top 16 countries in terms of competitive economies according to the report are: (1) Finland; (2) USA; (3) Sweden; (4) Taiwan; (5) Denmark; (6) Norway; (7) Singapore; (8) Switzerland; (9) Japan; (10) Iceland; (11) United Kingdom; (12) Netherlands; (13) Germany; (14) Australia; (15) Canada; (16) UAE. The rankings are drawn from the results of the Executive Opinion Survey, a survey conducted by the World Economic Forum, which this year polled over 8,700 business leaders in 104 economies worldwide. The survey questionnaire is designed to capture a broad range of factors affecting an economy’s business environment that are key determinants of sustained economic growth. Particular attention is placed on elements of the macroeconomic environment, the quality of public institutions which underpin the development process, and the level of technological readiness and innovation. The Global Competitiveness Report reviews 104 economies. Further information is available at [http://www.weforum.org/](http://www.weforum.org/%22%20%5Ct%20%22_new) **1.5 UK Corporate boards and senior executives see shortcomings in monitoring and reporting**According to a new survey conducted on behalf of Deloitte Touche Tohmatsu by the [Economist Intelligence Unit](http://www.eiu.com/%22%20%5Ct%20%22_new) (EIU) and published on 12 October 2004 only about one third (34 percent) of board members and top executives polled say their companies are proficient at monitoring critical non-financial indicators of corporate performance.The majority of board directors and senior executives surveyed for the study called "[In the Dark: what boards and executives don’t know about the health of their businesses](http://www.deloitte.com/dtt/whitepaper/0%2C1017%2Ccid%253D62386%2526pre%253DY%2526lid%253D1%2526new%253DU%2C00.html%22%20%5Ct%20%22_new)" said that factors such as customer satisfaction, innovation, supplier relations and employee commitment are critical to corporate success. But they admitted that there were difficulties in monitoring these drivers of organizational performance. By contrast, the study indicates that 86 percent of executives believe their companies are excellent or good at measuring and tracking the performance indicators necessary for financial reporting purposes.The cross-industry survey of 249 executives worldwide was conducted in March and April 2004. Most of the firms were large, with 71 percent having annual revenue of more than US$500 million. Survey data was collected from an online questionnaire and telephone interviews. The survey is part of a larger Deloitte study that is currently underway focusing on best-practices of companies around the world that are superior at providing their boards and senior executives with valuable information on firm performance, both financial and non-financial.The survey found that most board directors and executives need more non-financial information on how well their companies are satisfying customers, delivering quality products and services, operating with efficient processes, and developing new products and services. Almost 75 percent said their companies were under increasing pressure to monitor non-financial performance indicators. And 92 percent said their board directors were responsible for monitoring both the financial and non-financial measures of their companies' performance.The survey revealed that the minority or only a slight majority of the companies said their board directors are given excellent or good information in key areas including:          The company’s impact on society and the environment (27%)         Employee commitment (35%)         Relations with suppliers and other external "stakeholders" (39%)         Product/service innovation (43%)         Customer satisfaction (50%)         Brand strength (51%)         Product/service quality (52%)         The quality of corporate governance and management processes (56%)Asked why board members and senior managers lacked information on many of the vital signs of their businesses, respondents identified two barriers more than any others: the absence of developed tools for analyzing non-financial measures, and scepticism that such measures directly impact the bottom line.The study is available at: [http://www.deloitte.com](http://www.deloitte.com/%22%20%5Ct%20%22_new)**1.6 UK FSA issues final proposals for modernising the listing regime**On 11 October 2004 the Financial Services Authority (FSA) published its [consultation paper](http://www.fsa.gov.uk/pubs/cp/04_16/%22%20%5Ct%20%22_new) on the implementation of the EU Prospectus Directive and on modernising the listing regime. The paper includes a feedback statement on CP203 – Review of the Listing Regime, the FSA's initial consultation on reforming the regime. The aim of the listing review is to simplify and modernise the existing UK regime to ensure that it provides an appropriate level of regulation**,** while retaining and strengthening the many features which have contributed to the integrity and competitiveness of UK markets. The FSA is consulting on a restructured set of rules and guidance to:          simplify and modernise the Listing Rules;         implement the Prospectus Directive;         ensure that the UK offers an appropriate regime for regulating securities as well as the flexibility and transparency needed by those wishing to raise capital on the London markets, while providing sufficient protection for investors; and         ensure that the legal and regulatory environment continues to meet its regulatory objectives.**(a) Feedback and proposals** The feedback received in response to CP203 supported the FSA's general approach to listing and regulation of the primary securities markets. In light of industry comments regarding the 'gold-plating' of directives and to reflect concerns regarding competitiveness, the FSA proposes to remove all super-equivalent regulation which currently applies to the debt and secondary listed markets. The market has not requested super-equivalence in these areas and the directives provide an acceptable level of regulation for these securities. However a significant majority of respondents supported 'gold-plating' the eligibility requirements for primary listed issuers of shares, imposing higher standards than those required by the European Directives. The FSA proposes to retain certain of these provisions which include the eligibility criteria requiring a three year track record and a 'clean' working capital statement. The key proposals include:          Listing Principles - revised listing principles which will be enforceable as FSA Rules designed to ensure the spirit as well as the letter of the rules is followed;         Sponsor Regime - retaining the requirement for sponsors for certain transactions, clarifying the role and obligations of sponsors, toughening up the supervision of sponsors and strengthening enforcement against sponsors who fall short of the standards expected;          Eligibility - retaining the super-equivalent eligibility requirements, such as the requirement for a 3 year revenue earning track record and a 'clean' working capital statement;         Continuing Obligations - retaining the super-equivalent continuing obligations requirements, such as class tests and the related party requirements;         Financial Information - adopting a more flexible approach to the presentation of financial information produced outside the ambit of the Prospectus Directive;         Model Code - streamlining the Model Code and extending it to persons discharging managerial responsibility;         Debt and Specialist Securities - aligning the requirements for debt securities with those of the directives and establishing a listing particulars regime for issuers of Specialist Securities to provide flexibility in the presentation of historical financial information;         Overseas Issuers - bringing the rules for overseas primary listed issuers more closely into line with those for domestic issuers while acknowledging that there are some areas where it is inappropriate for overseas primary listed issuers to comply in full with domestic rules; and          Re-structuring the rule book to reflect our wider role in the regulation of primary securities markets under the directives. The rules will clearly and separately identify rules derived from the directives while also allowing issuers of different securities types to clearly identify the rules applicable to them.**(b) Prospectus directive** The key changes proposed under the Prospectus Directive, for which HM Treasury will be publishing the implementation legislation shortly, are:          Scope of Rules – will be extended to include public offers of securities;         Prospectus Requirements – will prescribe the contents and format of prospectuses; allowing incorporation by reference; allowing the use of three part prospectuses; setting out the exemptions from the requirement to produce prospectuses;         Passport Rights – introduces the ability to passport prospectuses on a pan-European basis making it easier for companies to raise capital across Europe;         Third Country Issuers – determining the home Member State for non-EU issuers;         Approval of Prospectuses – setting out the procedures for approval; and         Other Provisions – including the requirement for issuers to produce annual information updates and the setting up of a qualified investors register.**(c) Next steps** The FSA intends to publish the final version of the Listing Rules in Spring 2005 for implementation on 1 July 2005, when the Prospectus Directive will also come into force. The consultation papers are available at: [http://www.fsa.gov.uk/pubs/press/2004/081.html](http://www.fsa.gov.uk/pubs/press/2004/081.html%22%20%5Ct%20%22_new) **1.7 UK study of shareholder voting**Early analysis by Manifest (a UK proxy advisory firm) of the votes cast at all this year’s shareholder meetings in the FTSE All Share has shown that five resolutions to approve the remuneration report have been defeated as compared to only one the year before. A further three small companies had their report defeated according to Manifest’s study published on 7 October 2004.This is despite aggregate levels of dissent in respect of resolutions to approve the remuneration report falling from 11.89% in the last voting season to 10.27% this year. Dissent is defined as the total number of votes cast either against or as positive abstentions.Across all resolutions, average levels of dissent have slightly decreased from 3.36% to 2.84%. The analysis is based on voting results from 722 companies, representing 86.16% of all events held by FTSE All-Share companies between 1 August 2003 and 31 July 2004. The level of dissent recorded at meetings of FTSE 100 companies has significantly decreased to 2.92% (2003: 4.51%) with the FTSE 250 at 2.60%. SmallCap companies have however, recorded a slight increase in the level of dissent to 3.04% from 2.71% last year. Some 1.23% of the total votes cast were in the form of abstentions, down from 1.65% over the last year. Votes against remained largely unchanged at 1.61% (2003: 1.71%), showing that shareholders were more likely to use against votes rather than positive abstentions to demonstrate their dissatisfaction. Excluding shareholder resolutions, five types of resolution saw average dissent levels of more than 10% during 2003/04, including approval of charitable donations at 33.45% (only one relevant resolution included in the data), waiver under rule 9 (29.64%), bundled resolutions (11.77%), articles of association – investment trust companies (10.83%) and approval of the remuneration report (10.27%) as previously mentioned.Manifest recorded a substantial increase in the numbers of companies disclosing proxy poll data to shareholders who did not attend the meeting. For the first time, Manifest has recorded a 100% response rate from FTSE 100 companies (2003: 96.7%), with the FTSE All Share being 86.9% (2003: 77.6%). The biggest increase was recorded in the SmallCap Index, where the response rate has increased to 83% from only 69.6% one year ago. However, the response rate from Fledgling companies is still lower at just 60%. Manifest considers that the increased openness from companies is partly a reflection of the emphasis on shareholder communication under the revised Combined Code. In respect of companies currently in the FTSE 100, early analysis of the meeting turnout has shown a marginal decrease this year. Proxy votes in respect of 55.4% of the votable capital were cast at meetings in 2003/04, while the same companies last year recorded a turnout of 56.6%. However, average meeting turnout both in the FTSE 250 and the SmallCap has increased and now stands at 58.4% and 57.1% respectively (2003: 56.4% and 47.3%), still however falling short from the government’s target of 60%. However, when turnout at the meetings for investment trusts are excluded, the government’s target is comfortably exceeded for these indices. For further information about Manifest is available on its website at: [http://www.manifest.co.uk/](http://www.manifest.co.uk/%22%20%5Ct%20%22_new)**1.8 Study of Australian IPO’s****(a) Overview**IPO investors enjoyed high returns in the September 2004 quarter, according to Deloitte Corporate Finance quarterly IPO report published on 6 October 2004.Investors more than doubled their money in six of the 46 IPOs that listed in the past three months, while almost 80% of all IPOs equalled or bettered their issue price at the end of the quarter. The average return of all IPOs in the September quarter was 41%, almost four times the average of 11% for all IPOs in the year to 30 June 2004.The energy sector was a highlight with an unusually large number of IPOs - seven floats raising a total of $48 million - and an exceptional average return of 115%.The energy sector produced the two best performing IPOs of the quarter Elixir Petroleum (up 320%) and Tomahawk Energy (up 260%). All IPOs in this sector generated double digit returns for investors.The resources and energy sectors dominated activity in terms of number of floats, producing 17 of the 46 IPOs in the September quarter, but accounting for only $138 million or 11% of all funds raised.IPO activity continued to increase in the September 2004 quarter, with the number of IPOs rising from 31 in March 2004 to 37 in June 2004 and 46 in September 2004. However, the amount of equity raised decreased from $3.62 billion in the June quarter, which included last years biggest IPO - Pacific Brands, to $1.22 billion in the September quarter.**(b) Other features of the IPO market in September 2004 quarter**         average float size was $27 million in the September 2004 quarter, down sharply from $98 million in June 2004 quarter, which was boosted by the $1.2 billion IPO of Pacific Brands;         bookbuild IPOs achieved strong returns, in contrast with initial experiences for investors in 2003-04. Three of the five largest IPOs for the September quarter were bookbuild offers - DUET, Super Cheap Auto and Lipa Pharmaceuticals. These produced share prices gains of 10%, 57% and 43% respectively, or an average of 37%;         the high average returns from IPOs in the September quarter was achieved despite a decrease in the number of IPOs with specific dividend forecasts. These have traditionally attracted strong investor support and produced above-average share price gains on listing. Eleven of the 46 IPOs in the September 2004 quarter (or 24%) went to the market with a specific dividend forecast, compared to 38% in the June 2004 quarter and 28% for the whole of 2003-04. IPOs with a specific dividend forecast averaged a 22% premium over listing price at the end of quarter; and         consistent with high interest in energy and resources, Western Australia continued to generate the most floats, with 20 IPOs in the September quarter raising a total of $183 million. IPOs based in NSW raised the largest amount of capital by state ($809 million or almost two thirds of all funds raised).The full report is available at: [http://www.deloitte.com/dtt/press\_release/0,1014,sid%253D5527%2526cid%253D61705,00.html](http://www.deloitte.com/dtt/press_release/0%2C1014%2Csid%3D5527%26cid%3D61705%2C00.html%22%20%5Ct%20%22_new)**1.9 UK Auditing Practices Board finalises ethical standards for auditors**On 5 October 2004 the UK Auditing Practices Board (APB) announced that it has finalised five Ethical Standards (ESs), having undertaken an extensive period of consultation. They will be effective for audits of financial statements for periods commencing on or after 15 December 2004. The Standards establish basic principles and essential procedures with which auditors are required to comply in any audit of financial statements. These Standards will replace the existing guidance for auditors, issued by the auditors’ professional bodies. The five Standards cover:         integrity, objectivity and independence         financial, business, employment and personal relationships         long association with the audit engagement         fees, remuneration and evaluation policies, litigation, gifts and hospitality         non-audit services provided to audit clientsThe final versions of the Ethical Standards 1 to 5 are available to download from the Publications (Ethical Standards) section of the APB web site at: [http://www.frc.org.uk/apb/](http://www.frc.org.uk/apb/%22%20%5Ct%20%22_new)**1.10 Census of Australian women directors and executives**While there has been a gradual increase in the number of women stepping up to senior positions, the third EOWA Census of Women in Leadership shows that Australia’s corporate boardrooms are still dragging their feet. Released on 5 October 2004 by the Equal Opportunity for Women in the Workplace Agency (EOWA), the 2004 Census shows the number of women executive managers in Australia’s companies listed on the ASX has increased by 1.8% to 10.2%. The number of women board directors has increased by only 0.2% to 8.6%. The number of women in line positions, the experience widely considered necessary for rising to the most senior positions, has increased by 1.8%.Significantly, the number of companies in the ASX200 with no female executive managers has decreased by more than 10% since the Census was first conducted in 2002, however this is still a high 42%. The number of companies with two or more women executive managers has increased to nearly 25%, a rise of 6.3% since 2002.On all measures however, Australia lags behind the USA and Canada. 86% of US Fortune 500 companies and 62.4% of Canadian Financial Post 500 have at least one woman in an executive management position. Despite women’s workforce participation climbing to the highest ever rate of 45% and 56% of university graduates being female, women are still scarce in the top most corporate positions. Of the ASX200 companies, women hold only two Chairs of Boards and four CEO positions, even though a recent Catalyst report found that women are just as likely as men to seek the top jobs.Industries with the highest representation of women on boards and in executive management are telecommunications, software & services, diversified financials, banks, insurance and retailing. Industries with a low representation of women on boards are automobiles and components, technology and hardware equipment, commercial services & supplies, real estate and energy. Industries with a low representation in executive management are consumer durables and apparel, hotels restaurants and leisure, food beverage & tobacco, capital goods and automobiles and components. More information about the study is available on the [EOWA website](http://www.eowa.gov.au" \t "_new). **(a) Women executive managers**For the top 200 companies listed on the Australian Stock Exchange at 30 June 2004 and featured in the Census.         women hold 10.2% of Executive Management positions (compared with 8.8% in 2003)         42.0% of companies have no women executive managers (49.1% reported in 2003)         women hold just 6.5% of all line positions identified (up from 4.7% reported in 2003)         62.1% of women occupy support positions as opposed to line positions that ultimately lead to CEO or Board appointments, (compared with 31.4% of men in support positions)         37.9% of women executive managers are in line positions compared with 68.6% of men**(i) Best performing industries**        Software & Services        Retailing        Healthcare Equipment & Services         Banks        Diversified Financials**(ii) Worst performing industries**        Consumer Durables & Apparel        Hotels, Restaurants & Leisure        Food, Beverage & Tobacco        Capital Goods        Automobiles & Components**(iii) An international comparison of the % of women executive managers**Latest Census figures:         Australia 10.2% (2004)          United States 15.7% (2002)          Canada 14.0% (2002)          South Africa 14.7% (2004)**(b) Women board directors**For the top 200 companies listed on the Australian Stock Exchange at 30 June 2004 and featured in the Census:         Women hold 8.6% of Board Directorships (compared with 8.4% in 2003)         47.1% of companies have no women directors (compared with 47.3% in 2003)         Only 11.5% of companies have 2 or more women directors in 2004 (compared with 10.7% in 2003)         Only 8.0% of companies have 25% or more women directors (compared with 5.9% in 2003)**(i) Best performing industries**         Telecommunication services         Diversified financials         Banks         Insurance         Consumer durables & apparel**(ii) Worst performing industries**      Automobiles & Components      Technology Hardware & Equipment      Commercial Services & Supplies      Real Estate       Energy**(iii) An international comparison of the % of women board directors**Latest Census figures:         Australia 8.6% (2004)         United States 13.6% (2003)         Canada 11.2% (2003)         South Africa 7.1% (2004)**1.11 IFAC invites comments on audit independence guidance in revised code of ethics**On 4 October 2004 the Ethics Committee of the International Federation of Accountants (IFAC) released an exposure draft “Revised Code of Ethicsfor Professional Accountants”,clarifying independence requirements for professional accountants in public practice who perform assurance engagements.The changes are designed to conform the Code to the “InternationalFramework for Assurance Engagements”, issued by the International Auditing and Assurance Standards Board; and definitions contained in International Standard on Quality Control (ISQC) 1*, “*Quality Control for Firms that Perform Audits and Reviews of Historical Financial Information, and Other Assurance Related Services Engagements”.In addition, the ED proposes a requirement to rotate the individual responsible for the engagement quality review in an audit of a listed entity. The Ethics Committee believes that in an audit of a listed entity the person responsible for the engagement quality review be subject to the same rotation requirements as the engagement partner.In July 2003, the Ethics Committee released an ED in which it proposed fundamental principles of professional ethics for professional accountants and a conceptual framework for applying those principles. The Ethics Committee has now finalized the Code based on comments received on this earlier ED.The Ethics Committee is re- issuing the entire Code in this exposure draft to enable readers to understand the independence section in the context of the entire Code. An explanatory memorandum is being issued with the ED which provides background on recent changes to the Code and the areas on which comments are now being sought.This new ED of the revision to the “Code of Ethics for Professional Accountants” and the explanatory memorandum may be downloaded from the [IFAC website](http://www.ifac.org" \t "_new). Comments are requested by November 30, 2004. They may be submitted to: Edcomments@ifac.org or faxed (+1-212-286-9570) or mailed to the attention of Jan Munro at IFAC, 545 Fifth Avenue, 14th Floor, New York, NY 10017. All comments will be considered a matter of public record.IFAC is the worldwide organization for the accountancy profession. Its current membership consists of 157 professional accountancy bodies in 118 countries, representing more than 2.5 million accountants in public practice, education, government service, industry and commerce. The organization sets ethics, auditing and assurance, education, and public sector accounting standards.**1.12 Survey: complying with corporate governance reforms** The task of complying with the new financial disclosure and corporate governance standards isn't as difficult as expected, according to a Hill & Knowlton survey of US senior executives published on 1 October 2004.According to Hill & Knowlton's annual Corporate Reputation Watch study, corporate leaders seem to have overcome their initial misgivings about the potential administrative and financial burdens of complying with the requirements of the Sarbanes-Oxley era. Only 8 percent of senior executives surveyed believe that the task of complying with the new financial disclosure and corporate governance standards poses a real challenge to running a competitive business, while 45 percent say that the compliance burden is "heavy but manageable." Nearly half of those polled (48 percent) say that the burden is "reasonable."The survey of 175 senior executives, which was conducted by the Economist Intelligence Unit, also found that almost two-thirds of respondents believe that it is no more difficult to recruit board members today than it was before the new governance reforms were adopted.However, executives do see some downsides to burgeoning governance and compliance requirements. Respondents cite increased administrative complexity and the diversion of management time as the two top drawbacks, cited by 24 percent, while 22 percent cite increased investment in sophisticated compliance and reporting tools/systems, and 21 percent say that it has brought about an increased aversion to risk-taking.Among the initiatives they say that their companies have undertaken in the past two years specifically to strengthen corporate governance, 59 percent reviewed and enhanced compliance and disclosure standards and procedures; 40 percent put processes in place to ensure greater independence and accountability of their board; 35 percent introduced ethics-related employees training; and 28 percent reviewed and changed their auditor relationship. In addition, 25 percent restructured executive compensation, 24 percent separated the role of chief executive and chairman, and 10 percent created a chief ethics officer or similar role.The report is available on the Hill & Knowlton website at: [http://www.hillandknowlton.com/crw/](http://www.hillandknowlton.com/crw/%22%20%5Ct%20%22_new)**1.13 Disclosure of voting by US mutual funds**In October 2004, the AFL-CIO released a study of proxy voting by US mutual funds. On 31 August 2004, for the first time, US mutual fund companies reported how they cast their proxy votes at the public companies in which they invest. The disclosure is the result of US Securities and Exchange Commission rules adopted in January 2003.According to the Executive Summary, the report evaluates how the 10 largest mutual fund groups voted in relation to CEO pay at 12 S&P 500 companies in 2004. In addition, although the SEC rule does not require mutual funds to disclose business relationships with portfolio companies, the research indicates that, of the 120 proxy voting decisions in the survey, 25 involved a mutual fund advisor that has a business relationship with the portfolio company.The study is available at [http://www.aflcio.org/corporateamerica/capital/toolbox.cfm](http://www.aflcio.org/corporateamerica/capital/toolbox.cfm%22%20%5Ct%20%22_new)**1.14 Shareholder communication discussion paper**On 28 September 2004, the Business Council released a discussion paper outlining a number of new approaches Australia’s listed companies might adopt to strengthen or improve their communication and interaction with shareholders.The paper, “Fresh approaches to communication between companies and their shareholders”, was produced as a catalyst for debate for companies, shareholders and market commentators into the coming AGM season.Developed by the BCA’s Chairmen’s Panel, the Australian Institute of Company Directors (AICD) and Chartered Secretaries Australia (CSA), the Paper identifies ways companies and shareholders can strengthen or review the way they communicate and interact. The Australian Shareholders’ Association was also consulted in the development of the Paper.It is said in the paper that many of the current practices such as AGMs may need to be rethought or re-energised due to the increase in the number of shareholders, the heightened level of interest in and expectation of the performance of listed companies and the advent of new information and communication technologies. The paper was developed not only for companies but also to alert shareholders, as owners, of their own roles and responsibilities in being engaged in the process of information and communication with companies.The paper is particularly targeted at large listed companies, the top fifty of which account for 75 per cent of the Australian market by capitalisation. Ideas and alternatives canvassed in the paper include:         reforming or reinventing the annual general meeting as the centrepiece for communications between shareholders and companies;         asking shareholders in advance to table issues for discussion at annual general meetings;         placing issues identified by shareholders formally on the agenda at the annual general meeting;         improving the ways shareholders can initiate company meetings;         holding regular ‘shareholder meetings’ to supplement annual general meetings;         improving the use of proxies and how proxy votes are disclosed at annual general meetings;         improving the conduct of annual general meetings and the opportunities for shareholder participation;         having the heads of Board committees available to present to, and answer questions from, shareholders; and         establishing and implementing ‘Shareholder Communications Policies’;         increasing the use of electronic media in communications between companies and their shareholders.The BCA has written to the top fifty listed companies in Australia, encouraging them to consider the suggestions outlined in the paper.The discussion paper is available at: [http://www.bca.com.au/upload/Fresh\_Approaches\_to\_Communication\_Between\_Companies\_and\_their\_Shareholders.pdf](http://www.bca.com.au/upload/Fresh_Approaches_to_Communication_Between_Companies_and_their_Shareholders.pdf%22%20%5Ct%20%22_new)**1.15 UK FSA releases sector briefing on closed with-profits funds**The UK Financial Services Authority (FSA) published on 28 September 2004 an [insurance sector briefing](http://www.fsa.gov.uk/pubs/other/index-2004.html) on the regulation of closed with-profits funds, setting out some of the general considerations relating to closed funds and exploring some of the complexities surrounding them. The issues covered by the briefing paper include:          the FSA's current regulation of closed funds and its proposed changes to the regime;         challenges for the with-profits industry, in particular the need to treat closed with-profits funds policyholders fairly; and         common myths surrounding closed funds, such as the belief that policyholders in closed funds should always cash in their policies.Further information is available from: [http://www.fsa.gov.uk/pubs/press/2004/079.html](http://www.fsa.gov.uk/pubs/press/2004/079.html%22%20%5Ct%20%22_new)**1jjw CSA** **1.16 New ICSA guidance notes on corporate governance**The UK Institute of Chartered Secretaries and Administrators (ICSA) has published two new guidance notes, which aim to clarify areas of the revised combined code on corporate governance. The Roles of the Chairman, Chief Executive and Senior Independent Director under the Combined Code identifies the respective roles and responsibilities of these board members. After giving an overview of what the Combined Code says on each role, the note goes on to provide separate specimen descriptions of the roles of the chairman and chief executive and a suggested description of the role of the senior independent director. A draft board responsibilities statement and table provides a model statement on the division of responsibilities between the chairman and the chief executive, which can be adapted to each company’s circumstances. Terms of Reference – Executive Committees gives example terms of reference for the executive committee, which is the chief executive’s forum for major operational decisions. The executive committee will typically be made up of the executive directors and the most senior members of the management team – those individuals one level down from the board who report directly to the chief executive or possibly to the finance director. The terms of reference include the purpose, membership, and duties of the committee. An appendix sets out the duties and powers which are often delegated to a general purposes, or finance committee, rather than an executive committee. The guidance notes are available to download from the ICSA website at: [www.icsa.org.uk/news/guidance.php](http://www.icsa.org.uk/news/guidance.php%22%20%5Ct%20%22_new) **1.17** **Organisations worldwide must improve sustainability reporting** Businesses worldwide are failing to produce enough sustainability reports, while governments are doing little to encourage such reporting - which would have a direct benefit for business and the environment, a global survey by ACCA (the Association of Chartered Certified Accountants) and CorporateRegister.com has found. The survey was released in September 2004.The publication, Towards Transparency: progress on global sustainability reporting 2004, looks at the status of sustainability reporting around the world and identifies a number of trends - with marked improvements in coverage, standards and credibility needed in the next few years. It is split into four regional chapters - Europe, The Americas, Africa and the Middle East and Asia and Australasia. The publication shows that North America and Western Europe are the most active reporting regions. In contrast, non-financial reporting is practically unknown in the Middle East and most of Latin America. In the Asia Pacific region there is little reporting outside Australasia and Japan - and across Africa only South Africa is showing significant reporting activity. The publication shows that:         there are marked differences in the approach taken to external assurance in reports, both between regions and within regions. This needs to be addressed in the interest of reporting credibility - greater external assurance of reports is needed;         there are marked differences in levels of support shown by governments through the production of voluntary guidance or through mandatory reporting requirements;         improvements in quantity and quality of reports could be achieved through the use of globally applicable guidelines such as the Global Reporting Initiative (GRI). A globally common framework would enable meaningful comparisons to be made more easily; and         while there are major achievements in each region, there are still only 1,500 to 2,000 companies producing reports worldwide. The majority of companies still have to recognise the business case for reporting and starting to engage their stakeholders.In its European chapter, the publication shows that the region has led the way in non-financial reporting, accounting for just over half of all reports produced globally. In Europe, a fifth of reports are produced in Scandinavia, and over three quarters come from the rest of Western Europe. Central and Eastern Europe reporters account for only around 2% of reports. Almost two thirds of reports have an environmental focus, with a fifth representing fuller sustainability and corporate responsibility reports. Of the reports produced in Europe in 2003, just under half had external assurance. The publication shows that Africa and the Middle East are relatively new to sustainability reporting. South Africa dominates reporting in the region and accounts for over two thirds of all reports published between 1993 and 2003. The rest of Africa produces just under a quarter of all reports. Encouragingly, over 40% of reports are full sustainability or corporate responsibility reports. In its chapter on The Americas, the publication shows that reporting has reached a plateau in recent years, following steep growth between 1990 and 1995. The proportion of reports with external assurance has doubled since 1995, although the figure is low in comparison with the rest of the world. Between 2001 and 2003 almost two thirds of reports from the Americas were published in the US with a third published in Canada. Reports from South America account for only 6% of the total published reports. In the section on Asia and Australasia, the publication shows that three countries, Australia, Japan and New Zealand are responsible for growth in reporting, which doubled every year between 1996 and 2000. Over half the reports produced in the region were produced in East and South East Asia, Australasia accounted for 43% and South Asia just 1%. The report is available at: [http://www.accaglobal.com/news/](http://www.accaglobal.com/news/%22%20%5Ct%20%22_new) |
| **2. Recent ASIC Developments** |
| **2.1 ASIC issues licensing relief for wholesale foreign financial services providers regulated by the US Commodity Futures Trading Commission**On 19 October 2004 the Australian Securities and Investments Commission (ASIC) announced the release of a class order relieving certain wholesale foreign financial services providers, registered with the U.S. Commodity Futures Trading Commission (CFTC), from the requirement to hold an Australian financial services (AFS) licence.The relief, provided under Class Order [CO 04/0829]: US CFTC regulated financial services providers, applies to futures commission merchants, introducing brokers, commodity pool operators and commodity trading advisors who are registered with the CFTC and who are members of the U.S. National Futures Association. The relief took effect from 27 July 2004.'By granting this relief, ASIC recognises that the CFTC regulatory regime is sufficiently equivalent to our own. This relief means ASIC now recognises all the major federal United States financial regulators under ASIC Policy Statement 176: Licensing: Discretionary Powers – wholesale foreign financial services providers' (PS 176), ASIC Director, Regulatory Policy, Mr Mark Adams, said.This class order is substantially similar to the relief announced on 23 December 2003 for certain foreign financial services providers (FFSPs) regulated in the United Kingdom, Singapore and Hong Kong. For details of this relief and conditions (see ASIC Information Release 03/41: ASIC issues licensing relief for certain wholesale foreign financial services providers [IR 03/41]). FFSPs registered with the CFTC may rely on this class order to provide financial services to wholesale clients in Australia if, as far as possible, they comply with the regulatory requirements that would apply to these services in their home jurisdiction and if they comply with the conditions to the relief. These conditions are the same as those described in IR 03/41. In addition, if the FFSP is a commodity pool operator or commodity trading advisor, it will need to notify ASIC on an annual basis, and more frequently if requested by ASIC, that it has adequate resources to provide the financial services it provides or intends to provide in this jurisdiction.A copy of [CO 04/0829](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-829_pdf" \t "_new), [PS 176](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=ps176_pdf" \t "_new) and [IR 03/41](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR%2B03-41%2BASIC%2Bissues%2Blicensing%2Brelief%2Bfor%2Bcertain%2Bwholesale%2Bforeign%2Bfinancial%2Bservices%2Bproviders?openDocument" \t "_new) can be obtained from the [ASIC website](http://www.asic.gov.au" \t "_new), by calling ASIC's Infoline on 1300 300 630 or emailing infoline@asic.gov.au. **2.2 ASIC targets unlicensed financial services businesses**The Australian Securities and Investments Commission (ASIC) announced on 8 October 2004 that the second stage of a compliance campaign to remove unlicensed operators from the financial services industry was underway.The focus of the first phase of the campaign was the orderly transition of all old law licensees, including financial advisers, securities dealers and insurance brokers, to the new licensing regime. This phase is now complete and ASIC's attention has turned to identifying and taking action against unlicensed operators, including those who were not previously required to hold a licence but who are now regulated under the new law.**(a) Results of phase 1**In late December 2003, ASIC identified 966 old law licensees and certain APRA-regulated entities that had not applied for an Australian financial services licence (AFSL). The campaign taskforce contacted these licensees to ascertain what action they would be taking to obtain an AFSL by the 10 March 2004 deadline and to inform them of the consequences of failing to do so in time. ASIC also issued a media release, [[MR 04/013]](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/04-013%2BASIC%2Bwarns%2B%27no%2Blicence%2C%2Bno%2Bbusiness%27?openDocument" \t "_new) ASIC warns 'no licence, no business', to remind industry participants of the necessity of transitioning to the new regime by the deadline if they wished to continue their business.During phase 1 of the campaign ASIC followed up on these 966 businesses. As a result of its inquiries, ASIC can report that most unlicensed entities in this group have either restructured their businesses to operate under an AFSL held by a related entity, or become an authorised representative of another licensee. Other entities decided to exit the industry rather than obtain an AFSL. In short, ASIC found that the number of entities who had not made appropriate arrangements for conducting their financial services businesses after 10 March 2004 was much lower than originally feared. A small number of unlicensed operators in this group may be the subject of legal action.**(b)** **Phase 2: taking action**Phase 2 of the campaign, which is to identify any other businesses operating without a licence, is now underway. Over the next six months ASIC will be conducting compliance checks on anyone that appears to be conducting a financial services business without an AFSL. The results of the phase 1 process have assisted ASIC in identifying targets for these compliance checks. The penalty for carrying on a financial services business without a licence is a $22,000 fine or imprisonment for two years, or both.ASIC encourages consumers to check they are dealing with either a licensed financial services provider or an authorised representative of a licensee. Consumers can find this information by searching the registers of licensees and authorised representatives on ASIC's website via [http://www.asic.gov.au/search](http://www.asic.gov.au/search%22%20%5Ct%20%22_new).Anyone with information about unlicensed financial services businesses should contact the ASIC Infoline on 1300 300 630.**2.3 ASIC releases policy proposal paper on external administration: liquidator registration**The Australian Securities and Investments Commission (ASIC) released on 8 October 2004 a policy proposal paper on [external administration: liquidator registration](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=liquidator_registration_ppp_pdf" \t "_new)*.*This policy proposal paper sets out how ASIC proposes to amend the way it administers the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) to register suitably qualified persons as registered liquidators and official liquidators, and how applications for registration as a liquidator should be made. It also explains the ongoing obligations of registered liquidators under the Act and outlines ASIC's expectations in relation to the way in which registered liquidators perform these obligations.It is intended that the proposals in this policy proposal paper will replace ASIC's policy in Policy Statement 40 Registration of liquidators – experience criteria [PS 40] and Policy Statement 24 Registration of official liquidators [PS 24].ASIC will be undertaking direct consultation with insolvency practitioners, insolvency lawyers and bodies representing creditors and employees, and encourages anyone who has an interest in these issues to provide it with comments on the paper.Copies of the policy proposal paper may be obtained from the ASIC web site on [http://www.asic.gov.au/search](http://www.asic.gov.au/search%22%20%5Ct%20%22_new), by emailing ASIC's Infoline on infoline@asic.gov.au or by calling 1300 300 630. **2.4 ASIC announces transitional position on dollar disclosure****(a) Transitional position on dollar disclosure**On 7 October 2004, the Australian Securities and Investments Commission (ASIC) announced that it had granted relief to extend the date for compliance with the dollar disclosure regime from 1 January 2005 to 1 March 2005. ASIC's transitional approach is set out in ASIC Class Order [[CO 04/1176](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=co04-1176_pdf" \t "_new)]. 'ASIC's relief recognises that adequate time needs to be given to finalising the application of the dollar disclosure regime so as to produce quality outcomes for consumers', Ms Pamela McAlister, Deputy Executive Director, Financial Services Regulation said. ASIC expects to publish a final policy statement on dollar disclosure in November 2004. This policy statement will specify in what circumstances, if any, ASIC might determine that dollar disclosure is not possible, unreasonably burdensome or contrary to clients' interests. ASIC does not expect to grant any further general extension to the date for compliance with the dollar disclosure regime. This class order accords with the broad approach considered in ASIC's policy proposal paper Dollar Disclosure, published in August 2004. **(b) Background**The dollar disclosure regulations ([Corporations Amendment Regulations 2004 (No](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78112" \t "default)[6)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78112" \t "default)) were made on 24 June 2004. The regulations commenced on gazettal and provide for a transition period to 1 January 2005. Under the dollar disclosure provisions, providing entities and product issuers will be obliged to disclose various fees, benefits, costs and interests as amounts in dollars in the following documents:         Statements of Advice (SoAs);          Product Disclosure Statements (PDSs); and          periodic statements.In limited cases, ASIC can make a determination that a particular fee, benefit, cost or interest need not be disclosed as an amount in dollars. If a determination is made, the item needs to be disclosed by way of a percentage or description instead. ASIC can only make a determination where, for compelling reasons, disclosure in dollars is:          not possible;          unreasonably burdensome (including within a specified period); or          contrary to clients' interests.ASIC issued a [Policy Proposal Paper](http://www.asic.gov.au/asic/asic.nsf/lkuppdf/ASIC%2BPDFW?opendocument&key=Dollar_disclosure_PPP_pdf" \t "_new) (PPP) on 10 August 2004, which conveyed:          how ASIC proposes to administer the dollar disclosure provisions;         the situations in which ASIC might consider issuing dollar disclosure determinations on a class basis;          how ASIC proposes to assess applications for determinations; and          a tentative proposition on ASIC's approach to transition.**(c) Transitional relief**The transitional class relief provides industry with a further two month extension to the transition period. This means that providing entities and product issuers need not comply with the dollar disclosure regime until 1 March 2005. In essence, they will need to disclose various fees and benefits as amounts in dollars in SoAs, PDSs and periodic statements prepared on or after 1 March 2005. The transitional relief differs from the proposition in ASIC's Dollar Disclosure PPP in that entities intending to rely on this transitional relief are not required to undertake a self-certification process or lodge a reliance notice with ASIC. However, ASIC expects entities to do all that they can now to get ready to comply with the dollar disclosure requirements by 1 March 2005 (or earlier if they are capable of doing so).**(d)** **Other transitional issues**As ASIC develops its final policy on dollar disclosure, it will give consideration to additional specific transitional issues that have arisen in the course of consultation, including the technical issue of when a document is 'prepared' for the purposes of determining what documents will be subject to the dollar disclosure provisions. **2.5 ASIC seeks comments on relief for managed investment scheme constitutions**On 1 October 2004, the Australian Securities and Investments Commission (ASIC) called for comments on its proposal to grant class order relief relating to the constitutions of registered managed investment schemes. The proposed relief would allow the responsible entity of a scheme to retain limited discretion to charge entry and exit fees and make an allowance for certain transaction costs in some cases. The relief would also allow a responsible entity to determine the recognition and timing, or method of valuation, of amounts affecting the value of scheme interests, if various conditions were met.ASIC's Director of Financial Services Regulation, Legal and Technical Operations, Mr John Price said the proposals acknowledge that in certain circumstances, it may be commercially necessary for a responsible entity to make determinations affecting the amount payable to acquire or withdraw an interest from a managed investment scheme.'The proposed conditions of relief, which include disclosing the full details of transaction costs, entry and exit fees charged and valuations in the Product Disclosure Statement for the scheme, balance these commercial considerations with the need to protect investors', Mr Price said.The details of the proposed class order relief are set out in a consultation paper available on the [ASIC website](http://www.asic.gov.au" \t "_new), or by phoning the Infoline on 1300 300 630. ASIC is seeking comment on the proposals outlined in the paper by Tuesday 30 November 2004 and aims to finalise its policy on ongoing relief for constitutions of registered managed investment schemes by 31 March 2005. Until 31 March 2005 the interim relief referred to in ASIC Information Release [[IR 04-31]](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/IR%2B04-31%2BASIC%2Bannounces%2Binterim%2Bposition%2Bon%2Btransaction%2Bcosts%2Bfor%2Bmanaged%2Binvestment%2Bscheme%2Bconstitutions?openDocument" \t "_self) ASIC announces interim position on transaction costs for managed investment scheme constitutionswill continue to be available.Applications for interim relief can be sent to: fsr.applications.manager@asic.gov.au. Any existing interim relief already granted will be extended until that date.**2.6 ASIC details auditor independence surveillance**The Australian Securities and Investments Commission (ASIC) announced on 20 September 2004 that the first round of surveillance to regulate compliance with the [CLERP 9](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) audit independence requirements will commence in the last quarter of this calendar year. CLERP 9 introduced into the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) more extensive and specific requirements for auditors in terms of independence, as well as a general auditor independence requirement.'Independence is the cornerstone of the auditing profession and ASIC will be conducting on-site visits to review the systems and processes that audit firms have in place to ensure compliance with the independence requirements under the Corporations Act', said Mr Greg Pound, ASIC's Chief Accountant. In the first year, ASIC will review the 'Big 4' accounting firms, selected mid-tier firms, and any other firms where evidence of systemic independence issues arise during the course of its financial reporting surveillance program. 'We have chosen audit firms that have a significant number of listed company clients for the first year. This will help us form a view about the general level of compliance by auditors of the majority of listed companies', Mr Pound said. 'In the second year, we will expand the program to cover audit firms with a smaller number of listed company clients, and over time we will cover all audit firms on a systematic basis', he said. ASIC may also target any specific independence issues of concern that are identified in the market. Under the Memorandum of Understanding signed with the Financial Reporting Council (FRC) in June, ASIC will provide broad level findings and any systemic issues identified from its surveillance to the FRC to assist its oversight of the auditor independence arrangements in Australia.  |
| **3. Recent ASX Developments** |
| **3.1 Exposure draft - proposed ASX Listing Rule Amendments**ASX released an Exposure Draft on 30 September outlining proposals including:          a review of the framework governing debt listings to more adequately cater for debt products;          Chairman's open proxies;          issue of securities to related parties;          Exchange Traded Funds (ETFs);          dividend record dates;          deletion of a number of redundant provisions and correction of some technical matters.It is proposed the Listing Rule amendments will take effect on 1 March 2005. The document is available on the ASX website and ASX Online. Submissions on the proposed amendments are due by no later than 22 November 2004. **3.2 Amendments to responsible executive provisions of ASX Market Rules** Amendments have been made to the ASX Market Rules on 12 October 2004 to clarify the nature of the role of Responsible Executives of Market Participants.The amendments provide that a market participant must have management structures that ensure that it has compliance operations and processes in place that are reasonably designed to ensure compliance with the rules and are subject to oversight by responsible executives of appropriate authority, experience and integrity. The Responsible Executives key responsibilities relate to the design, implementation, functioning and review of those compliance systems and to the provision of appropriate annual representations to the relevant market participant.The amendments also remove ASX's power to fine responsible executives directly while maintaining its ability to exercise appropriate authority in respect of responsible executives’ activities. |
| **4. Recent Takeovers Panel Decisions** |
| **4.1 Emperor Mines Ltd: Panel makes declaration of unacceptable circumstances and final orders**On 18 October 2004, the Panel announced that it has made a declaration of unacceptable circumstances in relation to the affairs of Emperor Mines Limited (Emperor). The Panel has also made orders to remedy those unacceptable circumstances.**Summary**The Panel has made a declaration of unacceptable circumstances and orders in relation to the affairs of Emperor. The declaration and orders relate to a four for ten, pro-rata, non-renounceable rights issue (Rights Issue)proposed by Emperor, and associated underwriting arrangements (Underwriting). The Rights Issue was effectively underwritten by Durban Roodeport Deep, Limited (DRD) through its wholly owned subsidiary, DRD (Isle of Man) Limited (DRD IoM). The Applicants alleged that the Rights Issue and Underwriting were structured in such a way that it was likely that DRD would increase its control over Emperor at a discount to market and without the other shareholders in Emperor having a reasonable and equal opportunity to benefit.The Panel was concerned to address the unacceptable circumstances but it was also concerned not to adversely affect the financial position of Emperor. Therefore, it was necessary for the Panel to make a number of orders.The Panel considers that its orders strike an appropriate balance between a number of competing considerations:• not causing undue prejudice to Emperor and its shareholders, in light of Emperor’s financial position and stated need to complete the Rights Issue in a timely fashion; and• reducing, in a non-punitive manner, the increase in DRD's voting power in Emperor which the Rights Issue and the Underwriting were likely to cause, in circumstances where the Panel considered that the other Emperor shareholders did not have a reasonable and equal opportunity to participate in the benefits accruing through the Rights Issue and the Underwriting.The Panel has ordered:• a modification to the Shortfall Facility so that DRD IoM will not participate in any shortfall until all other shareholders’ applications to do so are satisfied in full;• an extension in the Rights Issue timetable to allow information to be sent to Emperor shareholders and to allow Emperor shareholders to consider that information. The Rights Issue will now close no earlier than 5.00pm (Sydney time) on 26 October 2004;• a 2-year freeze until 31 October 2006 on any increased voting power arising from the Rights Issue which DRD IoM would otherwise be able to exercise at a shareholders’ meeting of Emperor (subject to increases in voting power arising under future acquisitions of Emperor shares permitted by the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default));• a 1 month period for DRD to dispose of any 'Unacceptable Shares', at any price which DRD is able to achieve, with half of any profits going to Emperor;• a requirement that from 1 month after completion of the Rights Issue until 1 month after the release of Emperor’s half-yearly report for the six months ending 31 December 2004, DRD IoM must instruct its broker to accept any order to purchase any remaining ‘Unacceptable Shares’ which is priced at $0.45 (plus an allowance for costs approved by the Panel) or above; and• a requirement that DRD IoM not terminate the Participation Deed as a result of the effect of these orders.Further details of this decision are available on the [Takeover Panel’s website](http://www.takeovers.gov.au" \t "_new).**4.2 Pacific Energy Ltd: Panel consents to withdrawal of application**On 13 October 2004 the Takeovers Panel announced that it has consented to the withdrawal of the application by Pacific Energy Limited (PEA) dated 14 September 2004 alleging unacceptable circumstances in relation to the off-market takeover bid by Energy World International Limited (EWI) for all the ordinary shares in PEA.The Panel’s consent follows EWI’s agreement not to waive the 50% minimum acceptance condition under its bid and to lodge a substantially amended bidder’s statement containing further disclosure regarding a range of matters, but in particular:• the litigation between the PEA group, on the one hand, and EWI and its associates on the other hand (the Litigation); and• EWI’s intentions as to how those conflicts of interest will be managed if (after the bid) EWI and its associates have relevant interests in between 50% and 90% of the shares in PEA.**(a) The application**PEA sought:• a declaration of unacceptable circumstances under section 657A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default);• interim orders restraining EWI from dispatching the bidder’s statement to PEA shareholders pending final determination of proceedings by the Panel; and• final orders to rectify the alleged deficiencies in the bidder’s statement and to require that EWI’s takeover offer be made subject to a 90% minimum acceptance condition.In particular, PEA alleged that there were a range of deficiencies in the bidder’s statement, including in relation to disclosure concerning:• the nature and possible effects of the Litigation on PEA;• the intentions of EWI and its associates with respect to the Litigation if EWI and its associates owned between 50% and 90% of the shares in PEA following the takeover bid, including its intentions as to how conflicts of interest would be managed;• the composition of PEA’s board if EWI and its associates owned between 50% and 90% of the shares in PEA following the takeover bid;• the relationship between EWI and Energy World Corporation Limited (EWC), and the performance of EWC while EWC has been controlled by EWI; and• the funding of EWI’s takeover bid.**(b) Interim orders**Shortly after the Panel received the application, EWI indicated that it would seek to resolve many of the issues raised in the application by negotiation with PEA. In connection with this, EWI gave an undertaking to PEA and the Panel that it would not dispatch its bidder’s statement without 48 hours’ prior notice to both PEA and the Panel. Accordingly, the Panel did not grant the interim orders sought.**(c) Outcome of negotiations**The negotiations between PEA and EWI resulted in substantial changes to the bidder’s statement. The Panel was concerned at the potentially coercive effect which the Litigation might have on shareholders in PEA. In particular, the Panel considered that it would not be consistent with the existence of an efficient, competitive and informed market if PEA shareholders felt that they had no choice but to accept EWI’s takeover bid because of concerns that PEA would not properly manage the defence of the Litigation if it acquired control of PEA.In response, EWI agreed:• to tighten the statements in its bidder’s statement concerning how it intended to handle the Litigation;• to represent in its bidder’s statement that it would use its best endeavours to ensure that those intentions were carried out; and• not to waive its 50% minimum acceptance condition.Due to the automatic extension provisions in the Corporations Act, EWI’s agreement not to waive the 50% minimum acceptance condition ensures that shareholders in PEA will have a reasonable opportunity to accept EWI’s takeover bid after control of PEA passes to EWI (if, in fact, control does pass). This in turn will ensure that shareholders should not feel pressured into accepting the takeover bid merely because effective control mightpass to EWI (for example, because of concerns that the offer period might end with EWI and its associates owning 48% of the shares in PEA and that they might be left as part of an entrenched minority in circumstances where the controlling shareholder is in a material dispute with the company).The Panel did not consider that the information presented in the application warranted the Panel conducting proceedings in relation to the question of whether unacceptable circumstances existed because the bid was not subject to a 90% minimum acceptance condition.**(d) Decision**The Panel consented to the Application being withdrawn having regard to the amendments made to the bidder’s statement made by EWI. The Panel will publish reasons for its decision in due course, in which it will address in more detail issues relating to conflicts of interest arising from litigation between a bidder and a target.**4.3 Takeovers Panel publishes revised guidance note on unacceptable circumstances**The Takeovers Panel announced on 28 September 2004 that it has published a revised version of its Guidance Note on Unacceptable Circumstances.Guidance Note 1 discusses when the Takeovers Panel may make a declaration of unacceptable circumstances under section 657A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and some of the matters which the Panel will take into account in making such a declaration. In particular it provides guidance on the circumstances the Panel may consider unacceptable. The Panel took care to point out that each matter before it is decided on the circumstances of each particular case, and that although the Panel’s Guidance Notes are very good guidance, they will not be binding in 100% of cases.The Panel advised that it has not published the Guidance Note in a draft form for comment as it considers that the changes that it has made are not substantive and involve no change of policy. Rather the changes are part of the Panel’s planned process of reviewing the currency and consistency of its Guidance Notes. The types of changes which the Panel has made include adding recent matters as examples of the policy issues discussed. The Panel noted that it had reissued Guidance Notes 2 to 6 and 8 to 10 in July this year. Similarly, the Panel considered that those Guidance Notes had received merely updating rather than substantive change and did not publish them as drafts for comment.While it has not published the document as a draft, the Panel advised that it would, as always, be interested to receive comments on the revised version of Guidance Note 01.A copy of the revised Guidance Note 01 is available on the Panel’s website: [http://www.takeovers.gov.au/display.Guidance.](http://www.takeovers.gov.au/display.asp?contentid=122" \t "_new) |
| **5. Recent Corporate Law Decisions** |
| **5.1 Compensation orders against directors: it doesn’t have to be “all or nothing”** (By Carolyn Pugsley & Rebecca Archer, Freehills)Australian Securities and Investments Commission v John Barrie Loiterton [2004] NSWSC 897, New South Wales Supreme Court, Bergin J, 30 September 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc897.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc897.htm%22%20%5Co%20%22http%3A//cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc897.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**Following the 1 April 2004 judgment against the defendants for their numerous contraventions of the [Corporations Act 2001 (Act)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (see ASIC v Loiterton [2004] NSWSC 172), declarations of contravention were made on 17 May 2004 in respect of the defendants’ dishonest and negligent conduct in relation to the publicly listed company Clifford Corporation Ltd. At that time, the Court heard the parties’ submissions regarding banning orders, penalties and a claim for compensation against one of the defendants, but Justice Bergin elected to reserve her judgment on these matters until at least 14 days after the High Court delivered its reasons for allowing the appeal in Rich v ASIC [2004] HCA 42. On 30 September 2004, Justice Bergin handed down her decision regarding the appropriate pecuniary penalties, compensation orders and disqualification orders to be made against the defendants. Her judgment represents an endorsement of the principles enunciated by Justice McHugh in Rich v ASIC [2004] HCA 42, as well as a rejection of the “all or nothing” approach to compensation orders in favour of an approach based on the principles of proportionate liability. **(b) Facts** The first defendant, John Barrie Loiterton (Barrie Loiterton), was chairman and CEO of Clifford Corporation Ltd (CCL). The second and third defendants, Ian Robert Hall and Ian Sapier, were directors of CCL. The fourth defendant, Peter James Loiterton (Peter Loiterton), was a director of a subsidiary of CCL. As directors of the Clifford Group, the directors engaged in transactions to increase profitability of CCL for the 1996-1997 financial year which involved various contraventions of the Act. These contraventions included approving dividends for payment without having profits to pay them, as well as approving half-year and full year consolidated accounts which contained:         fictitious fees charged between subsidiary companies;         fees injected into subsidiaries on no commercial basis; and         dividends from subsidiaries which were not paid out of profits.In making declarations of contravention, Justice Bergin held that Barrie Loiterton had committed 29 breaches of the Act (including 13 acts of dishonesty), Hall had committed 32 breaches (including 12 acts of dishonesty), Sapier had committed 18 breaches (including two acts of dishonesty) and Peter Loiterton had committed two breaches. **(c) Decision** It was acknowledged by Justice Bergin that the “driving force” in these transactions was Barrie Loiterton, with Sapier and Peter Loiterton being out of their depth and unable to stand up to his dominant personality. In making orders, Justice Bergin endorsed the views of Justice McHugh in Rich & Anor v ASIC [2004]. In particular, Justice Bergin endorsed the position that fixed periods of disqualification are both protective of the public and punitive, with some of the factors taken into account bearing the hallmark of the criminal law, most notably personal and general deterrence. In relation to the issue of disqualification, her Honour took the view that when considering multiple contraventions, they should be judged both individually and cumulatively. On this basis, the following orders were made in relation to the defendants:         Barrie Loiterton was prohibited from managing a corporation for 17 years, with a pecuniary penalty of $400,000;         Hall was prohibited from managing a corporation for 14 years, with a pecuniary penalty of $285,000; and          Sapier was prohibited from managing a corporation other than those necessary to conduct his accounting firm, for 8 years, with a pecuniary penalty of $120,000 and an order for compensation for the amount of $120,000.No orders were made against Peter Loiterton.The issue of compensation was complicated by the fact that the first, second and fourth defendants were all declared bankrupt mid-way through the proceedings, leaving ASIC to bring a compensation claim directed against the third defendant only. Although the conduct of Mr Sapier was categorised as only facilitating the breaches of the Act by CCL, Justice Bergin held that an order for compensation was still appropriate despite the conduct being less serious. However, her Honour rejected the “all or nothing” approach to compensation orders put forward by ASIC, and instead favoured an award which took into account the same matters as if “proportionate liability were being considered”. Justice Bergin held that the general discretion of the Court in relation to the amount of compensation to be paid is not limited to the choices of awarding “all or nothing” of the amount claimed. Her Honour ultimately ordered Mr Sapier to pay compensation of $120,000 (out of the $1,814,768 sought by ASIC). The criminal action against Barrie Loiterton and Hall is currently before the courts, with the pair due to be sentenced in the Supreme Court of NSW on 15 December 2004.**5.2 Winding up - liquidator’s rejection of a proof of debt**(By Erica Martin, Mallesons Stephen Jaques)Re Jay-O-Bees; Rosseau v Jay-O-Bees [2004] NSWSC 818, New South Wales Supreme Court, Campbell J, 28 September 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc818.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc818.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 dealt with an initial matter in an appeal from a liquidator’s rejection of a proof of debt. It examined (a) in the admission of proofs of debt in a company liquidation, what effect should be given to a claim that the contract on which the proof of debt is based should be rectified, and (b) by what procedure such a claim should be made. **(1) Facts**On 6 December 1996 three Deeds of Assignment were entered into between Rosseau Pty Ltd (“Rosseau”) and Jay-O-Bees Pty Limited (“Jay-O-Bees”). The third of the deeds between Rosseau and Jay-O-Bees (“the Disputed Deed”) contained a recital that “Rosseau has agreed with J.O.B. to sell and assign to it for the sum of $49,750.00 the Debt owing by Nodcad (a third party) to Rosseau.” However, the operative provisions of the Disputed Deed did not fit with these recitals. Clause 1 of the deed states “That in consideration of the sum of $49,750.00 which amount Rosseau agrees and undertakes to pay to [another third party] 18 months from the date of this Deed or thereafter as may be agreed between the parties or if not agreed, payable on demand by Rosseau.”If the clause was to carry out the transaction envisaged by the recital, it would replace “which amount Rosseau agrees and undertakes to pay to [another third party]” with “which amount J.O.B. agrees and undertakes to pay to Rosseau”. Rosseau served a statutory demand on Jay-O-Bees, and an application to wind it up on the basis of that statutory demand. Master McLaughlin made an order for the winding up of Jay-O-Bees. Rosseau lodged a proof of debt with the liquidator of Jay-O-Bees in February 2000. The liquidator of Jay-O-Bees rejected that proof of debt as to $49,750.Rosseau filed a Notice of Motion naming the liquidator of Jay-O-Bees as first respondent and Jay-O-Bees as second respondent. It sought the following orders:“1. Pursuant to section 1321 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and sub regulation 5.6.54(2) of the [Corporations Regulations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "default), that the first respondent’s rejection of the applicant’s proof of debt in the amount of $49,750.00 be revoked.2. That the first respondent admit the applicant’s proof of debt in the amount of $245,027.69.2A. A declaration that, on its true construction, clause 1 of the Deed of Assignment between the plaintiff and the defendant dated 6 December 1996 imposed an obligation on the defendant to pay the plaintiff $49,750.3. Pursuant to section 471B of the Corporations Act that leave be granted to the applicant to proceed against the second respondent.4. Further or in the alternative to orders 1 and 2, that clause 1 of the Deed of Assignment between the plaintiff and the defendant dated 6 December 1996 be rectified to read as follows:“That in consideration of the sum of $49,750 which amount J.O.B. agrees and undertakes to pay to Rosseau 18 months from the date of this Deed or thereafter as may be agreed between the parties or if not agreed payable on demand by Rosseau.”The liquidator of Jay-O-Bees filed a Notice of Motion seeking an order that paragraphs 2A, 3 and 4 of Rosseau’s Notice of Motion be struck out. The solicitors for the applicant invited the respondent to issue a fresh Equity Division Summons seeking rectification. The Respondent did not accept that it was necessary for it to obtain rectification before its appeal against rejection of the proof of debt could succeed. The Respondent stated that, as a matter of construction, and independently of any right to obtain rectification, the Disputed Deed is one under which Rosseau has agreed to pay Jay-O-Bees $49,750. **(2) Legislation**Section 471B of the Corporations Act 2001 (Cth) (“Act”) provides that while a company is being wound up, a person cannot begin or proceed with a proceeding in a court against the company except with the leave of the court.The debts or claims that are provable in the winding up are defined by section 553 of the Act as debts or claims arising out of circumstances occurring before the relevant date.**(3) Principles concerning appeal against a liquidator’s rejection of proof of debt**Campbell J noted the decision in Tanning Research Laboratories Inc v O’Brien (1990) 169 CLR 332 at 338-40, where Brennan and Dawson JJ described the role of a liquidator concerning proofs of debt as “acting in a quasi-judicial capacity according to standards no less than the standards of a court or judge. The principles which determine enforceability of the liability to which a proof of debt relates are…the same as the principles which would be applied in an action brought directly against the company to enforce that liability... The same approach is equally applicable to estoppels which would defeat the distribution of assets among the true creditors of the company.” Campbell J noted that a liquidator is not bound by all equities which affect the company when deciding whether to admit proofs of debt, for two reasons:(a)        neither an express contract nor an estoppel can operate to frustrate the statutory obligation to distribute assets in a liquidation (Webb Distributions (Aust) Pty Ltd v The State of Victoria (1993) 179 CLR 15 at 38); and(b)        equity acts in personam, and once liquidation occurs, the people affected by any estoppel which might be asserted are different to the people involved in the circumstances which led to the creation of the estoppel.Therefore, once a winding up order was made, the company was no longer the beneficial owner of the property it once held. Campbell J took these reasons into account in deciding whether an equity of rectification which bound the company should bind a liquidator in admitting proofs of debt.The Applicant submitted that obtaining rectification was beyond the scope of the winding up proceedings in which the present Notice of Motion was brought. Campbell J agreed and ordered that paragraph 4 of the Notice of Motion be struck out. He stated that the appeal against rejection of proof of debt is an interlocutory proceeding, because that appeal is for the purpose of advancing the process of the winding up of the company. Seeking an order for rectification of the Disputed Deed was not seeking an order which had an objective purpose to advance that process. The Applicant pointed to the terms of section 553 of the Act and contended that, as at the relevant date, the Disputed Deed was in its unrectified form, and that any proof of debt concerning it needed to be decided on the basis of the Deed in its unrectified form. Campbell J considered that construction of section 553 needed to be carried out bearing in mind its purpose, as a means of achieving a pari passu distribution of available assets among those who are really creditors of the company. He disagreed with the Applicant’s contention and stated that events occurring after the winding up can cause a person who had a provable debt at the “relevant date” to cease to have a provable debt, if those events show that the creditor has ceased to be entitled to be paid (In re Reese; Ex parte Bryant (1890) 7 Morr 144). When the Disputed Deed was entered into prior to the relevant date, Campbell J felt it arguable that the claim to rectification was one which should be given effect to by the liquidator in deciding whether to admit a proof of debt. This would be in accordance with the principles in Tanning Research Laboratories Inc v O’Brien - the basis of the equity of rectification is that both parties had a common intention concerning the transaction, which it would be unconscionable for either of them to depart from, so the “true liability” of the company is ascertained in accordance with that common intention. However, Campbell J stated that the questions of whether the Disputed Deed could have been rectified, and whether it is open for the liquidator to admit the proof of debt on the basis that it is for the same amount as would have been owed if rectification had been obtained, were questions for the Court to consider on the appeal from the rejection of the proof of debt. Campbell J found for the Applicant in deciding that para 2A of the Notice of Motion should be struck out. He stated that seeking a declaration concerning the true construction of Clause 1 of the Disputed Deed, by interlocutory process in the winding up proceedings, was seeking relief which did not have the necessary objective tendency to advance the purpose of the winding up. Campbell J considered that as all the issues which the parties had with respect to rectification of the Disputed Deed could be raised in the appeal proceedings, and the question of construction of Clause 1 of the Disputed Deed could also be decided in the appeal proceedings, there was no reason why the leave should be granted and as such, Campbell J stated that paragraph 3 of the Notice of Motion should also be struck out.**5.3 Administrator's powers under sections 437A and 442A subject to limits**(By Tom Evans, Phillips Fox)Blundell v Macrocam Pty Ltd [2004] NSWSC 895, New South Wales Supreme Court, Barrett J, 28 September 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc895.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc895.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 powers of an administrator conferred by sections 437A and 442A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ('Act') may be exercised:         only for the purpose of carrying Part 5.3A into effect; and         only for a 'proper purpose'.**(b) Facts** The plaintiff, a former employee of the defendant company, served a statutory demand on the defendant in accordance with section 459E of the Act. In accordance with section 459Q, when the defendant did not comply with the statutory demand, the plaintiff filed an originating process seeking a winding up order.Before the return of the originating process, a creditor holding a charge over the whole or substantially the whole of the defendant's property, appointed an administrator pursuant to section 436C of the Act.The administrator requested the court's guidance in accordance with section 447D on the following questions:         whether the plaintiff’s claim on which the winding up application was based might be compromised so that a slightly smaller sum was paid as an expense of the administration;         whether that sum should be paid 'as a priority creditor claim in the liquidation of the company'; and         the extent to which any security should be provided by the plaintiff against the possibility of a later finding that he was involved in the trading of the defendant while it was insolvent.The administrator also sought to have the administration terminated prior to any winding up order being made. This would have the effect of making the 'relation back' day for the winding up the date of the filing of the winding up order, a date earlier than the date of appointment of the administrator.The administrator's report on the status of the defendant found that: the plaintiff was entitled to an amount slightly smaller than that claimed; the company had assets of $1,812,232, liabilities of $44,274,324 and therefore a deficiency of $42,411,992; the claim of the secured creditor was $5,234,157; in a winding up there could be claims for recovery of unfair preferences and in respect of uncommercial transactions and insolvent trading; and winding up was inevitable.**(c) Decision** His Honour Justice Barrett of the Supreme Court of New South Wales ordered that the company be wound up. The presumption of insolvency had arisen and a positive case was made out on the facts.His Honour declined to make the three directions the administrator sought. His Honour found that the powers of an administrator conferred by sections 437A and 442A of the Act may be exercised:         only for the purpose of carrying Part 5.3A into effect; and         subject to a 'proper purpose' requirement, as an incident of the general law requirement and the statutory duty arising under section 181 of the Act.Section 442A(d) of the Act provides that an administrator has power to do 'whatever else is necessary for the purposes of [Part 5.3A].' By implication, his Honour found that all other, more specific, powers of an administrator may be exercised only for the purpose of carrying Part 5.3A into effect.By virtue of section 9 of the Act, an administrator is an officer of the company, subject to the corresponding fiduciary duties. His Honour cited the case of Re NC RE Capital Ltd (1999) 32 ACSR 418 where Santow J said:“[T]he administrator is simply bound by the same general law obligation as would its displaced board…namely: to act in the interests of the relevant companies and, thus not to act contrary to the interests of creditors as a whole[.]”In the circumstances, his Honour found that no advantage would be given to the general body of creditors if the administrator agreed to pay a reduced amount in satisfaction of the plaintiff's claim. As a result of the imminent winding up, the secured creditor would be likely to realise its security, obtaining whatever assets were available. No funds would be available to any of the unsecured creditors, except for employees given priority under section 561.His Honour also declined to terminate the administration before ordering the winding up, as there was no suggestion that the administration had been manipulated for the benefit of the company, or officers of the company. This was the basis for such an order being made in St Leonards Property Pty Ltd v Ambridge Investments Pty Ltd [2004] NSWSC 851.**5.4 Members may bring or intervene in proceedings on behalf of a company under external administration** (By Connie Chaird and Janine Dennis, Corrs Chambers Westgarth)William Kamper v Applied Soil Technology Pty Limited [2004] NSWSC 891, New South Wales Supreme Court, Einstein J, 22 September 2004 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc891.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/september/2004nswsc891.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) Decision** Einstein J of the New South Wales Supreme Court has removed any lingering uncertainty as to whether a member of a company may bring, or intervene in, proceedings on behalf of a company under external administration. **(b) Relevant legislation** Section 236(1) 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 a member or an officer of a company may, with the court’s leave, bring or intervene in proceedings on behalf of that company. Pursuant to section 237(2), a court must grant such leave if it is satisfied that (amongst other things):         the applicant is acting in good faith;         it is in the best interests of the company; and         there is a serious issue to be considered.Section 237(3) further provides that a rebuttable presumption is to be made that granting such leave is not in the best interests of the company if (amongst other things):          a third party is involved;         the company itself has decided not to bring or intervene in the proceedings; and         the directors involved in making that decision acted in good faith and in the best interests of the company.**(c) Background** Prior to Einstein J handing down his decision in this matter, the issue of whether a member may bring or intervene in proceedings on behalf of a company under external administration had already been considered by the New South Wales Supreme Court a number of times (BL & GY International Company Limited v Hypec Electronics Pty Ltd [2001] NSWSC 705 per Einstein J; Roach v Winnote Pty Ltd (In Liq) [2001] NSWSC 822 per Santow J; Brightwell v RFB Holdings Pty Ltd (2003) 44 ACSR 186 per Austin J and Charlton v Barber [2003] NSWSC 745 per Barrett J). Interestingly, this issue was first considered by Einstein J himself in the matter of BL & GY International Co Ltd v Hypec Electronics Pty Ltd (2001) 19 ACLC 1622 in which he held that a member could not bring or intervene in proceedings on behalf of a company under external administration because of section 237(3) of the Corporations Act (set out above), which refers to directors (not liquidators or otherwise) of the company acting in good faith and in the best interests of the company.As liquidators, administrators and certain other controllers (as opposed to directors) have the power to make such decisions in respect of companies under external administration, Einstein J concluded in this first matter that section 237 could not apply to companies under external administration.However, each time this issue was subsequently considered (Roach v Winnote Pty Ltd (In Liq) [2001] NSWSC 822 per Santow J; Brightwell v RFB Holdings Pty Ltd (2003) 44 ACSR 186 per Austin J and Charlton v Barber [2003] NSWSC 745 per Barrett J), the New South Wales Supreme Court held that members may bring or intervene in proceedings on behalf of a company under external administration.**(d) Reasons for decision** Because of these subsequent decisions, Einstein J confirmed in this matter that members may bring or intervene in proceedings on behalf of a company under external administration. He reasoned that when interpreting legislation:          uniform national legislation should be construed in a similar fashion by all courts whenever possible; and          the proper approach to construction of words used particularly in legislation is to consider that legislation in context.Einstein J further stated that he was satisfied that the substantive requirements of section 237(3), which include the proceedings having to be in the best interests of the company, could still be satisfied by a company under external administration.**(e) Practical implications** While this decision confirms that it is possible for members to bring or intervene in proceedings on behalf of a company under administration, such applicants must be able to satisfy all the requirements of section 237 of the Corporation Act (set out above) before a court will grant them leave to bring or intervene in such proceedings.**5.5 “Assets” of a company (subject to a deed of arrangement) may include judgment debts**(By Connie Chaird and Nim Sathianathan, Corrs Chambers Westgarth)Elliott v Water Wheel Holdings Ltd (Subject to a Deed of Company Arrangement) [2004] FCAFC 253, Federal Court of Australia, Wilcox J, Heerey J and Nicholson J, 10 September 2004. The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fcafc253.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fcafc253.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**Where a company has entered into a deed of company arrangement and that deed defines assets available for distribution to pay creditors’ claims to include ‘all the assets and undertakings of the company’, such assets will be deemed to include judgment debts (even where the proceedings were commenced prior to the company entering into the deed of company arrangement).**(b) Facts**After ASIC commenced proceedings against John Elliot, a former director of Water Wheels Mills Pty Ltd (Company), for failure to prevent insolvent trading by the Company, the Company entered into a deed of company arrangement (DOCA) with its creditors.Subsequently, the Victorian Court of Appeal ordered Mr Elliot to pay compensation of $1,330,046.11 to the Company (Judgment Debt). Upon default of payment of the Judgment Debt, the administrator of the Company commenced bankruptcy proceedings against Mr Elliot. In this application to set aside those bankruptcy proceedings, Mr Elliot argued that the Judgment Debt was not an “asset” of the Company pursuant to the DOCA since the insolvent trading proceedings were brought against him prior to the Company entering into the DOCA. Mr Elliot further argued that, on this basis, the administrator of the Company had no grounds for making a claim for the Judgment Debt. **(c) Issues**The issue in this application was, therefore, whether the assets of the Company (subject of the DOCA) could include a judgment debt, where the proceedings were commenced prior to the Company entering into the DOCA. **(d) Decision**Section 444A(4)(b) of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires a deed of company arrangement to set out (amongst other things) the assets of the company to be made available to pay creditors claims “whether or not already owned by the company when it executes the deed”. Since this section clearly allows the assets of a company to be made available for creditors’ claims to include future assets of the company, the Federal Court in this application rejected Mr Elliot’s argument that the assets of the Company could not include the Judgment Debt and dismissed his application to set aside the bankruptcy proceedings.The Federal Court furthermore held that, where a deed of company arrangement defines assets to include future property, such property will be deemed an asset of the company if it is available for distribution to the creditors on the relevant distribution date.**5.6 Recovery under a proof of debt for loss of profits**(By Sarah d'Oliveyra, Phillips Fox)Thiess Infraca (Swanston) Pty Ltd v Smith [2004] FCA 1155, Federal Court of Australia, Finkelstein J, 7 September 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fca1155.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/september/2004fca1155.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case was brought by Thiess Infraco (Swanston) Pty Ltd ('the plaintiff') to recover lost profits as claimed in a proof of debt ('the proof') which had been lodged with the administrators ('the defendants') of a subsidiary company ('NX Swanston'). That company operated the "Swanston Trams" franchise as part of the Victorian transport system, from 1999 to 2002. The defendants had rejected the proof insofar as it claimed loss of profits as a consequence of the termination of an Infrastructure Maintenance Agreement ('the IMA') to which the plaintiff and NX Swanston had been parties. Finkelstein J found in favour of the plaintiff and ordered the defendants to admit in full the plaintiff's proof, subject to valuation. **(b) Facts** **(i) NX Swanston**NX Swanston was a subsidiary of National Express Group (Australia) Pty Ltd, which was in turn owned by National Express Group plc, a British publicly listed company ('National Express'). In 1999, NX Swanston was awarded the "Swanston Trams" franchise for a period of ten years. However, in December 2002, National Express withdrew its financial support and NX Swanston subsequently went into administration on 23 December 2002 and ultimately entered into a deed of company arrangement. **(ii) The IMA between the plaintiff and NX Swanston**Following the award of the "Swanston Trams" franchise in 1999, NX Swanston entered into the IMA with the plaintiff for the provision of maintenance services. The plaintiff received payment for those services until 17 December 2002. When NX Swanston went into administration, it owed the plaintiff approximately $4 million by way of unpaid fees under the IMA. The plaintiff did not have express termination rights under the IMA and only had limited termination rights in respect of the IMA under a related agreement ('the Direct Agreement') with the Director of Public Transport (Vic) ('the Director'). In December 2002, the plaintiff served default notices on the Director in accordance with the termination provisions contained in the Direct Agreement, thereby notifying the Director of NX Swanston's failure to pay its fees, in breach of the IMA. In order to secure the continued operation of the Swanston Trams, the Director notified the plaintiff that it could not suspend or terminate the IMA and that it was required to honour its obligations under the IMA. The plaintiff continued to perform its obligations under the IMA until 18 April 2004, when the IMA was terminated by agreement. **(iii) The proof**The plaintiff lodged the proof with the defendants for unpaid services charges for work performed under the IMA before 23 December 2002 and for profits lost as a consequence of the termination of the IMA. The administrators rejected the proof insofar as it claimed a loss of profits. **(iv) The defendants’ submissions in support of rejecting the proof**The defendants submitted that the plaintiff was not entitled to a loss of profits as claimed in the proof, on the following grounds:         The plaintiff failed to terminate the IMA shortly after NX Swanston's breach and repudiation on 17 December 2002 and therefore elected to affirm the IMA.         Further, or in the alternative, that the plaintiff lost any accrued rights under the IMA upon terminating it by agreement.**(c) Decision** Finkelstein J held that the plaintiff was entitled to recover loss of profits on the following grounds:         As at 23 December 2002 (the date on which the defendants were appointed administrators of NX Swanston), the plaintiff had a 'contingent' debt or claim against NX Swanston under the deed of company arrangement and as defined in the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).         NX Swanston was in breach of an essential term of the IMA by failing to pay the plaintiff's fees when they were due and payable. NX Swanston had also repudiated the IMA upon informing the Victorian Government and the plaintiff that it could no longer perform its obligations under the IMA in December 2002. However, under the Direct Agreement, the plaintiff was not entitled to terminate the IMA without the Director's consent, which was withheld until April 2004. Therefore, the plaintiff had no choice but to continue to perform its obligations under the IMA. This was not tantamount to an election to affirm the IMA.         The IMA was terminated by agreement, but in the absence of anything in the nature of an accord and satisfaction (i.e., the acceptance by the plaintiff of something in place of its cause of action), the plaintiff's accrued rights remain unaffected.**5.7 Service on companies: effective by any means if brought to company’s attention**(By Rebecca Campbell, Freehills)Emhill Pty Ltd v Bonsoc Pty Ltd [2004] VSC 322, Supreme Court of Victoria, Mandie J, 3 September 2004.The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/september/2004vsc322.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2004/september/2004vsc322.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 dispute related to service of a statutory demand asserted as having been served by the defendant pursuant to sections 495E and 109X(1)(b) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act). The defendant personally served the sole director and secretary of the plaintiff company with an original statutory demand. Section 109X(1)(b) provides that a company may be served by delivering a copy of the document personally to a director of the company. Mandie J held that section 109X(1) makes a clear distinction between service of a “document”, and service of a “copy of the document”, and concluded that the defendant had failed to serve the statutory demand pursuant to section 109X(1)(b). Further, Mandie J held section 109X(6)(b) could not be used to validate the service of the statutory demand, as section 109(6)(b) is a power to authorise service in the future only, and not a power to validate service in the past.Following consideration of the relevant authorities, particularly the decision in Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542, Mandie J concluded that section 109X of the Act is facultative and not exclusive or mandatory, and that any means of service which brings a document to the actual attention of a company will be valid. In the present case, Mr Cook was the sole director, secretary and shareholder of the plaintiff company, and thus was clearly the company’s directing mind and will. Service of the document upon Mr Cook brought the document to the actual attention of the plaintiff company, and the plaintiff was validly served with the statutory demand.**(b) Facts** The dispute related to service of a statutory demand asserted as having been served by the defendant pursuant to sections 495E and 109X(1)(b) of the Act.Mr Cook was sole director and secretary of the plaintiff, Emhill Pty Ltd. On 26 May 2004, Mr Verginis, a solicitor employed by Holding Redlich (the solicitors for the defendant, Bonsoc Pty Ltd), approached Mr Cook in Lonsdale Street and handed him the original statutory demand. Mr Cook took the original document and retained it. The registered office of the plaintiff was not served with the statutory demand at any time.The plaintiff brought proceedings under section 495G of the Act to set aside the statutory demand asserted as having been served by the defendant pursuant to section 495E of the Act. However, Mandie J considered that the plaintiff could not seek an order pursuant to section 459G of the Act setting aside the statutory demand where it wished to say that it had not been served with the demand in the first place. Instead, recognising that the originating process could be amended to seek a declaration, Mandie J decided to treat the application as one for a declaration that the purported service was ineffective.**(c) Decision** **(i) Statutory context**Section 459E(1) of the Act provides that a person may serve on a company a demand relating to a debt or debts that the company owes to the person, that is due, payable, and for an amount greater than the statutory minimum. Section 459E does not prescribe any particular mechanism for service of a statutory demand on a company. Section 109X of the Act is a general provision dealing with the service of documents on a company. Section 109X, so far as it is relevant to the present case, provides:“(1) For the purposes of any law, a document may be served on a company by:(a)  leaving it at, or posting it to, the company’s registered office; or(b)  delivering a copy of the document personally to a director of the company who resides in Australia or in an external Territory.(6) This section does not affect:(a) any other provision of this Act, or any provision of another law, that permits; or(b)        the power of a court to authorise;a document to be served in a different way.”**(ii) Did the service of an original statutory demand comply with section 109X(1)(b) of the Corporations Act?**The plaintiff submitted that because there had been no service at the company’s registered office and the service on the director was of the original statutory demand and not a “copy” as required by section 109X(1)(b), that the statutory demand had not been served. The defendant submitted that the original statutory demand served on the director fell within the meaning of a “copy”.Mandie J held that section 109X(1) makes a clear distinction between service of a “document”, and service of a “copy of the document”, a phrase used only in sub-paragraph (b) of the section. Therefore, Mandie J concluded that the defendant had failed to serve the statutory demand pursuant to section 109X(1)(b).**(iii) Could the Court validate the mode of service pursuant to section 109X(6)(b)?**The defendant submitted in the alternative that the Court had power pursuant to section 109X(6)(b) to validate the mode of service. However, relying upon Racecourse Totalizators Pty Ltd v Hartley Cyber Engineering Pty Ltd(1989) 15 ACLR 457, 459, which involved consideration of the relevant provisions of the then Companies (Victoria) Code, Mandie J held that it had been decided that section 109X(6)(b) is a power to authorise service in the future only, and not a power to validate service in the past. Therefore, section 109X(6)(b) could not be used to validate the service of the statutory demand.**(iv) Is section 109X facultative or exclusive and mandatory?**The defendant submitted further or in the alternative that section 109X was facultative and not mandatory, and that the mode of service was otherwise valid and effective.Following extensive consideration of the decisions in Howship Holdings Pty Ltd v Leslie (1996) 41 NSWLR 542, CGU Workers’ Compensation (Vic) Ltd v Carousel Bar Pty Ltd [1999] VSC 227, Biotech International Ltd v Peptech Ltd (2000) 156 FLR 296 and Parklands Blue Metal Pty Ltd v Kowari Motors Pty Ltd [2004] 1 Qd R 140, Mandie J concluded that:“[Section] 109X of the Act is facultative and not exclusive or mandatory and the section should not be construed so as to exclude any means of service which is proved to have brought a document to the actual attention of a company”.**(v) What constitutes valid service on a sole director and secretary company?**Finally, Mandie J considered whether the service of the document in the particular factual circumstances actually constituted service on the company. In the present case, Mr Cook was the sole director, secretary and shareholder of the plaintiff company, and thus was clearly the company’s directing mind and will. Not only did service of the document upon Mr Cook bring the document to the actual attention of the plaintiff company, the evidence was that Mr Cook expressly accepted service of the statutory demand on behalf of the plaintiff.Therefore, Mandie J held that the statutory demand had been duly served on the plaintiff company.**5.8 A shareholder's proper purpose to inspect a company's books**(By Georgina Johnson, Clayton Utz)Ito v Shinko (Australia) Pty Ltd [2004] QSC 268, Supreme Court of Queensland, Mullins J, 30 August 2004The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/august/2004qsc268.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/august/2004qsc268.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**Two shareholders in Shinko (Australia) Pty Ltd ("Shinko") and Hope Island Resort Development Corporation Limited ("HIRDCL") applied under section 247A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) for orders for the inspection and disclosure of documents in the possession of the two companies.The application against Shinko was dismissed on the basis that the inspection was not sought for a proper purpose within the meaning of section 247A. The application against HIRDCL was allowed, in relation to the inspection of those books relevant to the shareholders' "proper purpose", subject to any proper claims by HIRDCL to legal professional privilege.**(b) Facts**The applicants, Mr and Mrs Ito, were Japanese nationals who are neither conversant nor fluent in the written and oral English language. Shinko owned land that was being developed as the Hope Island Resort. Mr and Mrs Ito gave approximately $A20m to Shinko between 1995 and 1997 partly to purchase property and partly as a series of loans meant to be secured by first registered mortgages over land in the Hope Island Resort. However, the land in Hope Island Resort was already the subject of an earlier security. No mortgages were ever granted to Mr and Mrs Ito. In 1998 Mr and Mrs Ito became shareholders of Shinko.In 1999 Shinko transferred land in the Hope Island Resort to Mr and Mrs Ito to discharge $A5m of the $A20m debt owed. The remaining $A15m debt was satisfied by Mr and Mrs Ito acquiring a 12.50% shareholding in HIRDCL to which all the assets of Shinko had been transferred. Later that year provisional liquidators were appointed to Shinko. Under a deed of company arrangement HIRDCL underwrote a fund used to pay the unsecured creditors of Shinko to a specified amount.In 2000 a meeting of HIRDCL's shareholders allegedly voted unanimously to sell all of HIRDCL's assets to Hope Island Resort Holdings Pty Ltd. Soon after this meeting Hope Island Resort Holdings Pty Ltd acquired all remaining assets of Shinko and HIRDCL, rendering Mr and Mrs Ito's shares in the companies worthless. Mr & Mrs Ito, who were present at the shareholder meeting, claimed that even if they did approve this transaction, they did so on bad or inappropriate advice from their former solicitor and they would not have done so if they had been aware of the true nature of the transaction.There was a further dispute between the Itos and Mr Hazzard, solicitor for Shinko. In 2003 Mr and Mrs Ito sought to inspect the books of Shinko and HIRDCL. The Itos' request was denied by both companies. As shareholders in the companies, Mr and Mrs Ito applied under section 247A seeking orders for the inspection and disclosure of documents in the possession of Shinko and HIRDCL.**(c) Decision**Mullins J considered the authorities relevant to the exercise of the court's discretion under section 247A and more specifically the requirement that the court may only make the order if it is established that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.**(i) Nature of the court's discretion pursuant to section 247A** Williams J in Re Augold NL [1987] 2 QdR 297 at 309 referred to the court's discretion in this regard as a broad one, fettered only by the requirements that the member be “acting in good faith” and that the “inspection is to be made for a proper purpose.” This construction was supported by Connolly J (with whom the other members of the court agreed) in Re Claremont Petroleum NL [1990] 2 QdR 31.Brooking J in Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd (1989) 7 ACLC 536 at 541 was of the view that the requirements of “acting in good faith” and “for a proper purpose” expressed a composite notion rather than two distinct requirements.**(ii) What is a proper purpose?**A "proper purpose" is a purpose related to an entity's rights as a shareholder in the relevant company.In Quinlan v Vital Technology Australia Ltd (1987) 5 ACLC 389 at 393 the court found that, if the application is made by a substantial shareholder of long standing, those facts in themselves may establish that the shareholder is acting in good faith and that the inspection is to be made for a proper purpose.Brooking J in Knightswood Nominees Pty Ltd v Sherwin Pastoral Company Ltd (1989) 7 ACLC 536 at 541 considered that a proper purpose is one “reasonably related to the status of a member, or it is something which the plaintiff wishes to do for purposes reasonably related to that status.”  Young J in Cescastle Pty Ltd v Renak Holdings Ltd (1991) 9 ACLC 1,333 at 1,335 adopted a similar construction, finding that a proper purpose is one connected with the proper exercise of the rights of a shareholder as a shareholder, as opposed to a purpose connected with some other interest, such as an interest as a bidder under a takeover scheme, or as a litigant in proceedings against the company.**(iii) Effect of an applicant having more than one purpose**As long as the substantial purpose is a "proper purpose", additional purposes will not preclude an order for inspection being granted. Ryan J in Barrack Mines Ltd v Grants Patch Mining Ltd (1988) 6 ACLC 97 found that having multiple purposes did not preclude the order for inspection being made as long as the application is based on a proper purpose. In this case the applicant was found to have a primary purpose to protect its substantial financial interest in the relevant company and another purpose to obtain information to be used in support of its takeover bid. **(iv) Effect of a claim for legal professional privilege on an order to inspect books**It was common ground between the parties in this case that any order for inspection should not defeat a claim for legal professional privilege. This is consistent with the finding in Czerwinski v Syrena Royal Pty Ltd (2000) 18 ACLC 335 in which the application for inspection was refused on the basis that it had been made as a tactical manoeuvre to overcome the claim for legal professional privilege made in other proceedings involving the same interests. **(v) Restriction on what may be inspected**Mullins J noted the decisions of Re Claremont Petroleum NL [1990] 2 Qd 31, 31-32 and Re Claremont Petroleum NL (No 2) (1990) 8 ACLC 548, 552-553 which were relied on by Shinko and HIRDCL as authority for any inspection granted to be restricted to only those documents which are necessary to enable the purpose of the inspection to be fulfilled. Mullins J found that, generally, as the inspection must be for a proper purpose, that itself will act as a limitation on the ambit of the books and records which can be inspected pursuant to an order made under section 247A.**(d) Orders****(i) Application against Shinko** Mullins J summarised the concerns of Mr and Mrs Ito in relation to Shinko as including:         the dissipation of the moneys lent by them to Shinko;         whether there was any actionable conduct by Shinko, its officers or other persons associated with Shinko or Mr Hazzard that induced Mr and Mrs Ito to lend the moneys or resulted in Mr and Mrs Ito entering into the transactions that discharged the debt owed to them.Mullins J found that the purpose for which Mr and Mrs Ito were seeking the inspection had nothing to do with their interests as shareholders of Shinko. Consequently, their purpose could not be classified a proper purpose within the meaning of section 247A, and the application against Shinko was dismissed.**(ii) Application against HIRDCL** Mullins J found that Mr and Mrs Ito's substantial purpose was to gather information as to the value of HIRDCL’s shares at the time of the allotment of the shares to them and at the time that HIRDCL resolved to transfer its assets to Hope Island Resort Holdings Pty Ltd. They had a secondary purpose of a desire to pursue claims against Mr Hazzard and, possibly, their former solicitor.Mullins J noted this was the type of case where the shareholder has more than one purpose in seeking inspection, but where the substantial purpose of the application is a proper purpose within the meaning of section 247A.Mullins J found no bad faith on the Itos' part in making a request for inspection allied to a query about dividends, because that query was a reflection of their complaint in respect of their investment in the HIRDCL being worthless.Mullins J ordered that, subject to any proper claim by HIRDCL to legal professional privilege in respect of its books and records, Mr and Mrs Ito, their solicitor and accountant were authorised to inspect the books and records of HIRDCL relating to the allotment of 250 shares to Mr and Mrs Ito and the financial worth of HIRDCL at the time of that allotment and the transfer of the assets of HIRDCL to Hope Island Resort Holdings Pty Ltd.**5.9 A court may make consent orders about voidable transactions**(By Connie Chaird and Peter Brabant, Corrs Chambers Westgarth)Wanted World Wide (Australia) Limited v Commissioner of Taxation [2004] FCA 1063, Federal Court of Australia, Lander J, 19 August 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/august/2004fca1063.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/august/2004fca1063.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) Decision**Despite an earlier Federal Court decision stating otherwise, Lander J of the Federal Court has held that a court may make consent orders about voidable transactions.In this matter, the Federal Court, with the Tax Commissioner’s consent (after the Tax Commissioner had been provided by the liquidator with the insolvency report, which Lander J was satisfied with the preparation of), ordered that the Tax Commissioner repay Wanted World Wide (Australia) Limited (in liquidation) amounts (totalling $190,000) paid by the company less than 6 months before the commencement of the winding up process when the company was insolvent. **(b) Relevant legislation**Section 588FF of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) provides that a court may make certain orders about voidable transactions if it is “satisfied” that the transaction falls into one of the categories set out in section 588FE of Corporations Act, which includes:         insolvent transactions entered into less than 6 months before commencement of the winding up process;         insolvent and uncommercial transactions entered into less than 2 years before commencement of the winding up process;         insolvent transactions entered into by a related party less than 4 years before commencement of the winding up process;         insolvent transactions which may interfere with creditors’ rights and were entered into less than 10 years before commencement of the winding up process; and         unfair loans.**(c) Background**In the Federal Court matter of Crosbie v Commissioner of Taxation (2003) 130 FCR 275, Finkelstein J held that a court could not be “satisfied” that a voidable transaction existed without examination of the facts, irrespective of whether parties had given their consent to orders about such transactions.One of Finkelstein J’s concerns about making such orders was that under section 588 FCA directors must indemnify the Tax Commissioner against any loss or damage resulting from certain orders (including certain consent orders about voidable transactions made under section 588FF). In such circumstances, the directors (as opposed to the Tax Commissioner) are the real defendants and may not consent to such orders.However, in the subsequent New South Wales Supreme Court matter of Dean-Willcocks Pty Ltd v Commissioner of Taxation (No 2) (2004) 49 ACSR 325, Austin J held that the Crosbie decision was “plainly wrong… and [this] application would interfere with the efficient and cost-effective administration of the liquidation of insolvent companies”.**(d) Reasons for decision**Lander J identified numerous sections of the Corporations Act that require the court to be “satisfied” of certain matters before making orders. Lander J observed that, if the Crosbie decision applied, courts could not make consent orders in respect of any of these sections.Lander J further considered the advantages of allowing consent orders in respect of voidable transactions under section 588FF, including that:         it encourages parties to settle disputes;         where there is no dispute, a liquidator may not have to prepare an insolvency report, which are notoriously expensive, to establish that the company was insolvent;         unsecured creditors may be able to recover a greater dividend (because of reduced litigation costs) and secure that dividend earlier;         it encourages liquidators to bring appropriate actions because they are likely to be less costly; and         it may reduce litigation costs generally.After considering the above, Lander J elected not to follow the Crosbie decision but to follow Austin J’s decision to allow a court to make consent orders in relation to any matter about voidable transactions under section 588FF. However, Lander J also held that a court is not obliged to do so. In deciding whether or not to make such orders, Lander J stated that a court should have regard to:         the presumption that will be made in subsequent proceedings that the voidable transactions exists;         the information which has been relied on by the party offering the consent/admission and the extent of that party’s inquiries to satisfy itself that the consent/admission should be made; and         the interests of persons who may be affected by such a consent/admission (eg, directors who may be held liable to repay the Tax Commissioner under section 588FGA of the Corporations Act).Lander J further stated that, in some circumstances, it may be appropriate for a court to require a liquidator to prove certain matters before making consent orders under section 588FF. While he did not provide any examples of such matters, Lander J held that a court must determine whether it is “satisfied” that a voidable transaction exists on a balance of probabilities.**5.10 Costs: winding up proceedings and personal liability of liquidators**(By James Walsh, Mallesons Stephen Jaques)Hypec Electronics Pty Limited (in liq) v Mead; BL & GY International v Hypec Eletronics Pty Limited (in liq) [2004] NSWSC 731, NSW Supreme Court, Campell J, 13 August 2004The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswsc731.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/august/2004nswsc731.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**(a) Summary**This case concerned costs resulting from two proceedings heard jointly in relation to Hypec Electronics Pty Limited (in liq) (“HE”). HE brought the first proceeding to recover properties held by the defendants, while the second proceeding concerned an application to wind up HE. The court awarded costs against:         the defendants of the first proceeding, in relation to orders to which the defendants consented;         HE for the first proceeding, in relation to claims that the defendants successfully defended; and         the liquidator of HE in his personal capacity, in relation to an interlocutory process in the second proceeding which arose from conduct by the liquidator which was not justified by any proper performance by the liquidator of his functions.**(b) Facts** This case involved an unusually complex set of applications for costs in relation to two proceedings which were jointly heard and decided in November 2003. In the first proceeding, HE claimed ownership of various properties held by one or more of five defendants and sought an order for the defendants to transfer the properties to HE. Two of the defendants were Mr and Mrs Mead, who were the only directors and shareholders of HE. In the second proceeding, a winding-up order for HE was made by BL and GY International, the latter company being owned and operated by Mrs Mead, her friends and relatives. Part of that proceeding involved an interlocutory process filed by Mr Mead to terminate or stay the winding up of HE and to order the liquidator of HE, Mr Watson, to withdraw various caveats he had placed on properties held by Mr Mead. In the first proceeding, HE was successful except in relation to four properties held by Mr Mead. In the second proceeding, Mr Mead was successful in his interlocutory process for the removal of caveats.**(c) Decision** Campbell J considered the four cost applications addressed below regarding the two proceedings described above. **(i) Claim by HE against the defendants (excluding Mr & Mrs Mead) for costs in relation to orders to which they consented** The defendants (excluding Mr & Mrs Mead) consented to the orders claimed by HE in the first proceeding. As a result, Campbell J found that there was no reason why the ordinary principle that costs follow the event should not apply. His Honour awarded costs against the defendants accordingly.**(ii) Claim by HE for indemnity costs against Mr and Mrs Mead in relation to orders to which they consented** HE’s second application was against Mr and Mrs Mead for indemnity costs in relation to the orders to which they consented in the first proceeding. HE claimed that there was sufficient misconduct by Mr and Mrs Mead to justify costs being awarded on an indemnity basis. The misconduct alleged included breach of statutory and fiduciary duties owed to HE, misappropriation of company funds for personal benefit, false entries in the company books and tax fraud. Campbell J found the misconduct alleged could not be taken into account in determining whether or not to award indemnity costs because facts or circumstances which are themselves the subject matter of the litigation, as with facts or circumstances which have led up to litigation, are irrelevant for the purposes of making an indemnity costs order. His Honour awarded costs against Mr and Mrs Mead on the same basis as the award of costs against the other defendants who consented to HE’s orders in the first proceeding.**(iii) Claim by Mr Mead for indemnity costs to be paid by Mr Watson personally in relation to the successful parts of Mr Mead’s defence in the first proceeding**Although Campbell J was unaware of any cases in which a court has ordered a liquidator, in the exercise of its supervisory jurisdiction over liquidators, to pay the costs which have been ordered against a company as a result of litigation instigated and carried through by the liquidator, his Honour found that the court should make such an order when the liquidator’s conduct of the litigation is improper. However, his Honour found that such an order could only be made if the liquidator is given appropriate notice of the costs application and the basis upon which it will be made (and provided that there is no other problem of procedural fairness). Campbell J found that, in considering whether the conduct of litigation is proper, the court should consider whether the liquidator has properly performed his duties to the creditors and the contributories of the company; that is, whether the liquidator has acted reasonably and honestly in having the company undergo the risk of litigation. In the circumstances of the case, Campbell J found that Mr Watson acted honestly and reasonably because he obtained legal advice recommending litigation and Mr Mead consented to some of the orders sought by HE that he initially defended.**(iv) Claim by Mr Mead for indemnity costs to be paid by Mr Watson personally for Mr Mead’s successful interlocutory process in the second proceeding**In contrast to Mr Mead’s claim for indemnity costs in relation to the first proceeding, Mr Mead was successful in his application for costs against the liquidator for Mr Mead’s successful interlocutory process in the second proceeding (although not on an indemnity basis). Campbell J indicated that, if a liquidator is personally a defendant to a proceeding, the liquidator can be personally liable for the costs of the proceeding if he does something to make himself personally liable. Campbell J found that Mr Watson was a party (although not named as one) to Mr Mead’s interlocutory process because relief was sought against him. In addition, Mr Watson intervened in Family Court proceedings (to which Mr Mead was a party) in a way that Campbell J held was not justified in the proper performance of the liquidator’s functions. Costs were therefore awarded against Mr Watson in relation to Mr Mead’s interlocutory process, but not on an indemnity basis because the liquidator did not engage in any misconduct in the course of the interlocutory process. |
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