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1. RECENT CORPORATE LAW DEVELOPMENTS

(A) THE MELBOURNE UNIVERSITY GRADUATE LAW PROGRAM FOR 2002

Commercial and corporate law provides the framework for business transactions.   
  
The Melbourne University Graduate Program offers diversity, quality and the opportunity to specialise in key areas of law including Commercial and Corporate Law, Banking and Financial Services and e-Business.

Highlights of the 2002 program include: more than 100 subjects, 30 of which are completely new, 30 interlinked coursework degrees and diplomas, expert tuition blending theory and practice, an intensive teaching format, more than 25 visiting international Faculty, a stimulating graduate student cohort and maximum use of information technology.

Subjects offered in 2002 include:

Accounting for Commercial Lawyers  
Advanced Electronic Commerce Law  
Company Takeovers  
Comparative Companies Law in the Asia-Pacific Region  
Comparative Corporate Governance  
Competition in the High Capacity Media Market: Cable, Carriers and Internet  
Corporate Governance and the Duties of Directors  
Corporate Taxation  
Current Issues in Insurance Law  
Dispute Resolution in the Cyberspace Era  
Electronic Commerce Law  
Electronic Practice: IT and Litigation  
Emerging Issues in Product Liability: EU, US and Australian Law Compared   
Equity and Commerce  
Financial Innovation and Regulation  
Intangible Assets as Loan Collateral  
Intellectual Property in the Digital Age  
Internet Law  
The International Financial System: Law and Practice  
Legal Information Systems  
Licensing Financial Services Providers  
Professional Indemnity Insurance  
Project Finance  
Regulation of Financial Markets  
Repackaging Financial Assets  
Securities for Corporate Lending  
Securitisation  
Stamp Duties  
Superannuation Law  
Taxation of Business and Investment Income  
Taxation of Partnerships and Trusts  
US Securities Regulation

For information:

On line, at <http://graduate.unimelblaw.com.au> or

Briefing Session:

Saturday 10 November, 10am - 12 noon  
Baldwin Spencer Conference room  
Baldwin Spencer Building  
The University of Melbourne

To register:

Tel: (03) 8344 6190. Fax (03) 9347 9129  
Email: law-postgrad@unimelb.edu.au

(B) REPORT ON STRENGTHENING AUDIT INDEPENDENCE

On 4 October 2001 the Minister for Financial Services and Regulation, the Hon Joe Hockey, welcomed a report by Professor Ian Ramsay on audit independence in Australia. Professor Ramsay is the Director of the Centre for Corporate Law and Securities Regulation at The University of Melbourne and had been commissioned by Minister Hockey to prepare the report for the Government. "This Government wants to improve the safety and the security of investments. Improving auditor independence is a key way of doing this," the Minister said.

Key recommendations include:

- inserting in the Corporations Act, which currently has several provisions dealing with auditors' independence, a requirement for auditors to be independent;  
- strengthening, and bringing into line with best practice internationally, those provisions in the Corporations Act which deal with employment relationships between auditors and their clients and financial relationships between auditors and their clients;  
- improved disclosure of non-audit services provided by auditors to their client so that the dollar value of all non-audit services is disclosed, divided by category of service, with appropriate discussion of those services;  
- preventing a former partner of an audit firm who is directly involved in the audit of a client becoming a director of the client within a period of two years of resigning as a partner of the audit firm;  
- requiring all listed companies to have an audit committee;  
- establishment of an auditor independence supervisory board; and  
- measures to improve the operation of the Companies Auditors and Liquidators Disciplinary Board.

Minister Hockey stated in his media release: "We must ensure the independence of auditors is preserved and that stakeholders are secure with the knowledge that the auditor is objective and independent. Professor Ramsay's recommendations strike a good balance between safeguarding shareholders' interests and preserving the commercial interests of public companies. Regulation of auditors must be workable for all companies. Professor Ramsay's report makes a substantial contribution to the debate and I urge industry to give it their careful consideration."

The Shadow Minister for Financial Services and Regulation, Senator Stephen Conroy, in a media release issued on 4 October 2001 stated that the Labor Party welcomed the report by Professor Ramsay and its recommendations. The Australian Democrats' Business and Corporate Affairs spokesperson, Senator Andrew Murray, in a media release dated 4 October 2001, stated that the Democrats "unreservedly supported the recommendations" on the basis that they will improve auditor independence.

In other media releases, the Australian Institute of Company Directors welcomed the publication of the report by Professor Ramsay. Chief Executive Officer of the AICD John Hall, stated that "AICD is pleased to see the Report implements many of the initiatives mentioned in the recently published Audit Committees Best Practice Guide produced by AICD, the Auditing and Assurance Standards Board of the Australian Accounting Research Foundation and the Institute of Internal Auditors. The Report adds further impetus to our constant message to all company boards that the independence of their auditors and the work of their audit committees is crucial to the integrity of the market. And the AICD is happy to assist in developing appropriate independence rules recommended by the Report", Mr Hall said.

The major accounting bodies also issued media releases commenting on the report. The CEO of CPA Australia, Mr Greg Larsen, in a media release dated 4 October 2001, stated: "The report enshrines best practice audit principles, reinforces the vital role of auditors in our financial structure, and gives the public highly visible assurance on matters of auditors' independence. Professor Ramsay's recommendations are both considered and balanced, and very appropriate in addressing the concerns of the public. In particular, as the professions peak accounting body, we welcome the creation of an auditor independence supervisory board similar to that in place in the UK. This would provide arm's length scrutiny of audit independence issues and practices." The Institute of Chartered Accountants, in a media release dated 4 October 2001, stated that the report "is a significant step towards improving the role and effectiveness of audits in Australia whilst maintaining harmony with global standards. The ICAA and the accounting profession look forward to working with all stakeholders to implement the recommendations of Professor Ramsay to revise and update the Corporations Act and the Australian standards governing audit independence thereby enhancing good corporate governance."

The report is available at <http://www.treasury.gov.au> under "what's new" or <http://cclsr.law.unimelb.edu.au> under "what's new".

(C) PRUDENTIAL SUPERVISION OF CONGLOMERATE GROUPS

On 10 October 2001 the Australian Prudential Regulation Authority released a Policy Discussion Paper finalising its framework for the prudential supervision of conglomerate groups that include an authorised deposit-taking institution (ADI).

Previous papers (issued in April 2000 and November 1999) set out details on various other aspects of APRA's proposed supervisory approach (eg on organisational structures, board composition, risk management and group relations such as common badging, distribution of products and shared premises).

However, two important issues remained outstanding: intra-group exposures and capital adequacy. The development of proposals in these areas has been a difficult task, complicated by the need to balance prudential objectives with a wide variety of existing commercial practices. It has involved discussions with a number of institutions with a view to ensuring that the proposals meet this objective.

The Policy Discussion Paper released on 10 October outlines APRA's conclusions on these issues. It will be followed by the release of draft Prudential Standards over the next month or two for industry comment. All ADIs and other interested parties will have the opportunity to comment on these draft Standards before they are finalised.

APRA also intends that, where the new requirements cut across existing commercial arrangements, ADIs will be given an adequate transitional period within which to make necessary adjustments. To this end, it is envisaged that full implementation of the new requirements will not occur until 2005, so as to coincide with the introduction of the new Basel Capital Accord. (See APRA's media release of 1 June 2001 for further detail on this.)

For further information contact:

Greg Brunner  
General Manager  
Policy Development and Statistics  
Tel: (02) 9210 3148  
greg.brunner@apra.gov.au

(D) DISPUTE RESOLUTION IN E-COMMERCE

On 9 October 2001 the Minister for Financial Services and Regulation, the Hon Joe Hockey, released a discussion paper that highlights the importance of resolving disputes when consumers do business over the Internet.

The paper, Dispute Resolution in Electronic Commerce, has been produced by the Minister's Electronic Commerce Expert Group, a group of leading industry and consumer professionals who advise the Minister on consumer protection in e-commerce.

Comments are sought on a range of issues raised in the paper, including:

- the nature and extent of e-commerce complaints;   
- how businesses handle e-commerce complaints; and,   
- the Government's role in dispute resolution.

The discussion paper can be found at <http://www.selfregulation.gov.au> or <http://www.ecommerce.treasury.gov.au>

All submissions will be published on the self-regulation website, subject to any claims for confidentiality.

For more information contact:

Consumer Affairs Division  
Department of the Treasury  
Langton Crescent  
Parkes ACT 2600  
Tel: (02) 6263 3856  
Fax: (02) 6263 3964  
E-Mail: adr@treasury.gov.au

Comments on the discussion paper are due by 30 November 2001.

(E) APPOINTMENTS TO THE COMPANIES AND SECURITIES ADVISORY COMMITTEE AND TO ASIC

On 8 October 2001 the Treasurer, the Hon Peter Costello MP announced a number of appointments to the Companies and Securities Advisory Committee (CASAC) and its Legal Sub-Committee.

CASAC is established under the Australian Securities and Investments Commission Act 2001 to advise the Government on matters relating to the amendment, administration or reform of the Corporations Law, companies, and the securities and futures industries. Among the issues considered by CASAC to date are corporate financial transactions, enhanced statutory disclosure, prospectus law reform, statutory derivative actions, collective investments, compulsory acquisitions, directors' duties, insider trading, and the regulation of derivatives.

Members of CASAC are selected from panels of names put forward by the States and the Northern Territory.

Mr Richard St John, Legal Consultant, Sydney, and currently Secretary to the HIH Royal Commission, has been re-appointed as Convenor of CASAC for a term of three years.

The following new appointments have been made to CASAC, also for terms of three years: Ms Susan Doyle, Chief General Manager Investments, NRMA, Sydney; Ms Louise McBride, Partner, Deloitte Touche Tohmatsu, Sydney; Mr Robert Seidler, The Seidler Law Firm, Sydney; and Ms Nerolie Withnall, Consultant, Minter Ellison, Brisbane and currently a member of CASAC's Legal Sub-Committee.

CASAC's Legal Sub-Committee, which mainly comprises senior corporate lawyers, provides advice on all matters coming before CASAC. The following new appointments have been made to the Legal Sub-Committee for terms of three years: Ms Nerolie Withnall, Consultant, Minter Ellison, Brisbane, and a member of the Sub Committee since 1994, has been appointed Convenor of the Legal Sub-Committee. Ms Withnall's dual appointment as a member of CASAC will ensure continued effective liaison between the two bodies; Ms Elspeth Arnold, Partner, Blake Dawson Waldron, Melbourne; and Professor Elizabeth Boros, Monash University, Melbourne.

The following re-appointments to the Legal Sub-Committee have been made for terms of two years: Mr Damian Egan, Partner, Murdoch Clarke, Hobart; Mr Brett Heading, Partner, McCullough Robertson, Brisbane; Mr Francis Landels, Chief Legal Counsel, Wesfarmers Ltd, Perth; Mr Laurence Shervington, Partner, Minter Ellison, Perth; Ms Anne Trimmer, Partner, Deacons, Canberra; and Mr Gary Watts, Partner, Fisher Jeffries, Adelaide.

Members of CASAC are appointed on a part-time basis for terms of up to three years based on their knowledge of or experience in business, the administration of companies, the financial markets, law, economics or accounting. When the Financial Services Reform Bill comes into effect in March 2002, CASAC's name will change to the Corporations and Markets Advisory Committee and the qualifications for appointment of members will be extended to include knowledge of or experience in financial products and financial services. The appointments announced on 8 October 2001 also have regard to the broader expertise the Advisory Committee will need under its extended mandate.

The Treasurer has also announced the appointment of Professor Berna Collier of Queensland University of Technology Law School as an ASIC Commissioner, to be based in ASIC's Brisbane office.

(F) SUPERANNUATION REFORMS

On 2 October 2001 the Minister for Financial Services and Regulation, the Hon Joe Hockey MP, announced the Government would strengthen the supervision of Australia's 12,000 APRA-regulated superannuation funds.

The five key options include:

- universal licensing for all super funds;   
- minimum capital for all super funds;   
- forcing super funds to hold annual general meetings;   
- giving the regulator, APRA, the power to make prudential standards, like it does for banks and general insurers; and   
- reviewing ways the Government can help funds that suffer big losses.

Other options include:

- using compliance plans for super funds;   
- empowering members to approve the giving of benefits to related parties;   
- giving APRA an extra $5.2 million over the next two years to expand its super investigation and enforcement   
- having APRA revise its investment guidelines for trustees, and developing other new rules on funds outsourcing their responsibilities;   
- guiding trustees on how to improve their accountability of super funds.

A Superannuation Working Group will be set up with members from APRA, the Treasury and ASIC, to conduct public consultation on the issues paper. Mr Don Mercer, former CEO of the ANZ Banking Group and a current board director of APRA will chair the group.

Comments on the issues paper are due by 1 February 2002. The issues paper can be found at <http://www.joehockey.com>

(G) PAPER ON MARKET MISCONDUCT PROVISIONS OF THE FINANCIAL SERVICES REFORM ACT

There is a new paper on the market misconduct provisions of the Financial Services Reform Act by Joe Longo, Special Counsel, Freehills. It was presented at Centre for Corporate Law and Securities Regulation seminars in Sydney and Melbourne.

The focus of the paper is Part 7.10 of the Act titled "Market Misconduct and Other Prohibited Conduct relating to Financial Products and Financial Services". Essentially, Part 7.10 deals with market manipulation and related prohibitions, some general market misconduct provisions and insider trading. However, the Act creates a whole range of new offences "relating to financial products and financial services" (for example, in connection with preparing and providing a product disclosure statement) not dealt with in Part 7.10.

The paper is available on the Centre for Corporate Law and Securities Regulation website at <http://cclsr.law.unimelb.edu.au/research-papers/>

(H) NEL COMMISSION OF INQUIRY INTO THE AFFAIRS OF THE MASTERBOND GROUP AND INVESTOR PROTECTION IN SOUTH AFRICA

The Final Report of the Commission of Inquiry into the Affairs of the Masterbond Group and Investor Protection in South Africa: Corporate Law and Securities Regulation in South Africa is now available at <http://www.doj.gov.za/commissions.htm>

2. RECENT ASIC DEVELOPMENTS

(A) ASIC RELEASES TWO FSR GUIDANCE PAPERS

On 25 October 2001 ASIC released two further papers providing guidance on the administrative implementation of the financial services reform (FSR) legislation. This legislation commences on 11 March 2002.

The first paper, Licensing and disclosure: Making the transition to the FSR regime - An ASIC guide, explains how the key financial services licensing and financial product disclosure transition provisions work. It also outlines the processes ASIC will have in place to deal with existing financial service providers seeking an Australian financial services (AFS) licence under the FSR legislation.

The second paper, How do you get an Australian Financial Service (AFS) licence? - A Process Guideline, informs existing and potential new financial service providers about ASIC's licensing process and details the types of AFS licence authorizations that someone can apply for.

ASIC invites public comment on the contents of these guidance papers. ASIC will consider any comments when finalising ASIC's forthcoming FSR related publications (such as the AFS Licensing Kit) and in settling ASIC's administrative processes.

Public comment on these papers is sought as soon as possible, and comments should be sent to the postal or email addresses set out in the relevant paper.

For more information:

- For an up to date ASIC publication timetable to implement the FSR legislation, see the Supplement to ASIC's Building the FSRB Administrative Framework (released on 11 September 2001).  
-Copies of the guidance papers and Supplement may be obtained from the FSR page of the ASIC web site at http://www.asic.gov.au, by emailing ASIC's Infoline on infoline@asic.gov.au, or by calling 1300 300 630.  
- To see the FSR legislation, go to <http://www.law.gov.au>. Copies of the FSR regulations can be obtained from <http://www.treasury.gov.au>.

Related information:

By proclamation on 8 October 2001, 11 March 2002 was fixed as the day on which the financial services licensing and financial product disclosure provisions of the FSR legislation will commence.

(B) ASIC INVITES COMMENT ON EXCHANGE APPLICATIONS

On 24 October 2001 ASIC announced that it is inviting public comment on independent applications by three exchanges to have their futures markets declared exempt. If these applications are approved, Australian participants will have direct access to the automated trading system of the relevant exchanges.

The three exchanges are Eurex Deutschland (Eurex), Hong Kong Futures Exchange Limited (HKFE) and The London Metal Exchange (LME). Eurex has also made an application for declaration of an exempt stock market.

ASIC is seeking comment on the applications before making a recommendation to the Minister for Financial Services and Regulation in relation to each of the applications.

A summary of the applications by Eurex, HKFE and LME is available from the ASIC website at www.asic.gov.au. ASIC will accept comments up to close of business on 16 November 2001.

Submissions should be marked to the attention of Tracey Lyons, Manager, Markets Regulation, Australian Securities and Investments Commission, GPO Box 9827, Sydney NSW 2000. Submissions can also be emailed to tracey.lyons@asic.gov.au.

All submissions will be treated as public and will be provided to Eurex, HKFE and LME. Interested parties may, if they prefer, provide separate submissions in relation to each application.

For further information contact:

Jennifer O'Donnell  
Director, Markets Regulation  
ASIC  
Tel: (02) 9911 2123  
Mobile: 0411 549 257

(C) REPORTING BY DUAL-LISTED COMPANIES

On 3 October 2001 ASIC released a Practice Note outlining financial reporting guidelines for Australian entities in dual listed company (DLC) arrangements.

Practice Note 71 outlines circumstances in which the Australian entity in a DLC structure should be regarded as having acquired the foreign-listed entity. As a guide, where the fair value of the Australian entity is more than 1.5 times the fair value of the other entity at the time the DLC is created, ASIC will usually take the view that there has been an acquisition in substance. This is consistent with UK guidelines for applying acquisition accounting rather than merger accounting.

Where the Australian entity is regarded as having acquired the foreign-listed entity, the consolidated financial statements will recognize the foreign-listed entity's assets at fair values, including purchased goodwill.

Where the Australian entity is not regarded as having made an acquisition, the Practice Note requires the production of combined financial statements covering both of the listed entities in a DLC structure. These financial statements are in addition to consolidated and single-entity financial statements specifically required under the Corporations Act 2001, and must be prepared in accordance with Australian accounting standards and in Australian dollars.

The Practice Note also provides guidelines on the disclosure to the Australian market of information disclosed in foreign markets.

Copies of Practice Note 71 can be obtained from the ASIC website at <http://www.asic.gov.au> or ASIC's InfoLine, telephone 1300 300 630. The Practice Note will be available in the  
7 November 2001 update to the ASIC Digest.

For media enquiries contact:

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3. RECENT ASX DEVELOPMENTS

(A) ASX LISTING RULES EXPOSURE DRAFT MARCH 2002

ASX proposes to release an Exposure Draft by the end of November of proposed listing rule amendments to take effect in March 2002. The rule amendments will deal with two substantive matters:

- Amendments which are primarily technical in nature, consequential to the introduction of the Financial Services Reform Act 2001 which will take effect on 11 March 2002.  
- Amendments to the Listing Rules in relation to ASX foreign exempt entities.

(1) Financial Services Reform Act 2001

As a result of the Financial Services Reform Act (the "Act"), the following amendments are required to be made to the Listing Rules.

(a) "Securities"

Subsequent to commencement of the Act, the Corporations Act will contain several definitions of "securities". The Listing Rules currently define "security" by reference to the ASX constitution, which refers to the definition in (current) section 92(1), plus rights and options. The ASX constitution is to be amended to delete the definition of "security" and therefore a new definition will need to be adopted for the purposes of the Listing Rules. It is proposed to utilise a definition based on section 92(1) and is essentially the same as the current definition.

(b) Trusts

The Act introduces a disclosure regime for managed investment schemes which differs from the regime which applies to companies. Sections 1012B and 1012C require a product disclosure statement, not a prospectus, for an offer for the issue or sale of a financial product. "Financial product" in this context includes an interest in a managed investment scheme but not a share or debenture. Amendments to add a reference to "Product Disclosure Statement" to references to a prospectus are therefore proposed.

A range of other amendments are proposed encompassing disclosure issues, rights to return interests in managed investment schemes (as subscribers for shares in a company currently have), and cooling-off periods. These amendments will be to Appendices 1A, 1B, 1C, 3B, and notes to listing rules 2.10 and 3.17.

(c) Confirmation requirement

Section 1017F introduces a new requirement for confirmation which applies to shares as well as units. It requires confirmation of transactions by which the holder acquired the product or that occurs while the holder holds the product, including a transaction by which the holder disposes of all or part of the product. The warranty provisions of Appendices 1A, 1B, 1C, and 3B will be amended to refer to this provision.

(d) Changes to section numbers

A number of provisions of the Corporations Act are relocated and renumbered by the Act, including sections 1001A and 1001D which deal with continuous disclosure. This requires minor consequential amendments to the Listing Rules.

(2) ASX Foreign exempt entities

On 3 October 2001, ASX announced that it proposes to amend the Listing Rules to update and revise provisions relating to Foreign Exempt entities.

Currently foreign companies listed on another exchange may be listed on ASX as Foreign Exempt provided they have net tangible assets of $A50 million, or profit before tax in each of the previous three years of $A10 million. These companies are not subject to most of the ASX Listing Rule requirements, including listing rule 3.1 in relation to continuous disclosure. Instead, these entities are only required to lodge with ASX all periodic reports and notices provided to their home exchange.

The proposed Listing Rule amendments have been prompted by two concerns.

Firstly, the Foreign Exempt classification has not delivered a liquid market in securities of foreign entities, which was the substantive purpose underlying the introduction of the category in 1985. ASX remains one of the few stock exchanges offering Foreign Exempt status. ASX currently has 1,413 listed entities, of which only 41 companies are admitted as Foreign Exempt entities. Most of those 41 companies have attracted minimal investor interest.

Secondly, and in an effort to increase the liquidity of those companies, ASX has become increasingly of the view that entities listed on ASX should comply with ASX's continuous disclosure regime, and that the investment community trading securities on the ASX market expects entities to do so. Companies currently classified as Foreign Exempt entities on ASX are not required to comply with the majority of the ASX Listing Rules, including ASX's continuous disclosure regime.

Under the proposed listing rule amendments, the threshold for admission to the Foreign Exempt category will be increased to $A2 billion of net assets and $A200 million profit after tax in each of the previous three years. Any entity not meeting these criteria may apply to convert to a full ASX Listing, in which case they must comply with all of the Listing Rules. These entities need not relinquish their listing on any other exchange. There are currently 42 foreign entities listed in the full ASX Listing category who also maintain listings on one or more other exchanges.

It is proposed that the rule amendments will be introduced at the same time as the amendments consequential to the commencement of the Financial Services Reform Act 2001. However, it is proposed that the provisions will not take effect until 30 June 2002, to give time to Foreign Exempt entities to consider their options and where necessary, convert to full ASX Listing status. In the meantime, ASX has placed a moratorium on applications for Foreign Exempt listings.

(B) SINGAPORE EXCHANGE LIMITED AND ASX ALLIANCE AGREEMENT

In 2000, Singapore Exchange Limited (SGX) and Australian Stock Exchange Limited (ASX) entered into an alliance agreement to undertake the design of a reciprocal market linkage portal service to support cross border trading between the two Exchanges. The two Exchanges have subsequently proceeded with development of the technical linkage facilities, trading and settlement processes, and, in consultation with the Australian Securities and Investments Commission (ASIC) and the Monetary Authority of Singapore (MAS), development of an appropriate legal and regulatory framework for the linkage. This development work is now in its final stages.

A paper has been prepared by ASX, in consultation with ASIC. The main objectives of this paper are to:

- describe the business model for the linkage at a high level, and  
- highlight the major legal and regulatory principles supporting the linkage arrangements;  
- seek comments in relation to particular aspects of the proposed linkage arrangements, (which are noted in italics throughout the paper); and  
- invite comments on the proposed linkage arrangements generally.

Submissions are requested by the close of business on 26 October 2001.

The paper is available on the ASX website at <http://www.asx.com.au> under "what's new".

4. RECENT TAKEOVERS PANEL MATTERS

(A) REVIEW PANEL REQUIRES BIGSHOP PLACEMENT TO BE PUT TO SHAREHOLDERS

On 17 October 2001 the Takeovers Panel advised the directors of Bigshop.com.au Ltd that a proposed issue to Macquarie Bank Limited of 6.667 million shares in Bigshop should go to Bigshop shareholders for approval. The decision was in response to an application by Fast Scout Limited to the Panel for review of the Panel's decision of 27 September 2001, when the Panel decided (in its Bigshop 01 decision) not to make a declaration of unacceptable circumstances in relation to the proposed issue.

After reviewing the matter and taking into account new information, the Review Panel has decided to make orders, on the basis that implementation of the proposed issue, without shareholder approval, would constitute unacceptable circumstances.

The Review Panel considered that it was reasonably open to Fast Scout to assert that it could achieve its stated objective of "effective control" of Bigshop, under its partial takeover bid for Bigshop, if it acquired at least 25%. The Review Panel also accepted Fast Scout's assertion that the proposed placement to Macquarie and arrangements to add up to three directors, would be likely to lead to the defeat of the bid, and therefore unreasonably reduce the prospect of it achieving effective control of Bigshop under its bid. In those circumstances, if the proposed placement and other arrangements were implemented without shareholder approval, the shareholders would be denied the opportunity to consider the bid. Therefore, the Review Panel considered that the proposal, in the absence of a commitment to put it to Bigshop shareholders for approval, was "frustrating conduct". It considers this is consistent with the principles in the Pinnacle 8 decision.

Additionally, the Review Panel advises that Fast Scout has offered to make undertakings to the Panel materially improving its bid, on certain conditions. A shareholders' meeting has been convened to consider motions by Fast Scout to remove and replace the existing board. Fast Scout has offered to undertake, provided no shares or options are issued to Macquarie without its agreement, that: if the motions to remove the directors are defeated, it will seek ASIC's consent to withdraw its offers; but if the motions are carried, it will declare its bid to be free of all conditions except the 25% minimum acceptance condition, the prescribed occurrences condition, and conditions relating to minimum cash holdings and liabilities and material changes to assets and financial position; and it will also increase the bid consideration from 7.8 cents to 9 cents per share.

Fast Scout has also offered to undertake, subject to ASIC providing any necessary relief, to vary the proportion of each shareholder's shares to which its partial offer applies from 51% to 65%, provided no shares or options are issued to Macquarie without its agreement, and that no waiver is granted by ASX of Listing Rule 9.17, under which substantial parcels of Bigshop shares are currently held in escrow.

The Panel regards the offering of these undertakings as material new information which should be disclosed to the Bigshop shareholders, and has decided that the undertakings should be accepted. It is desirable in the interests of the Bigshop shareholders that all relevant matters should be placed before them, so that they can choose between remaining with the existing directors and proceeding with the placement to Macquarie (if it remains available), on one hand, and replacing the board and (if they wish) accepting Fast Scout's revised partial bid, on the other hand.

The Review Panel will order Bigshop to postpone the meeting scheduled for 26 October (to replace the existing board) until after the meeting which is currently scheduled to be held on 2 November (to ratify the making of a partial bid). The Review Panel will also order Bigshop to dispatch further information to shareholders. The Review Panel considers that the postponement, and the further information will give shareholders adequate time and information to consider all relevant matters. Bigshop has advised the Review Panel that it may be necessary, yet, to postpone the 2 November meeting to a new date. However, the Review Panel has advised Bigshop that both meetings must be held before 16 November 2001.

The making of Fast Scout's bid has already been the subject of a significant period of unexplained delay, and the implementation of the Panel's orders will involve inevitably some further delay but it enables shareholders to make a clear decision between the two alternatives. However, the Panel considered that neither Bigshop nor Macquarie had provided any clear commercial imperative for immediate implementation of the transaction without shareholder approval, particularly as the placement was announced on 28 August 2001. Bigshop has had it within its power at least from then to take the proposal to shareholders for approval.

The Panel intends to make orders designed to ensure that Fast Scout proceeds with its revised bid quickly and does not unreasonably extend it, if the shareholders vote to replace the existing board of Bigshop.

The review Panel comprised Justice R P Austin (sitting President), Simon Mordant (sitting deputy President) and Karen Wood.

The reasons will be published on the Panel's website at <http://www.takeovers.gov.au>

(B) PANEL DECLARES UNACCEPTABLE CIRCUMSTANCES IN RELATION TO VANTECK'S TAKEOVER FOR PINNACLE OVER LISTING APPLICATION

On 17 October 2001 the Takeovers Panel advised that it had made a declaration of unacceptable circumstances and final orders in relation to Vanteck (VRB) Technology Corp's takeover bid for Pinnacle VRB Limited. Vanteck is listed on the Canadian Venture Exchange. The Panel has ordered that Vanteck proceed as soon as practicable to make an application for quotation of its securities on ASX and that it extend the closing date of its bid. Pinnacle shareholders who have accepted since that announcement will also be able to withdraw their acceptance of the bid.

During the proceedings, ASIC submitted that:

(a) Vanteck's announcement on 7 September 2001 of its intention to make an application for quotation of its securities on ASX and its subsequent failure to take adequate steps to make an application for quotation in a timely manner; and

(b) Vanteck's letter of 20 August 2001 to the Board of Pinnacle asserting that Vanteck considered Pinnacle's directors to be in the position of caretakers pending the outcome of the bid and the outcome of the EGM,

gave rise to unacceptable circumstances.

The Panel considers that Vanteck's announcement on 7 September 2001 indicated to shareholders a clear intention that Vanteck would shortly make an application for quotation of its securities on ASX. The Panel considers that Vanteck's failure to make such application and its failure to keep the market informed as to the progress of the application, given its bid for Pinnacle, gives rise to unacceptable circumstances.

The Panel's orders require Vanteck:

(a) to make an application for quotation within 14 days of the date of the orders;

(b) to issue a supplementary bidder's statement on or before 18 October 2001 informing the market of:

(i) the Panel's decision,

(ii) its orders, and

(iii) the timetable for and the progress of its application for quotation.

(c) to extend the closing date for its bid until the date that falls 7 days after ASX makes a decision in relation to Vanteck's application for quotation.

The orders also give Pinnacle shareholders who accepted Vanteck's offer between 7 September and 22 October 2001 the opportunity to withdraw their acceptances should they so choose.

The Panel has decided not to make a declaration or take any action in relation to Vanteck's letter of 20 August 2001 to the Board of Pinnacle. The Panel does not consider that the letter had any material effect on the market for shares in Pinnacle that would require it to take further action.

The sitting Panel in this matter was constituted by Ms Marian Micalizzi (sitting President), Ms Robyn Ahern (sitting Deputy President) and Ms Alison Lansley.

The Panel's reasons for the decision will be available shortly on the Panel's website at <http://www.takeovers.gov.au>

(C) PANEL MAKES DECLARATION AND ORDERS IN PINNACLE NO 11 PROCEEDINGS

On 16 October 2001 the Takeovers Panel advised that the Pinnacle No 11 Panel had made a declaration of unacceptable circumstances and final orders in relation to Vanteck (VRB) Technology Corp's (Vanteck) takeover bid for Pinnacle VRB Ltd (Pinnacle).

The review Panel's decision confirms the views of the Pinnacle No 10 Panel in its decision of 5 October 2001 relating to acceptances made by Credit Suisse First Boston Australia Equities Private Ltd (CSFB) on 22 and 23 September 2001 on behalf of Ronay Investments Pty Ltd (Ronay) and some other Pinnacle shareholders.

The Panel accepted that CSFB erroneously and mistakenly authorised acceptance of Vanteck's bid on behalf of Ronay and the other Pinnacle shareholders for approximately 1.6 million shares. Vanteck refused to consent to a reversal of the transaction which is necessary under the SCH Business Rules before the acceptances could be reversed. The Panel considered that the facts surrounding the acceptances, and the current circumstances of Vanteck's bid for Pinnacle, mean that the acceptances should be reversed.

The Panel's final orders require the erroneous acceptances to be reversed and CSFB to notify the affected Pinnacle shareholders of their right to vote, or to appoint a proxy representative, at the general meeting of Pinnacle shareholders scheduled.

The review Panel in this matter was constituted by Mr Simon McKeon (sitting President), Mr Kevin McCann (sitting Deputy President) and Mr Chris Photakis.

The Panel's reasons for the decision will be available shortly on the Panel's website at <http://www.takeovers.gov.au>

(D) NEW NAME FOR THE TAKEOVERS PANEL

On 11 October 2001 the President of the Takeovers Panel (previously the Corporations and Securities Panel), Mr Simon McKeon, welcomed the introduction of the new name for the body.

The name change took effect as part of the Transitional Provisions of the Government's Financial Services Reform Act 2001.

The Takeovers Panel was formed in January 1991 when the Corporations Law became effective. Its original name was intended to be a reflection of the breadth of the potential matters that could be referred by the then Australian Securities Commission to the Panel . It included share buy-backs, shareholder approved transactions and other acquisitions of shares. In March 2000, the Panel's role and scope in relation to takeovers was significantly expanded with the introduction of the Corporate Law Economic Reform Program Act. The majority of the Panel's work is now in its dispute resolution role in regards to takeovers.

Mr McKeon said that the new name reflected the Panel's current work more closely, and was the name most people in the mergers and acquisitions field called the Panel already.

The Panel's website address remains the same <http://www.takeovers.gov.au>

5. RECENT CORPORATE LAW DECISIONS

(A) PROTECTION OF COMPANY'S PROPERTY DURING ADMINISTRATION  
(By Michael Paphazy, [Blake Dawson Waldron](http://www.bdw.com.au))

In the matter of Ansett Australia Limited; Intrepid Aviation Partners VII LLC v Ansett Australia Limited [2001] FCA 1360, Federal Court of Australia, Goldberg J, 20 September 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/september/2001fca1360.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

Inteprid Aviation Partners VII LLC sought leave of the Court under section 440C of the Corporations Act to take possession of a Boeing 727-277F aircraft which it owned and leased to Ansett Australia Limited. As a result of Ansett being placed under administration on 14 September 2001 a material term of the lease was breached, and Intrepid served notice to Ansett on 17 September 2001 that the lease agreement was terminated and that it required Ansett to deliver the aircraft to it.

Ansett did not use the aircraft itself but contracted with Independent Air Freighters Pty Ltd ("IAF") to operate and maintain the aircraft for carrying freight. Since the demise of Ansett, there had arisen a substantial backlog of freight in Melbourne waiting to be transported to Perth, as all Ansett aircraft were grounded.

Whereas most applicants under section 440C would normally seek to obtain possession of their property to protect its proprietary and security interests, in this instance, Intrepid sought to obtain possession of the aircraft for the purpose of making it available to IAF.

(2) What factors were involved in the exercise of the Court's discretion under section 440C?

In assessing the purpose of Part 5.3A of the Corporations Act, Goldberg J reviewed section 435A, which states that the object of Part 5.3A is "to provide for the business, property and affairs of an insolvent company to be administered in a way that:

- maximises the chances of the company, or as much as possible of its business, continuing in existence; or

- if it is not possible for the company or its business to continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company."

In particular, Goldberg J looked at how the Court should exercise its discretion under section 440C. Citing with approval a statement made by Byrne J in Java 452 Pty Ltd; Permanent Trustee Australia Ltd v Snout (1999) 32 ACSR 507 at 516, Goldberg J found that under section 440C the Court possessed an unfettered discretion to determine whether to grant leave to a lessor to take possession of property which is used or is in the possession of a company under administration.

Accordingly, in exercising the Court's discretion, Goldberg J took into account the public interest in addition to the objectives stated in section 435A: namely, the urgent need to transport air freight around Australia together with the fact that only a limited number of aircraft were equipped to be able to perform these tasks, meant that the continuing operation of this aircraft was essential in alleviating the backlog of freight.

(3) What did the Court order?

In summary, while the Court did not wish to prejudice the administrators' concerns for negotiating the sale of the air freight unit, Goldberg J concluded that the "significant public interest element" was grounds for allowing an order for the aircraft to be used temporarily and for a limited purpose by IAF. However, this order was made subject to the aircraft having proper insurance cover and on the understanding that the aircraft would not leave Australia. Further, Goldberg J made it clear that this order was not to be regarded as being made pursuant to Intrepid's termination notice of 17 September 2001, but was rather freezing the rights of the parties so that the aircraft could be used in the same way as it had operated prior to Ansett being placed under administration.

(4) Comment

This decision reinforces the notion that the scope of a court's discretion under section 440C is broad and that a court may elect to take into account factors extraneous to the object of Part 5.3A of the Corporations Act in order to justify leave being granted to an applicant.

(B) APPROVAL OF ADMINISTRATORS' DECISION TO ENTER INTO MEMORANDUM OF UNDERSTANDING  
(By Kimberley Pritchard, [Blake Dawson Waldron](http://www.bdw.com.au))

In the matter of Ansett Australia Limited and Mentha [2001] FCA 1439, Federal Court of Australia, Goldberg J, 12 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/federal/2001/october/2001fca1439.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The administrators of Ansett Australia Limited and other related companies (the "Ansett Group") sought approval of the Court under section 447D(1) Corporations Act to enter into a Memorandum of Understanding with the Air New Zealand Group.

The administrators took the view that it was imperative for the Ansett group to recommence flying operations as soon as practicable to minimise the damage which its cessation of operations had caused to the goodwill of its business. The administrators developed a strategy for recommencing Ansett operations which became known as "Ansett Kick-Start". The aim of this project was to recommence flying a limited number of aircraft on the main trunk routes so as to preserve the name, mark and goodwill of Ansett. The administrators realised that they required funds to implement Ansett Kick-Start, that is the resumption of limited operations, and to develop a longer term strategy for Ansett Mark II.

On 8 August 2001, Air New Zealand Ltd had written a letter ("Letter of Comfort") to the directors of Ansett Holdings Limited, Ansett International Limited and Ansett Australia Limited saying it was its current policy to take such steps from time to time as are necessary to ensure that its wholly owned subsidiaries (including the Companies) are able to meet their debts as they fall due, and that it would advise promptly in the event of any change in this policy. It also undertook to make working capital advances up to $400 million.

The administrators were advised that the Ansett group had claims against Air New Zealand arising out of the Letter of Comfort and that theoretically there may be claims against the directors of companies in the Ansett group pursuant to provisions of the Corporations Act, the Trade Practices Act 1974 (Cth) and at common law. Enquiries in relation to the general financial position of Air New Zealand suggested that it might be counter-productive for the Ansett group to issue legal proceedings seeking hundreds of millions of dollars from Air New Zealand at a time when it was financially distressed.

On 23 September the Chairman of Air New Zealand informed the administrators that unless Air New Zealand could make significant progress to settle its disputes with the Ansett group by 3.00pm that day, the directors of Air New Zealand would apply to the New Zealand Government to appoint a statutory manager that day. Air New Zealand took the position that it should be treated as having paid or credited as having paid sums totalling $160 million in respect of any possible liability under the Letter of Comfort. Air New Zealand was, therefore, of the view that the maximum amount due under the Letter of Comfort was $216 million. The administrators disputed this proposition. Ultimately, Air New Zealand came up with an offer of a payment of $150 million and said that if the administrators pushed for more money, the Air New Zealand group would collapse.

One of the issues which arose for the administrators was the concern that if they received any payment from Air New Zealand, and it subsequently became insolvent, the administrators might be required to disgorge the payment as a preference. The administrators, therefore, required that either the payment be made by the New Zealand Government or that the New Zealand Government give the administrators an appropriate indemnity. On 3 October 2001, the New Zealand Government agreed to give the administrators the indemnity.

The administrators considered that it was in the interests of the Ansett group and its creditors that they enter into the Memorandum of Understanding which involves, in particular, the receipt of $150 million, the giving up of any further claims under the Letter of Comfort and the giving up of certain claims which the Ansett group might have against Air New Zealand and the Directors. The matter of concern to the administrators was that they were giving up claims which they had not been able to quantify, and there was no basis for assessing the likely prospects of recovery from the Directors.

Under section 447D(1) of the Corporations Act an administrator of a company under administration may apply to the Court for directions about a matter arising in connection with the performance or exercise of any of the administrator's functions and powers. Essentially what a court is doing when giving directions under section 447D(1) is to provide the administrator with protection against claims that he or she acted inappropriately or unreasonably in entering into, and performing, the agreement. Although the courts will not pronounce upon the commercial prudence of a particular transaction, they will act in an appropriate case to protect administrators from claims that they have acted unreasonably provided the administrator has made full and fair disclosure to the Court. Courts should pay regard to the commercial judgment of liquidators when considering compromises of claims or causes of action made by liquidators in respect of which compromises the approval of the court is sought. The Court will generally defer to the commercial judgment of liquidators and administrators.

In reviewing the Memorandum of Understanding and the relevant factual circumstances, Goldberg J was satisfied that the administrators were, in entering into the agreement, seeking first to maximise the chances of the Ansett Group and secondly, if that was not possible, to achieve maximum return for the Ansett Group's creditors. Goldberg J ordered that the Court approve, under section 447D(1), the Memorandum of Understanding, but held that it was no part of the function of the Court to give any indication or direction as to how the $150million should be applied

(C) COMPULSORY ACQUISITION OF SHARES AND THE CONSTITUTION  
(By Stephen Magee)

Pauls Limited v Elkington [2001] QCA 414, Queensland Court of Appeal, McPherson and Williams JJA, Jones J, 2 October 2001

The full text of this judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/qld/2001/october/2001qca414.htm> or <http://cclsr.law.unimelb.edu.au/judgments/>

The significance of the central issue in this case - the constitutionality of the Corporations Law - has been largely rendered redundant by the passage of the Corporations Act 2001. However, in the course of dismissing that constitutional issue, the Qld Court of Appeal touched on a constitutional question about the Corporations Act.

(1) What happened

The case arose out of a compulsory acquisition of shares under Pt 6A.2 of the Corporations Law of Victoria. Mrs Elkington challenged the compulsory acquisition on the grounds that the Corporations Law of Victoria was constitutionally invalid (on several grounds). Her arguments were unanimously dismissed by the Court of Appeal.

The Court of Appeal also noted that the question of the constitutionality of the Corporations Law might not be capable of being a live issue after 15 July 2001, even for court proceedings begun before that date. This was because section 1384 of the Act "translates" pending court proceedings under the Law (including, persumably, appeals) into proceedings under the Corporations Act. On that basis, a challenge to the constitutionality of the Corporations Law simply falls away, since a component subject matter of the proccedings (the Corporations Law) has been statutorily removed from them.

However, in the course of proceedings, Mrs Elkington indicated that she would be challenging the constitutional validity of section 1384. There is no doubt that section 1384 was a novel piece of legislation, and it will be interesting to see how a challenge to it plays out.

(2) Acquisition on just terms

Also of interest is the wider question of the effect of placitum xxxi of section 51 of the Constitution on the general compulsory acquisition power in the Corporations Law/Act. Underlying one limb of Mrs Elkington's constitutional challenge was the contention that a Commonwealth compulsory acquisition provision runs foul of the "just terms" requirement of placitum xxxi.

Briefly considering this issue in obiter, Williams JA (Jones J concurring) drew attention to section 1350(1) of the Corporations Act. That provides:

"Section 1350 Compensation for compulsory acquisition

1350(1) If:

(a) apart from this section, the operation of this Act would result in the acquisition of property from a person otherwise than on just terms; and

(b) the acquisition would be invalid because of paragraph 51(xxxi) of the Constitution ;

the person who acquires the property is liable to pay compensation of a reasonable amount to the person from whom the property is acquired in respect of the acquisition."

In obiter, Williams JA said: "[t]hat provision...has the effect that if in law the acquisition must be on `just terms' because of [placitum xxxi], that is how the compensation payable must be assessed. In other words the legislation is not rendered invalid by [placitum xxxi], but rather if [placitum xxxi] applies appropriate compensation must be paid."

It is unclear whether Williams J would read section 1350(1) as governing the exercise of the Court's powers under section 664F or whether the separate compensation procedure set out in section 1350(2) and (3) would provide a mechanism by which any assessments under section 664F could be topped up by a separate application by the minority shareholder.

In theory, of course, section 1350 is a complete answer to any doubts about the constitutionality of section 664F: however it operates, it would ensure that a minority shareholder was entitled to obtain "just terms" for their shares. In practice, however, there is a considerable difference between a single procedure for ensuring that a 90% holder pays a just price and a two-step procedure, with all of the delays and additional expense that the latter entails.

On the other hand, it is entirely feasible that section 664F will be interpreted in such a way that the "fair value" required by the section equates to "just terms", so that there is no need to refer to section 1350 in the first place.

(D) LIQUORLAND INJUNCTION APPLICATION PUT BACK IN THE BOTTLE  
(By Nicholas Mavrakis, [Clayton Utz](http://www.claytonutz.com))

Liquorland (Aust) Pty Ltd v Anghie [2001] VSC 362, Supreme Court of Victoria, Warren J, 2 October 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/vic/2001/october/2001vsc362.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

The Supreme Court of Victoria has declined to grant a takeover bidder an interlocutory injunction to hold on trust consideration payable by the bidder to the directors of the target company under the takeover offer.

(1) Background

The proceedings arose out of a takeover offer made by Liquorland (Aust) Pty Ltd ("Liquorland") for Australian Liquor Group Ltd ("ALG"). The takeover offer was accepted by ALG's shareholders.

Liquorland alleged that certain directors of ALG had misrepresented to it ALG's forecast profit and sales before Liquorland made its takeover offer.

On 12 July 2001, Liquorland applied to the Takeovers Panel for a declaration of unacceptable circumstances under section 657A of the Corporations Act and an interim order restraining the payment by it of the bid consideration. On 31 July 2001, the Panel found that Liquorland had made out a prima facie case that unacceptable circumstances existed. The Panel directed Liquorland to lodge the bid consideration payable to the directors into an interest bearing account; this was intended to provide Liquorland with an opportunity to seek remedies against the directors in Court. The Panel accepted that the Court was the most appropriate forum for these claims to be heard and determined.

On 1 August 2001, Liquorland commenced these proceedings in Supreme Court of Victoria against the ALG directors, claiming loss and damages. In addition to a claim that the directors were in breach of section 995(2) of the Corporations Act for misleading and deceptive conduct for misrepresenting the true forecasted sales and profits, Liquorland also alleged that the directors contravened the insider trading provisions in section 1002G(2) of the Corporations Act.

Liquorland sought an interlocutory injunction under section 1325 of the Corporations Act that the bid consideration be held in trust pending the final hearing. Liquorland also sought an order under section 1325A(1) (under which a Court may make any orders it considers appropriate if a person contravenes a provision of Chapter 6, 6A, 6B or 6C).

(2) Power to make interlocutory orders

Justice Warren held there was no power in sections 1325 or 1325A for the Court to make the interlocutory orders sought by Liquorland. This is because section 1325 of the Act is predicated on the suffering or likely suffering of loss or damage arising from contravention of the specified Chapters or Divisions of the Corporations Act and section 1325A is predicated on a contravention of specific provisions in the Act, certain conditions or certain knowledge relating to a particular notice. These elements were not satisfied at this interlocutory stage.

Justice Warren nevertheless held that the Court has power under section 1324 to grant final or interim injunctions. An application for this injunction is to be determined in accordance with the usual principles applicable to interlocutory injunctions. Her Honour also held that the Supreme Court of Victoria has power under section 37(1) of the Supreme Court Act 1986 (Vic) to grant an interlocutory order (as does the Federal Court under section 23 of the Federal Court of Australia Act 1976 (Cth)).

In the exercise of her discretion, however, Justice Warren declined to grant the interlocutory injunction sought by Liquorland. This was for several reasons.

First, her Honour characterised the injunction sought by Liquorland as a Mareva injunction. A Mareva injunction may be granted where the plaintiff establishes a good arguable case and there exists a real risk that the defendant will remove assets from the jurisdiction or dispose of or otherwise deal with the assets within the jurisdiction in such a way that there is a danger that judgment for the successful plaintiff will be unable to be satisfied: Jackson v Sterling Industries Limited (1987) 162 CLR 332. Her Honour characterised the injunction as a Mareva injunction because it sought to prevent the directors from disposing of or dealing with the bid consideration in such a way that would frustrate any order for damages that Liquorland may obtain at final hearing. Liquorland had failed to demonstrate any risk that the directors would dissipate the moneys or otherwise remove the moneys from the jurisdiction.

Secondly, Justice Warren dealt with Liquorland's application on the basis that it was properly characterised as an interlocutory injunction, not a Mareva injunction. The first issue to consider was whether there was a serious question to be tried and the second was to assess where the balance of convenience lay.

(3) Serious question and balance of convenience

Her Honour was satisfied that there was a serious question to be tried as to whether Liquorland had been prejudiced by the non-disclosure of material information such that the value of ALG shares might have been less than the bid price. In coming to this conclusion, Her Honour said that it was "very relevant" that the Takeovers Panel had found that it appeared likely that unacceptable circumstances existed.

On the balance of convenience aspect, Liquorland submitted that its rights against the directors would be irreparably harmed if the injunction was not granted: its right to seek final relief in the nature of varying the bid contracts or divestiture of shares would be extinguished and become futile once payment to the directors was made.

Justice Warren did not agree with this submission. It misconceived the nature of the relief available to Liquorland if successful at trial. Liquorland's remedies, for instance under section 1325 or 1325A, would not be extinguished by releasing the bid consideration to the directors, as the proper remedy available to Liquorland under sections 1325 or 1325A was damages. As damages was an appropriate remedy, the balance of convenience lay with the directors.

(4) Comment

Justice Warren made some interesting comments about the nature of injunctive relief. If granted, the injunction would place the directors in the position of effectively providing security to Liquorland for its potential claim for damages in the event it was successful at trial. This is contrary to long standing authority that a Court will not require a defendant to give security for the plaintiff's claim by way of an injunction: Lister & Co v Stubbs (1890) 45 Ch D 1. Her Honour cited the following passage from the judgment of Brooking J in National Australia Bank Limited v Bond Brewing Holdings Limited (1991) 1 VR 386 in support of this proposition:

"But despite the recognition and extension of the Mareva jurisdiction the court continues to insist on a danger that assets will be dissipated and the old principle of Lister & Co v Stubbs remains intact, the principle, that is, that the giving by a defendant of pre-trial security to meet the plaintiff's claim is not regarded as a means of protecting or enforcing the plaintiff's rights for the purposes of the principles on which injunctions are granted...it has been accepted now for a hundred years or more that a plaintiff is not entitled to be secured against the danger, for example, that his debtor will lose his assets by unprofitable trading before judgment is given on the claim."

The judgment is therefore a reminder of the fundamental principle that interlocutory injunctions will not be granted where damages are an adequate remedy and an injunction will not be granted where it essentially amounts to a defendant giving pre-trial security in the event that the plaintiff is ultimately successful at a final hearing.

The judgment also illustrates the importance and care that need to be taken in documents lodged with the Takeovers Panel. Justice Warren regarded the Panel's findings that unacceptable circumstances appeared likely to exist as relevant to the discretion as to whether to grant this interlocutory injunction. It is important that in any applications, statements or submissions lodged with the Panel, statements are not made or positions adopted which may prejudice the party's position in proceedings which may be commenced in Court after the takeover bid period has concluded. In its reasons for decision dated 7 August 2001, the Panel recognised that Liquorland's claims, the availability of precisely defined causes of actions, the measures of loss, the procedural powers and remedies, the likely time it might take to resolve the issues and the fact that the Court's processes and procedures were better suited to enabling the testing of a large amount of evidence required to make a proper determination of the facts made the Court a more appropriate forum for Liquorland's claims to be resolved.

(E) CONFIDENTIALITY OF PROCEEDINGS AT BOARD MEETINGS  
(By Sean Tully, [Phillips Fox](http://www.phillipsfox.com))

NRMA v Stewart Geeson [2001] NSWCA 343, Supreme Court of New South Wales Court of Appeal, Ipp AJA, Mason P, Giles JA, 11 October 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/october/2001nswca343.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The applicant, the National Roads and Motorists' Association Limited ('NRMA'), is a company limited by guarantee. Its principal function is to render roadside and other services to motorists. It has approximately 1.8 million members. Mr Stewart Geeson, Ms Anne Keating and Ms Jane Singleton were board members of NRMA and were the first, second and third respondents. The fourth respondent, John Fairfax Publications Pty Ltd, is the publisher of the Sydney Morning Herald newspaper.

The president of the board of directors of NRMA was Mr N Whitlam. A number of board members supported Mr Whitlam and a number did not. The first, second and third respondents, at least at times, did not support Mr Whitlam.

The first and third respondents, appeared on Channel 9's 'Sunday Program' telecast in September 2001.

A board meeting was held on 17 September 2001 at which:

(a) a statement criticising the appearance of the first and third respondents on the Sunday Program was read by the Chief Executive Officer. The grounds of criticism were:

(i) the 'turmoil' among the board, which had received 'much negative media' had caused 'a drop in positive member perceptions of the company and the brand.'

(ii) some employees were concerned 'at the action of some directors'.

(iii) The appearance constituted a breach of the Code of Conduct applicable to directors which the board had adopted.

(b) a motion was moved by the first respondent that "in view of the gravity of the charges levelled against the president by the Australian Securities and Investments Commission…the deputy president take the chair until the ASIC matter has been completed".

The 'ASIC matter' referred to serious allegations made by ASIC against Mr Whitlam relating to contraventions of the Corporations Act.

In response to the motion that the deputy chair step aside, Mr Whitlam informed the board that he was entitled to chair the meeting and that the first respondent could only move a motion to remove him as president. The second respondent stated that the board had an obligation to consider matters put before it by directors and she would make the way the board voted a matter of public record.

The first respondent stated he did not wish to move such a motion and moved an alternative motion that "the chair consider standing aside as president of the company until the ASIC matter has been completed.

Mr Whitlam stated that, if he did not receive an undertaking from every director present that he or she would not disclose "confidential discussion outside the boardroom", he would seek an immediate injunction. He then asked each director for such an undertaking. All directors, other than the first, second and third respondents, stated that they would provide such an undertaking. According to the second respondent, before a vote could be taken on the first respondent's motion, Mr Whitlam abruptly halted the meeting by saying that it had come to an end. As she put it, "there was no vote, no discussion".

An election of the board was pending at the time of the meeting.

The applicant then brought an application for an injunction to protect, as confidential, 'the proceedings of the [applicant's] board on 17 September 2001, including the board papers, discussions and deliberations at that meeting.'

(2) Decision at first instance

On 21 September 2001, in his judgment at first instance, Bryson J categorised the information claimed to be confidential as follows:

(a) Events and discussions relating to Mr Whitlam's occupation of the chair at the board meeting on 17 September 2001.

(b) Board papers, such as legal advice or other documents, tabled at or read to board meetings, or minutes of board meetings.

(c) Information about events at the board meeting of 17 September 2001.

Bryson J then dismissed the application for an interlocutory injunction. On the same day, Ipp AJA granted the applicant an interim injunction restraining the four respondents from publishing the 'confidential' information.

(3) Decision on appeal

On 28 September 2001, the Court of Appeal dismissed the applicant's application for leave to appeal and dissolved the injunction granted by Ipp AJA. The Court of Appeal determined that Bryson J had not erred in his findings nor in taking into account the public interest in the dissemination of information as part of the factors relevant to whether there was a serious question to be tried.

(a) Justice Bryson found that there was a serious issue to be tried as to whether the information was confidential in character.

The Court of Appeal considered whether there was a qualified obligation of confidentiality in relation to the first category of information (that relating to the events and discussions concerning Mr Whitlam's occupation of the chair). In doing so, Ipp AJA stated that "The mere fact that particular information is of a confidential character does not impose an obligation of absolute confidentiality on every person in possession of it… Each case depends on its own circumstances and in each case there has to be an enquiry into the extent and limits of the obligation of confidentiality that may be imposed on an individual in regard to particular pieces of confidential information in his or her possession."

The applicant contended that the second respondent was obliged not to disclose the first category of information because such a disclosure would be in breach of her fiduciary duties as a director of the applicant. However, Ipp AJA held that the second respondent would not breach her fiduciary duties to the applicant by disclosing the first category of information as, in the circumstances, it was strongly arguable that it would be in the interests of the applicant as a whole, and entirely proper, for the second respondent, as a director of the applicant, to advise the members of NRMA of the events and discussions relating to Mr Whitlam's occupation of the chair at the board meeting on 17 September 2001.

(b) Justice Bryson found the evidence supported a reasonable apprehension that the second and fourth respondents might disclose a limited quantity of the information concerned. The evidence did not support a reasonable apprehension that the first and third respondents would do so.

In considering the application, the Court of Appeal determined that there were a number of possible reasons for the unwillingness of the first and third respondents to give the undertaking requested. These ranged from a "sense of affront" caused by the demand for the undertaking to a knowledge of the existence of a qualified duty not to disclose the information which rendered the undertaking unnecessary or even undesirable. Ipp AJA concluded that Bryson J's reasons for reaching this finding were entirely correct, and therefore effectively disposed of the application insofar as it applied to the first and third respondents.

Justice Bryson then went on to consider the balance of convenience and found:

(i) The circumstances of NRMA, including the breadth of its membership, were such that the only practical method of informing them was by the press. The information may be significant to members, particularly in circumstances were an election was pending.

(ii) The role of NRMA in NSW society, was such that the public had a legitimate interest in its governance.

(iii) After considering the balance of convenience, the interests of justices prevailed on the side of not granting the injunction.

The Court of Appeal agreed that the press was the only practical method of disseminating the information and that the interests of the public in governance of NRMA were legitimate and 'of significance to society in New South Wales as a whole'. In particular, 'The way in which the applicant's board of directors conducts its affairs could materially affect the roadside and motoring facilities available to the public in this State….'.

The Court of Appeal considered that, in contrast to Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106, 'the affairs of the applicant are of [such] direct and immediate concern to the members of the public, it is arguable that considerations analogous to those involving freedom of communication in relation to public affairs apply.'

The applicant submitted that Bryson J erred in having regard to public interest considerations in determining whether an injunction should be granted. The applicant relied on David Syme & Co Limited v General Motors-Holden Limited [1984] 2 NSWLR 294 in which the Court of Appeal in the Supreme Court of New South Wales refused to take into account considerations of public interest in determining whether an injunction against disclosure of trade secrets should be granted.

Ipp AJA distinguished the circumstances in the present application from those in David Syme & Co Limited on the grounds that, 'The real interest that the public would have in such a topic…is not comparable with the idle curiosity the public in general might have about the secret manufacturing processes of a well known industrial company'. Ipp AJA therefore concluded that Bryson J had not erred in taking into account the public interest in the dissemination of information concerning what took place at the board meeting as part of the factors relevant to whether there was a serious question to be tried.

His Honour then examined Bryson J's determination in relation to the balance of convenience. The choice before Bryson J lay between refusing the injunction, which would result in permanent and irrevocable loss of confidentiality in the information concerned, or granting the injunction, which would result in the members of the applicant not being informed of the events and discussions at the meeting in question at a time when a board election was pending.

Ipp AJA stated that on appeal, the approach of the Court should be as expressed by Sir John Donaldson MR in the Court of Appeal in Attorney-General v Guardian Newspapers Limited [1987] 3 All ER 316 at 335-336:

"[T]he appeal is against the exercise of a judicial discretion and it is not sufficient that we may think that, faced with this problem, we would have exercised the discretion differently. Initially our function is one of review only. This Court, as an appellate court, may not intervene, unless it is satisfied that the judge exercised his discretion on a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly."

His Honour was not persuaded that Bryson J erred in the exercise of his discretion in any respect and therefore dismissed the application for leave to appeal. Ipp AJA stated that "Bryson J committed no error of principle in his general approach to the question before him. He took into account all relevant factors and did not take into account any irrelevant factors. There was evidence before him that supported the factors that he did take into account".

Mason P and Giles JA agreed with Ipp AJA.

(F) AMENDMENT OF CONSTITUTION - OPPRESSION - CONSTRUCTION OF MEMBERS' REQUISITIONS   
(By Caro Walters, [Phillips Fox](http://www.phillipsfox.com))

NRMA Limited v Snodgrass [2001] NSWSCA 312, Supreme Court of New South Wales, Court of Appeal, Mason P, Meagher JA, Sheller JA, 12 September 2001

The full text of the judgment is available at:

<http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2001/september/2001nswca312.html> or <http://cclsr.law.unimelb.edu.au/judgments/>

(1) Background

The respondent, Mr Snodgrass, is a member of NRMA Limited ('NRMA'). He was the instigator of a members' requisitioned meeting to consider two amendments to the constitution of NRMA.

The court at first instance refused to declare the requisition invalid and also refused to restrain the presentation of the requisition to NRMA on the grounds that NRMA had failed to demonstrate the meeting would be called for an improper purpose.

NRMA appealed against that decision in relation to the following proposed resolution:

'That the Constitution of NRMA Limited be amended by inserting a new Rule 161, in the following terms:

"All Directors elected to the Board at the 1999 half board election shall publish to members in the [following] report to members, full details of their election campaign funding including details of all donations and advertising, donated advertisements, and all other provided services.

After each election of Directors the candidates who are elected shall be required to publish the same details of their election campaign as required by the preceding sub-paragraph.  
Any Director who fails to fully comply with this rule to be forever disqualified from serving on the NRMA Limited Board."'

The explanatory statement in relation to the proposed resolution included, among other things, the following:

'The need for this new rule…is highlighted by what happened during the 1999 NRMA Ltd half-board elections, when Nick Whitlam fielded a team of eight candidates known as the "Members First" group.

This group ran a massive, extremely costly advertising campaign which ensured that all eight members of Whitlam's faction were elected to the board. The question is who paid for this mammoth campaign and why? This question has never been answered.'

(2) Decision on appeal

Mason P delivered the decision of the Court of Appeal which upheld the decision of the court at first instance and dismissed the appeal with costs on the grounds set out below.

The Court of Appeal accepted Windeyer J's reasoning at first instance in relation to NRMA's submission that the requisition was not for a proper purpose and was, consequently, ultra vires. In particular, the Court of Appeal determined that the members' meeting must be held for a proper purpose (section 249Q of the Corporations Law, now Corporations Act 2001). Consideration of a proposal to amend the Constitution is such purpose. The contract embodied in the constitution is inherently capable of amendments (sections 136, 140) and 'no special contract as between the 1999 directors and the company is invoked'.

The Court rejected the submission that the proposed amendment was oppressive in the sense that it would provide grounds for relief in accordance with sections 232 - 233, as the Court determined:

(a) the amendment is prospective in operation and 'does no more than treat past events (the 1999 election) as the basis for a future prescription'.

(b) the directors elected at the 1999 election 'point to no special or vested contract'.

(c) the 'sanction' of disqualification from office, 'would fall upon directors who chose not to comply with the mandate of the new rule…The mere alteration of the   
Constitution…will not trigger the removal of any director.'

(d) the fact that the new rule would not apply to directors elected earlier (and who had yet to retire), was not unfairly discriminatory. There were no class rights affected by the proposed resolution. 'In the absence of evidence establishing that it is oppressive to discriminate in this way, the court must leave it to the good sense of the members to decide whether they want the new rule'.

The Court also rejected the submission that the proposed rule is so vague as to be meaningless. Following the decision of the English Court of Appeal in Isle of Wight Railway Co v Tahourdin (1883) 25 ChD 320, the Court ruled restraint should be exercised when construing notices of meeting and particularly notices of requisitionists 'will be construed with regard to the possibility that ambiguities can be debated and modified'. Restraint was especially called for before 'precluding members from exercising such limited powers as they possess as regards company governance'.

6. RECENT CORPORATE LAW JOURNAL ARTICLES

K Morgan-Wicks, 'The New General Compulsory Acquisition Power: Re-establishing the Minority's Right to an Independent Expert' (2001) 19 Company and Securities Law Journal 349

The recent decision of Pauls Limited v Jennifer Mary Dwyer is the first to consider the new extended compulsory acquisition power in Pt 6A.2 of the Corporations Law, since its commencement on 13 March 2000. The decision in itself is controversial, for two reasons: it basically removes the notion of "independence" from the requirement to prepare an expert's report; and ignores established and continuing ASIC policy applicable to Ch 6A. The purpose of this article is to challenge the findings of Douglas J in this case, drawing upon an analysis of the express provisions, ASIC policy, case law and extrinsic materials to re-establish the minority's right to an "independent" expert.

V Priskich, 'CASAC's Proposals for Reform of the Law Relating to Corporate Groups' (2001) 19 Company and Securities Law Journal

The completion of the final report by the Companies and Securities Advisory Committee into corporate groups heralds what will be a major change to company law affecting corporate groups, if the recommendations are implemented. This article examines specific aspects of the report including the proposals for consolidated wholly-owned groups, and the special regime for partly-owned groups. It also explores specific disincentives arising from the models, which threaten their adoption by group companies.

L Nash and B Collier, 'Fixed Charges over Book Debts after Agnew v Commissioner of Inland Revenue' (2001) 9 Insolvency Law Journal 116

Under the Corporations Act 2001 (Cth), employees and other nominated unsecured creditors are given priority to assets of an insolvent company. In some cases, these rights are superior to those of the holders of floating charges over those same assets. One consequence has been the drafting of security documentation by some secured creditors to encompass as many assets of the debtor company as possible within the scope of a fixed charge. However, a recent decision of the Judicial Committee of the Privy Council on appeal from the Court of Appeal of New Zealand, Agnew v Commissioner of Inland Revenue, has ruled that a fixed charge over book debts is possible in only limited circumstances, and that the earlier leading case on this topic - Re New Bullas Trading Ltd (1994) 12 ACLC 3,203 - was wrongly decided. This article examines Agnew in detail, and looks at the body of case law in this area to ascertain the potential impact of Agnew on Australian law.

J Glover and J Duns, 'Insolvency Administrations at General Law: Fiduciary Obligations of Company Receivers, Voluntary Administrators and Liquidators' (2001) 9 Insolvency Law Journal 130

This article examines the usefulness of applying the fiduciary label to the offices of company receivers, voluntary administrators and liquidators. Three conclusions are suggested. First, the breach of fiduciary duty wrong, for most purposes, is now jurisdictionally redundant. Secondly, new duties in the Corporations Act require equitable glosses in order to be sensibly applied. Thirdly, ingenious and unforeseeable frauds require the retention of an unwritten fiduciary's law.

S McNee, 'The Just and Equitable Ground - A Remedy of Last Resort' (2001) 9 Insolvency Law Journal 147

This article provides an overview of the issues surrounding an application to wind up a company on the just and equitable ground combined with an analysis of recent cases in the area. This area of the law is not without its nuances and practitioners need to be careful when relying upon the ground particularly where the company the subject of the application is solvent. Practitioners should consider carefully whether other more appropriate remedies are available and whether the applicant's conduct may be a bar to obtaining this type of equitable relief. The recent case of Guerinoni suggests that the courts will not allow applicants to avail themselves of the just and equitable ground unless their conduct has been entirely above reproach.

Note, 'Inquiries into the Conduct of Liquidators (Leslie v Hennessy; Re Aboriginal Councils and Associations Act 1976)' (2001) 9 Insolvency Law Journal 160

Note, 'Voidable preference due to inactive secured creditor (G & M Aldridge Pty Ltd v Walsh)' (2001) 9 Insolvency Law Journal 162

Note, 'Invalidity of a bankruptcy notice if the judgment on which it relies cannot be enforced at the time it is issued (Reasonable Endeavours Pty Ltd v Dennehy; and Cawood v Cawood)' (2001) 9 Insolvency Law Journal 164

Note, 'Insolvency Law Reform in New Zealand- Further Developments' (2001) 9 Insolvency Law Journal 167

S Rousseau, 'Internet-based Securities Offerings by Small and Medium Sized Enterprises: Attractions and Challenges' (2001) 35 Canadian Business Law Journal 226

P Lee, 'Global Finance and Transnational Failure: Comity and the Bankruptcy Code' (2001) Vol 118 No 7 Banking Law Journal

L Pruitt, 'Permissible Securities Activities of Banks: The Networking and Trust Activities Exceptions to Broker-Dealer Registration' (2001) Vol 118 No 8 Banking Law Journal

A Roussos, 'Realising the Free Movement of Companies' (2001) 12 European Business Law Review 7

P Leyens, 'A Framework for Adequate Shareholder Protection' (2001) 12 European Business Law Review 42

A Poutianen, 'Shareholders and Corporate Governance: The Principle of One Share - One Vote' (2001) 12 European Business Law Review 67

P Omar, 'Company Law Reform in France: The Economic Imperative' (2001) 12 European Business Law Review 76

M Lauterfeld, 'Centros and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach Towards Pseudo-Foreign Companies in German International Company and Insolvency Law?' (2001) 12 European Business Law Review 79

S Sashenveng, 'Companies' Liabilities Under the First EC Directive' (2001) 12 European Business Law Review 89

Corporate Governance Bulletin: Vol 19 No 2, May-July 2001. Articles include:

- Shareholders Keep Up the Heat on Executive Compensation  
- Dissidents Emerge Victorious From the 2001 Proxy Season  
- Audit: Non-Audit Fees Vary Widely Finds IRRC  
- More European Nations Increase Disclosure on Executive Pay

Corporate Governance International, Vol 4 No 2, June 2001. Articles include:

- Financial Institutions, Independent Directors and Darwinian Evolution  
- The Competitive Advantages of Compound Boards

R Maxwell and M Paulsen, 'Equity Investments by Financial Holding Companies' (2001) 16 Journal of International Banking Law 131

L Faugerolas, 'Equity Tracking Securities - The Alcatel Experience' (2001) 29 International Business Lawyer 254

I Robinson, 'Venture Capital Company Board and Management Guidelines in the United States' (2001) 29 International Business Lawyer 268

S Sheikh, 'Employee Consultation Rights Bill: Extending Corporate Democracy' (2001) 12 International Company and Commercial Law Review 143

C Svernlov, 'Proposed Changes Re Liquidation of Limited Liability Companies in Sweden' (2001) 12 International Company and Commercial Law Review 163

J Smallenberger, 'Restructuring Mutual Life Insurance Companies: A Practical Guide Through the Process' (2001) Vol 49 No 4 Drake Law Review

T Pick, 'New German Takeover Act' (2001) 9 Trade Practices Law Journal 192

Virginia Journal of International Law, Vol 41 No 3, Spring 2001. Special Issue on the Privatization of the Securities Laws. Articles include:

- Introduction: Privatization and Its Prospects  
- Private Versus Political Choice of Securities Regulation: A Political Cost/Benefit Analysis  
- Stock Exchange Mobility, Unilateral Recognition, and the Privatization of Securities Regulation  
- Proposals for Reform of Securities Regulation  
- Regulation FD and Foreign Issuers: Globalization's Strains and Opportunities  
- Privatizing 'Outsider Trading'  
- Jurisdictional Choice in Securities Regulation

A Hicks, 'Director Disqualification: Can It Deliver?' (2001) Journal of Business Law 433

C K Low, 'Revisiting the Regulatory Framework of Capital Markets in Malaysia' (2001) 14 Columbia Journal of Asian Law 277

A Karaki, 'Regulation and Compliance in Japanese Financial Institutions' (2001) 14 Columbia Journal of Asian Law 327

Note, 'Should Limited Liability Company Membership Interests be Treated as Securities in South Carolina?' (2001) 52 South Carolina Law Review 827

Note, 'The Financial Services Reform Act: Implications for Managed Investment Schemes' (2001) Vol 21 No 8 Proctor: Journal of the Queensland Law Society 14

D Brown, 'Street Crime, Corporate Crime, and the Contingency of Criminal Liability' (2001) 149 University of Pennsylvania Law Review 1295

Note, 'Convertible Bonds: Will the Market Respond?' (2001) Vol 15 No 5 China Law and Practice 40

Note, 'Trends in Mergers and Acquisitions: The Restructuring of Domestically Listed Chinese Companies' (2001) Vol 15 No 5 China Law and Practice 55

Note, 'New Share Offerings in the PRC: Administration of Offering New Shares by Listed Companies Procedures' (2001) Vol 15 No 4 China Law and Practice 24

Corporate Governance: An International Review, Vol 9 No 3, July 2001. Articles include:

- Redesigning Corporate Governance Structures and Systems for the Twenty-First Century  
- Corporate Governance in Germany: The Move to Shareholder Value  
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- The Strategic Board: The Changing Role of Directors in Developing and Maintaining Corporate Capability  
- Corporate Board, Investors and Their Relationships: Accounts of Accountability in Corporate Governance in Action  
- Towards a Mutual Understanding of Objectives: Attitudes of Institutional Investors and Listed Companies to Corporate Governance Reform  
- Women Directors on Top UK Boards  
- What Makes Boards Effective? An Examination of the Relationships Between Board Inputs, Structures, Processes and Effectiveness in Non-Profit Organisations  
- Building of a Corporate Governance System in Poland: Initial Experiences  
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Corporate Governance: An International Review, Vol 9 No 2, April 2001. Articles include:

- Corporate Governance in the Russian Federation: The Relevance of the OECD Principles on Shareholder Rights and Equitable Treatment  
- Principles of Corporate Governance in Greece  
- Generally Accepted Management Principles - Functions, First Proposals, and Acceptance Among German Top Managers  
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