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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 Seminar (Sydney and Melbourne) – The Takeovers Panel: Key issues for companies and advisers - Seminar to mark the 5th anniversary of the new Panel** In March 2005 the Takeovers Panel celebrates its fifth anniversary as the main forum for resolving takeover disputes. In this time the Panel has delivered almost 150 decisions on a range of important matters relating to takeovers.This seminar brings together leading speakers to examine current and emerging issues for the Panel and those involved in takeovers including:         Conditions in bids - where should the line be drawn?;        Covering the "no mans land" between bids and schemes (especially trust schemes)        Control transactions outside takeovers and schemes - selective capital reductions, rights issues and buy-backs;        Collateral benefits;        Equal access to information by competing bidders;        ASIC's relationship with the Panel and ASIC's current approach to Panel matters;        Understanding the Panel's approach and what really matters to it; and        The Panel or the Courts - where to go if you have a choice?**Speakers:**Tim Bednall    -            Partner, Mallesons Stephen Jaques  Richard Cockburn  -      Director of Corporate Finance,  ASICGeorge Durbridge  -      Counsel, Takeovers PanelBryon Koster -             Partner, Blake Dawson WaldronAlison Lansley  -          Partner, Mallesons Stephen JaquesMarie McDonald -         Partner, Blake Dawson WaldronSimon McKeon -          Executive Chairman, Macquarie Bank Limited and President, Takeovers PanelNigel Morris -               Director, Takeovers Panel**Dates:**3March 2005  Melbourne Seminar9 March  2005  Sydney Seminar**Times:**5.30pm - 7.30pm. Refreshments will be served afterwards.**Venues:****Melbourne Seminar** Blake Dawson Waldron Level 39 101 Collins Street Melbourne 3000  **Sydney Seminar** Blake Dawson WaldronLevel 41 Grosvenor Place 225 George Street Sydney 2000**Cost:**  $90 + $9 GST = $99For further information please go to [http://cclsr.law.unimelb.edu.au/news/](http://cclsr.law.unimelb.edu.au/news/%22%20%5Ct%20%22_new)**1.2 New book – directors’ duties**A new book “Company Directors: Principles of Law and Corporate Governance” was published this month by LexisNexis Butterworths.The authors are Justice Robert Austin, Professor Harold Ford and Professor Ian Ramsay.The book is an important publication given the economic significance of directors, the intensity of debate about their functions and accountability, and the breadth of public interest in the subject of company directors.The book is a detailed and authoritative analysis of the duties of company directors, remedies for breach of these duties, and the structure and operations of the board of directors. The book also examines key issues in corporate governance as they relate to company directors. The book will be of use to practising lawyers, company directors, company secretaries, in-house counsel and academics as well as those with an interest in company directors and corporate governance.The topics dealt with in the book include:         issues in corporate governance (such as corporate governance reports and principles as they affect directors, the role of the stock exchange in corporate governance and disclosure of remuneration);         the structure of the board of directors (including the appointment of directors, disqualification of directors, and removal of directors);         the board's operations (including delegation by directors, meetings of the board, and the appointment of company officers);         the authority of directors to act for the company;         the rights of directors (such as the right to have the affairs of the company administered in accordance with the corporate constitution and the law, the right of access to financial records and other corporate information, and the right to assistance from the company's officers, employees and external advisers);         the duties of company directors (such as the duty to act with care and diligence, the duty to act in good faith in the best interests of the company, the duty to act for proper purposes, the duty to avoid conflicts of interest, the duty to avoid insolvent trading, duties in relation to meetings of shareholders, and duties in the context of capital raising);         nominee  directors;         accessory liability of directors;         directors' insurance and indemnification, ratification and relaxation of duties by shareholders;         remedies and penalties for breach of duty; and         shareholders' derivative litigation to enforce directors' duties.More information about the book is available at: [http://www.lexisnexis.com.au/aus/products/promotions/CompanyDirectors.pdf](http://www.lexisnexis.com.au/aus/products/promotions/CompanyDirectors.pdf%22%20%5Ct%20%22_new)**1.3 Report on board self-assessment in mutual funds**On 15 February 2005, the Independent Directors' Council (a US organisation which represents the interests of independent directors of mutual funds) published a report titled "Board Self-Assessments: Seeking to Improve Mutual Fund Board Effectiveness".The report deals with the process of conducting self-assessment and the topics that should be the subject of board self-assessment. The report also examines assessment of individual board members.The report is available at: [http://www.idc1.org/getPublicPDF.do?file=18543](http://www.idc1.org/getPublicPDF.do?file=18543" \t "_new)**1.4 Myners report on pre-emption rights published**On 10 February 2005 Paul Myners' report on pre-emption rights was published. The report concludes that more active shareholder engagement is the key to UK listed companies - such as those in the biotechnology sector - being able to raise the capital they need to grow and develop. Paul Myners concludes that while the principle of shareholders having pre-emptive rights is valuable and should not be eroded, the current blanket approach to disapplying these rights - due to a rigid interpretation of the existing guidelines - is not working as intended. The report recommends that:          current guidelines should be replaced by new guidance with emphasis placed on a case by case engagement between a company's directors and shareholders;          a new Pre-Emption Group should be formed with wider membership and take a more proactive approach to monitoring application of guidelines; and          the current 5% non pre-emptive right authorisation level should be retained as a benchmark for individual applications. The report follows Paul Myners' study of pre-emption rights, which give existing shareholders first refusal on any new shares that a company issues to raise cash, commissioned by DTI in September 2004. The "Bioscience 2015" report, published by the Bioscience Innovation and Growth Team in November 2003, suggested that the guidelines constrained the growth of companies seeking to finance the transition from the R&D stage to the launch of a product. The full report and the responses to the Invitation to Comment are available on the DTI website at [http://www.dti.gov.uk/cld/public.htm](http://www.dti.gov.uk/cld/public.htm%22%20%5Ct%20%22_new)**1.5 CESR’S final recommendations for consistent implementation of the EU regulation on prospectus** On 10 February 2005 the Committee of European Securities Regulators (CESR) published its final recommendations for the consistent implementation of the European Commission’s Regulation on Prospectus (Ref. CESR/05-054b) and a feedback statement (Ref. CESR/05-055b) which sets out how CESR has taken into account the comments received. The final set of recommendations follows an extensive consultation with industry that has enabled the views from market participants and end-users to be fully considered when drafting the recommendations which are now in their final form.The Prospectus Directive and accompanying Regulation establishes a harmonised format for prospectuses in Europe and allows companies to use a prospectus to list on all European markets without having to re-apply for approval from the local regulator and by doing so, it is intended to help companies avoid the inherent delays and cost that this may involve. As a result of this new legislation, consumers can also be assured of more consistent and standardised information which will enable them to compare more effectively the various securities offers available from a wider number of European companies. This is likely to lead to a greater range of products being available to consumers by making it easier for European companies to list and offer on a number of exchanges or markets due to the strengthening and simplification of the regulatory regime.During the consultations that CESR undertook in order to develop the level two advice for the European Commission and in the responses to the call for evidence published by CESR in March 2004, market participants expressed the need for a consistent approach to be adopted by competent authorities in the different jurisdictions when implementing the Regulation’s requirements. In particular, there was a strong demand for guidance on a number of items of the Regulation.In response to these demands, CESR members decided to start co-ordinating their views and started a consultation process that has now been finalised with the publication of the paper on 10 February 2005. The aim of CESR when issuing these recommendations is to provide greater clarity for issuing companies regarding the provision to disclose information on a range of areas and to promote greater transparency in the way in which supervisors will apply the Regulation, without imposing further obligations on issuers.Following the result of the consultation, CESR has decided to introduce a number of amendments to the original proposals. As suggested, CESR has taken into consideration the overarching principle of the Directive whereby the information included in a prospectus has to be given according to the particular nature of the issuer and of the securities offered to the public or admitted to trading. It has, therefore, clarified what types of securities each recommendation should apply to, bearing in mind that investors need a different level of disclosure depending on the type of securities offered or admitted to trading.In addition, CESR has decided not to issue recommendations on those items included in the consultation paper where there has been a clear consensus in the market on the fact that there is no need for further clarifications, as the Regulation is self explanatory.Moreover, CESR has clarified the scope of its recommendation in relation to forecasts made outside the prospectus, for instance in the context of a road show; the recommendation on the capitalisation and indebtedness statement has been redrafted to address the concerns from respondents on the need to calculate and publish the level of profits at the date of the statement.A number of amendments have been introduced in the specialist issuers section. Following criticism from market participants CESR decided to allow the valuation report required for property companies to be dated up to one year prior to the prospectus. In addition, CESR has clarified that the recommendation on scientific research based companies applies only to companies that can be defined as start-up companies. Moreover, for start-up companies, CESR decided not to require a valuation report on the services/products of the issuer. After due consideration of the pros and cons as put forward by the respondents, it was decided that this report should be voluntary.  The measures included in the paper cover:   Financial information issues:(a) The purpose of the recommendations is not to provide interpretations of IAS/IFRS or Member States’ local GAAP but to clarify certain disclosure requirements included in the Regulation where necessary. The paper includes recommendations on ‘Operating and Financial Review’; ‘Profit forecast or estimates’; ‘Pro forma financial information’, and ‘Working capital statements’.   Non financial information issues:(a) This section comprises several areas: First, CESR proposes to issue recommendations in order to ensure co-ordination among competent authorities when applying Article 23 of the Regulation. This article gives competent authorities the power to require adapted information (in addition to the information items included in the schedules and building blocks) to those issuers listed in Annex XIX of the Regulation (specialist issuers), such as start-up companies or property companies. The second area covers recommendations on certain items of the prospectus where CESR feels there is a need for clarification at this stage. Amongst others, the paper includes recommendations on the following items of the Regulation: related party transactions, history of the share capital, and information on holdings. In addition, CESR also establishes recommendations on the content of the document required in the case of securities offered to employees or offers of shares allotted free of charge to existing shareholders. This is an issue not related to the prospectuses schedules and building blocks.Further information is available on the CESR website at: [http://www.cesr-eu.org/popup2.php?id=3001](http://www.cesr-eu.org/popup2.php?id=3001" \t "_new)**1.6 Parliamentary Committee report on international accounting standards** On 10 February 2005, the Parliamentary Joint Committee on Corporations and Financial Services published its report on adoption in Australia of international accounting standards. The report is titled “Report on Australian Accounting Standards Tabled in Compliance with the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) on 30 August and 16 November 2004”.In its report, the Committee considered 41 new accounting standards. It is stated in the report that the “Committee took the view that the current inquiry should focus on whether the proposed standards meet the formal requirements of the Corporations Act, and whether any unforeseen anomalies have been identified, particularly by companies preparing to implement the standards. The Committee did not intend that this inquiry should provide encouragement to parties to revisit arguments about the technical content of the standards.”The Committee supports the new accounting standards but does recommend that small and medium enterprises be permitted additional time to report to ASIC for that enterprise’s first reporting year under the new standards.The Committee’s report is available at: [http://www.aph.gov.au/senate/committee/corporations\_ctte/aas/report/index.htm](http://www.aph.gov.au/senate/committee/corporations_ctte/aas/report/index.htm%22%20%5Ct%20%22_new)**1.7** **Leaders of accountancy bodies commit international support to clarifying professional responsibilities** The International Federation of Accountants (IFAC), the global organisation for the accountancy profession representing 163 accountancy organizations with more than 2.5 million accountants in public practice, education, government service, industry and commerce, convened a meeting in London in February with the chief executives of 30 member bodies and regional accountancy organisations.Representatives of the World Bank and the United Nations Conference on Trade and Development (UNCTAD) also attended the meeting. The group discussed a global agenda for enhancing the accountancy profession’s contributions to economic growth and development.Participants agreed that the international profession should strengthen accountancy in developing nations, address professional responsibility in financial reporting, clarify the role of accountants in corporate governance, provide support and guidance for professional accountants in business, and focus on supporting small and medium enterprises and practices.The group agreed that the following actions need to be addressed:         Support more rapid development of narrative reporting to achieve greater transparency and more integrity in corporate reporting;         Establish an international forum, addressing audit quality, with investors, regulators and others;         Reinforce the role of professional accountants with respect to corporate governance, building on the work of the Organization for Economic Cooperation and Development (OECD) and the Task Force on Rebuilding Public Confidence in Financial Reporting;   Clarify, communicate and promote the roles of professional accountants in business and provide them with practical guidance; and   Make a long-term commitment to the development of the profession, focusing on the education of professional accountants, promotion of international standards, and the development of financial and management skills – all of which are necessary to a high quality profession that can effectively serve the public interest and meet investor needs.In addition to this list of recommendations, during the meeting IFAC received support for several initiatives that are already underway:         An international consultative conference, to be held in March, designed to better identify the needs of small and medium enterprises and practices and those of developing nations;         The implementation of IFAC’s new Member Body Compliance Program, which encourages convergence of and adherence to high quality professional standards by national accountancy institutes;         Efforts to clarify the language of international standards to facilitate convergence; and          The roles of IFAC’s Developing Nations Permanent Task Force and Small and Medium Practices Permanent Task Force in international standard-setting processes.Member bodies and regional accountancy organisations indicated their commitment to achieving convergence to international standards on accounting and auditing and expressed their dedication to supporting developing countries in establishing a profession based on internationally recognised competencies and standards.**1.8 Discussion paper on strengthening bankruptcy laws** On 8 February 2005 the Australian Attorney-General Philip Ruddock announced the release of a discussion paper on changes to bankruptcy laws designed to target high income earners who use bankruptcy to avoid paying debts they can afford to pay.Amendments targeting this issue were released as an exposure draft in mid-2004 and were later withdrawn.The Insolvency and Trustee Service Australia (ITSA) will also soon convene stakeholder focus groups on these issues.The discussion paper is available on [ITSA's website](http://www.itsa.gov.au/%22%20%5Ct%20%22_new).**1.9 Shareholder participation reforms**On 7 February 2005 the Parliamentary Secretary to the Australian Treasurer, the Hon Chris Pearce MP, released a package of draft legislation relating to shareholder participation.The legislation would remove the so called ‘100 member rule’, which currently requires companies to hold special general meetings at the request of only 100 shareholders. A minimum of 5 per cent of total voting shares would be required to requisition a special general meeting. Mr Pearce said the 100 member rule has been criticised by many, including the judiciary on the following grounds:         it confers disproportionate influence on very small groups of shareholders by enabling them to require companies to hold special meetings on particular issues;          it fails to recognise substantial differences in the size of companies; and          it is out of step with comparative laws in other countries.A number of new proposals have been developed to enhance the capacity of shareholders to participate in scheduled meetings. These proposals include making it easier for minority shareholders to place resolutions on the agenda of scheduled company meetings and to require companies to distribute members’ statements along with notices of meetings. There will also be greater scope for resolutions and statements to be distributed electronically to members. Finally, the reforms will require proxy holders to vote in accordance with shareholder instructions. This will improve shareholder confidence in proxy voting by preventing the questionable practice of ‘cherry picking’ proxies, whereby proxy holders’ lodge votes that accord with their own views while withholding contrary votes. The draft legislation will be contained in the proposed Corporations Amendment Bill (No 2) 2005. The Parliamentary Joint Committee on Corporations and Financial Services has announced that it will hold an inquiry into the proposed reforms. The draft legislation is available on the [Treasury website](http://www.treasury.gov.au/%22%20%5Ct%20%22_new).**1.10 Pricing practices of New Zealand fund managers**On 3 February 2005 the New Zealand Securities Commission announced that it had completed its inquiry into the pricing practices of fund managers. The Commission found that neither market timing nor late trading was commonly practised in New Zealand. "Market timing" is trading in units based on an out of date price. Short-term investors use market timing to make quick trades to exploit a stale fund price. A fund price is stale when the price of the units in the fund does not reflect all the available information about that fund. "Late trading" is the buying and selling of units after the close of trading but using a price that was current when the market closed. Late trading allows certain preferred investors to trade after the cut-off time for accepting buy or sell instructions. The inquiry followed concerns raised last year in the United States, and subsequently in Australia, about certain practices that may be detrimental to investors, particularly market timing and late trading.In New Zealand both historical and forward pricing methods are used by fund managers to price their funds. Forward pricing is when the price of the units in the fund is determined after the buy or sell instructions have been received from the investor. Historical pricing is when the price of the units in the fund is determined before the investors' buy or sell instructions are received. There is a greater potential for market timing where historical pricing, rather than forward pricing, is used. This is because a forward pricing model ensures that the price of the units is not publicly known at the time buy or sell instructions are issued by investors. The Commission notes that most fund managers have taken steps to detect and deter market timing activities. The Commission supports these steps.The Commission:          supports the move of fund managers to using forward pricing for managed funds;          supports the use of procedures such as limiting switching privileges, switching fees or transaction costs, the suspension or spreading of payments, the ability to re-price funds, the ability to review transactions and disclosure in offer documents of fund managers' pricing practices including general information about measures in place to prevent or deter abusive practices, where historical pricing is used or where the fund invests in international equities;          supports the use of strict cut-off times to prevent late trading;          supports procedural checks such as management reviews, compliance checks, internal and external audits, etc., to ensure that cut-off times are adhered to; and         recommends that fund managers and trustees of funds actively monitor procedures and protections in place to detect or deter market timing and late trading activities.The Commission conducted its inquiry by seeking written and signed statements from fund manager firms. The Commission's findings are based on the information provided by those firms.**1.11 Choice of fund in Australia: where the super money and members will move to** Around 7.5% of total superannuation assets are likely to move as the superannuation industry changes shape following the introduction of choice of fund in July this year, according to a new report released on 2 February 2005 by the Association of Superannuation Funds of Australia (ASFA). But caution is the byword for consumers, with the report referring to anecdotal reports of mis-selling already underway. The ASFA Report ‘Implications of choice of superannuation fund legislation for members, employers and funds’ suggests that 5.7 million Australians will have a statutory right to choose their own super fund, and of those around 8%, or some 456,000, will exercise choice.Based on survey data of fund members, choice of fund will lead to gross flows between fund sectors of about 6% of members over time. Because individuals most likely to change funds will also tend to have higher account balances, the percentage of assets that will move over time will be higher, at some 7.5%. Super assets in Australia currently stand at $648.9 billion.Most public sector employees and many employees in large organizations covered by industrial agreements will be exempt from choice of super fund. The report cautions that fund members must be wary of unlicensed financial advisors, and that the regulator (ASIC) needs to be vigilant.The ASFA Report, prepared by Principal Researcher Ross Clare, states that self managed super funds (SMSFs) look set to gain from choice, with retail funds appearing most likely to lose members. Recent surveys have suggested a higher proportion of retail fund members plan to change funds, for a variety of reasons, ranging from fund performance to fee levels.However, both retail and industry funds will gain market share from the closure of certain corporate funds. With twenty two per cent of superannuation assets currently held in SMSFs, ASFA expects this to be boosted over time by 4% of total superannuation assets. Employers whose employees are not exempted from choice of fund will almost certainly be making contributions to more funds from 1 July. A very large employer might be contributing to around 50 super funds on behalf of employees. The ASFA Report warns employers to be careful who they allow to provide educational or marketing material in the workplace to their employees. There have already been reports of “educational seminars” that have recommended inappropriate or unwise courses of action to employees. ‘Implications of choice of superannuation fund legislation for members, employers and funds’ can be accessed at the [ASFA website](http://www.superannuation.asn.au/%22%20%5Ct%20%22_new).**1.12 Criminal penalties for serious cartel behaviour** On 2 February 2005 it was announced that the Australian Government will amend the [Trade Practices Act 1974](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) to introduce criminal penalties for serious cartel conduct.The Review of the Competition Provisions of the Trade Practices Act (the Dawson Review) recommended the introduction of criminal penalties for serious cartel conduct, recognising the growing international experience that suggests they are effective in deterring serious cartel conduct.However, the Dawson Review also indicated that a number of problems with the introduction of criminal penalties needed to be resolved before such penalties could be introduced. Principally, the problems identified in the Dawson Review centred on appropriately defining a criminal offence and implementing an effective leniency or immunity policy in the Australian context.The proposed criminal cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel.To ensure the offence targets serious cartel conduct that causes large scale or significant economic harm, and that minor breaches are dealt with through civil rather than criminal proceedings, the DPP and the ACCC will enter into a formal, publicly available Memorandum of Understanding (MOU) establishing procedures for the investigation of the cartel offence and the circumstances in which the ACCC will refer a case to the DPP for prosecution. The MOU will also specify that in making an independent determination as to whether to prosecute a particular matter, the DPP will consider factors such as the impact of the cartel and the scale of detriment caused to consumers and the public, and previous admissions to or convictions for cartel conduct.The ACCC will issue guidelines, prepared in consultation with the DPP, to outline the factors that will inform any decision to pursue a criminal investigation.Appropriate protection for whistleblowers that come forward to uncover cartel conduct will be provided though a clear and certain immunity policy. International experience suggests immunity for whistleblowers is critical in uncovering cartels. Guidelines will be published setting out the conditions for immunity to be granted by the DPP, upon the advice of the ACCC. The respective roles and responsibilities of the ACCC and the DPP will also be defined in the MOU.The maximum penalties for the offence will be a term of imprisonment of five years and a fine of $220,000 for individuals and a fine for corporations that is the greater of $10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual turnover.In accordance with the intergovernmental Conduct Code Agreement, the Australian Government will consult with the States and Territories over the next three months.Further information is available on the [website](http://www.treasurer.gov.au/%22%20%5Ct%20%22_new) of the Treasurer.**1.13 Global CEO survey: governance, risk management and compliance** On 26 January 2005 Pricewaterhouse Coopers published its 8th Annual Global CEO Survey. According to the survey, building robust corporate governance systems and processes, managing risk on a global scale, and complying with an increasingly vast web of regulatory requirements is difficult, costly and time consuming work; however, CEOs worldwide, think it is well worth the effort.Of more than 1,300 CEOs, 43 percent consider governance, risk management and compliance (GRC) a value driver and a source of competitive advantage, and 56 percent believe that it has a positive effect on reputation and brand. However, responses indicate that effective governance, risk management and compliance are not easily achieved and that CEOs are struggling with their implementation.The survey shows that there are clear benefits to effective GRC; however, responses overwhelmingly demonstrate that CEOs face numerous challenges when it comes to implementation and, ultimately, to realising these benefits. While a majority of CEOs surveyed are confident that they can respond to governance, risk management and compliance issues in their domestic operations, only one quarter say they can very effectively respond to foreign laws and regulations and to internal policies and procedures in foreign business units. The survey also shows that CEOs are struggling with effective implementation. While 53 percent feel that codes of conduct are fully developed in their companies, far fewer believe that their compliance and ethics training programs meet the same standards. A third of CEOs feel that their measurement of performance in these areas is not well-developed if at all. The majority of CEOs surveyed, however, recognize that governance, risk management and compliance have a positive effect on reducing legal liabilities (64 percent) and on enhancing reputation and brand. Additionally, the 58 percent of CEOs who consider GRC expenditures an investment see greater benefits than those who view it as a cost. These executives believe that GRC is a value driver, a source of competitive advantage, and an aid in enabling them to take risks to create value.In this report, four global business leaders provided in-depth, personal perspectives on how they and their organisations are meeting the challenges of GRC. These leaders are:          Leif Johansson, President and CEO, Volvo Group          Michael McCallister, President and CEO, Humana Inc.          Fernando Roberto Moreira Salles, CEO, Companhia Brasileira de Metalurgia e Mineração (CBMM)          Captain Wei Jiafu, President and CEO, COSCO GroupThe full report is available on the [PWC website](http://www.pwcglobal.com/%22%20%5Ct%20%22_new).**1.14 Research on UK directors’ pay rules** Better disclosure on directors' pay is leading to improved dialogue between companies and shareholders according to new research published on 25 January 2005 by the UK Trade and Industry Secretary, Patricia Hewitt. In a written statement to Parliament, Patricia Hewitt said that rules on pay disclosure introduced by the Government (Directors' Remuneration Report Regulations 2002) had had a "positive impact" and that the independent report by Deloitte and Touche published on 25 January 2005 underlines the effectiveness of the Government's action in making directors' remuneration subject to closer scrutiny by shareholders.As a result of the findings, the UK Government has decided against new provisions on directors' remuneration in the forthcoming Company Law Reform Bill.The findings show:         a significant increase in the levels of compliance with the Directors' Remuneration Report Regulations. The research shows a rapid and almost complete reduction in directors' notice periods to one year or less, and high disclosure standards of 80 per cent or more in 19 out of the 22 areas covered by the regulations;         growing investor satisfaction with improved disclosure on director's pay and awards. All of the top 350 FTSE companies now put their remuneration report to a separate shareholder vote and a number of well-publicised situations have seen remuneration committees changing their policy or practice as a direct result of shareholder voting;         better communication and engagement between shareholders and companies: over 90 per cent of shareholders say communications have improved; and         companies changing their remuneration policies and practices to reflect the link between pay and performance. For example, directors’ awards are now more likely to be vested proportionally to set levels of performance with full vesting of awards only for more stretching performance targets.Patricia Hewitt called on the Association of British Insurers and National Association of Pension Funds, and the Confederation of British Industry, to develop a common set of best practice guidelines on directors' contracts.The research identifies minor changes to the Regulations in order to further clarify what is required of companies with regard to some elements of their annual remuneration report and suggests some additional improvements to the transparency and quality of the information provided.Consideration will be given by the UK Government to the need for the changes suggested by the report in the light of views expressed by stakeholders and better regulation principles. The Trade Secretary stated that if, as a result, the changes are considered necessary, they should not involve additional costs or additional regulatory burdens on companies or shareholders.The full text of the Deloitte and Touche report is available on the website at: [http://www.dti.gov.uk/cld/Deloitte\_Rep\_DRRR\_2004.pdf](http://www.dti.gov.uk/cld/Deloitte_Rep_DRRR_2004.pdf%22%20%5Ct%20%22_new) or via the main [DTI homepage](http://www.dti.gov.uk/%22%20%5Ct%20%22_new).The research was based on a detailed analysis of companies' latest annual reports and a survey of the views of shareholders, institutional shareholders' representative bodies, the CBI, IMA and the IMA.The full text of Patricia Hewitt’s written statement is available at: [http://www.parliament.uk](http://www.parliament.uk/%22%20%5Ct%20%22_new) **1.15 Supervising financial services in an integrated European single market: discussion paper** On 24 January 2005 the UK Financial Service Authority, HM Treasury and the Bank of England published a discussion paper titled “Supervising financial services in an integrated European Single Market”. The following is an extract from the executive summary:As Europe’s financial markets become more integrated, so the question of how to supervise these markets becomes more complex. Financial institutions quite reasonably demand more efficient supervisory arrangements to lower costs and to increase efficiency and competitive advantage, while investors and financial supervisors want supervisory arrangements that tackle cross-border risks more effectively.There is no single or simple way to achieve supervisory convergence: the issues are complex and the solutions are multiple and multi-faceted. This paper sketches out five related challenges that need to be addressed to make progress on achieving convergence of supervisory practice, and offers some proposals for how this can be achieved. Such proposals do not require new EU legislation but rather focus on practical solutions to this complex issue. Taken together, these challenges and proposals present an ambitious framework for action:         to ensure the effective, consistent and proportionate implementation and enforcement of EU legislation on financial services. This requires practical mechanisms which involve supervisors and the financial sector and which build on initiatives already underway;         to improve cooperation between supervisors. There is plenty of scope within the existing legislative framework for more effective cooperation, including better information sharing, consultation and joint working. The UK authorities propose that the appropriate model of cooperation should be guided by a series of impact criteria based primarily on the systemic importance of an institution to the home or host Member State;         to ensure that the supply and sharing of data to, and between, financial supervisory authorities is efficient and effective. Market initiatives to improve the efficiency of data flows need to be encouraged. Supervisors need to work together to define common data requirements for firms and reach agreement among themselves on adopting common formats or “languages”. One goal should be for firms to be able to supply data about their activities in one area (such as banking or securities trading) to only one supervisory authority;         to ensure that financial supervisory authorities, along with central banks and finance ministries, are able to work together to manage financial crises. Cemented in deeper trust between supervisors, practical mechanisms are needed that allow supervisors to take decisions quickly and fairly, such as crisis management exercises embedded in Memoranda of Understanding and joint working; and         to continue to develop trust between market participants and supervisors and between supervisors themselves. Supervisory authorities and national governments must have trust and confidence in each others’ judgments and actions. Firms and consumers must also have trust in supervisory authorities. The best ways to increase trust are to increase transparency, for example by publishing national rulebooks or being open to peer review; to work more closely together; and to address conflicts of interest.The full text of the discussion paper is available at: [http://www.fsa.gov.uk/pubs/other/tripartite\_dp.pdf](http://www.fsa.gov.uk/pubs/other/tripartite_dp.pdf%22%20%5Ct%20%22_new) |
| **2. Recent ASIC Developments** |
| **2.1 Small capitalisation companies and fundraising disclosure**  On 23 February 2005 the Australian Securities and Investments Commission (ASIC) announced a campaign aimed at improving the disclosure in fundraising documents issued by small capitalisation companies (Small Caps Campaign). 'The Small Caps Campaign will be aimed at fundraisings of up to around $5 million by existing listed companies and initial public offerings (IPOs) seeking listing on the Australian Stock Exchange, Bendigo Stock Exchange, Newcastle Stock Exchange, or Australia Pacific Exchange', ASIC's Director of Corporate Finance, Mr Richard Cockburn said.In the six months to 31 December 2004, 279 documents were lodged with ASIC for fundraisings up to $5 million, seeking to raise a total of $400 million. The campaign will focus on getting disclosure right the first time in six areas of disclosure. ASIC has identified that the quality of information and levels of disclosure in these six areas have, historically, not been sufficient to allow investors to make informed investment decisions about the merits of the offer.The six areas that ASIC will focus on are:         use of funds and consequences of not raising the full amount sought;         use of terms from the Australasian Code for Reporting Mineral Resources and Ore Reserves (JORC) and Valmin Codes by resource sector companies;          prospective financial information;          related party underwritten fundraisings;          material contracts; and          directors' track record.ASIC expects to release a report on the results of its campaign report by June 2005.Further information is available from the [ASIC website](http://www.asic.gov.au" \t "_new).**2.2 ASIC releases policy on approving codes of conduct**On 23 February 2005 the Australian Securities and Investments Commission (ASIC) issued a new Policy Statement [PS 183] Approval of financial services sector codes of conduct, which sets out how ASIC will approve codes in accordance with section 1101A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act). This is a statutory power to approve voluntary industry codes of conduct.ASIC does not have the power to mandate industry codes. Industry must decide in the first instance whether to develop a code, and then whether to have that code approved by ASIC. [PS 183] describes the key features of an effective codes regime that can apply to both large and small sections of the financial services industry. The policy further sets out the process by which ASIC will exercise its approvals power. According to the policy, ASIC expects a code submitted for approval to satisfy the following key criteria:          be freestanding and written in plain English;          incorporate a comprehensive body of rules (not a single issue guideline);          be enforceable against subscribers;          be developed in a consultative way with key stakeholders;          be effectively and independently administered;          be adequately promoted;          have monitored and enforced compliance;          contain appropriate remedies and sanctions; and          be subject to a mandatory review every three years.A copy of the Policy Statement can be obtained from ASIC's Infoline by calling 1300 300 630 or from the [ASIC website](http://www.asic.gov.au" \t "_new).**2.3 ASIC releases preliminary results of 2004-05 financial reporting surveillance project**On 17 February 2005 the Australian Securities and Investments Commission (ASIC) released the preliminary results of its 2004-05 financial reporting surveillance program. 'Over the last four months, ASIC has reviewed the full-year financial reports of about 400 listed companies with balance dates between 31 March and 30 September 2004 for general compliance with accounting standards', ASIC's Chief Accountant, Mr Greg Pound said.'Taking into account an earlier surveillance program of 2003 financial statements, approximately half of all listed entity full year financial reports have been reviewed for general compliance with accounting standards. This is part of our systematic program aimed at reviewing the financial report of every listed entity at least once every four years', Mr Pound said.As previously reported, ASIC also reviewed the financial reports of all listed entities, with 30 June 2004 balance dates, for compliance with disclosure requirements regarding the transition to the Australian equivalents of International Financial Reporting Standards (IFRS).In addition, qualifications or 'emphasis of matter paragraphs' contained in audit reports of listed entities were reviewed for issues that may warrant further inquiry of the listed entity. **(a) Financial reporting surveillance**Following a review of 400 financial reports, ASIC has sought information and explanations in relation to the accounting treatments adopted by 32 listed entities. ASIC is in the process of reviewing the further information provided and discussing issues with the entities involved. Based on this process a decision will be made as to what action, if any, is warranted.ASIC's inquiries are concerned with the following areas:         Fair value acquisition accounting issues, including queries over computation of goodwill, fair value of purchase consideration and assets acquired, and failure to include appropriate disclosures;          Carrying values of assets (particularly intangibles), including various instances of non-depreciation and non-amortisation;         Appropriateness of deferral of expenditure and associated recoverability;          Recognition and calculation of revenue;          The timing and appropriateness of consolidation and deconsolidation of entities;         Failure to adequately disclose details of directors and executives remuneration either in the accounts or Directors Report; and          Lack of disclosure in relation to appropriate accounting policies, EPS, discontinuing operations, IFRS and segment reporting.As a result of ASIC's inquiries, Consolidated Global Investments Limited amended and re-lodged its financial report on 23 December 2004. The amended annual report disclosed that the consolidated loss from ordinary activities before income tax increased from $496,796, as previously reported, to $848,439. The company made the adjustments in order to comply with AASB1041 'Revaluation of Non-Current Assets' as an asset revaluation had been incorrectly taken to profit. **(b)** **Disclosing the impact of adopting international accounting standards** ASIC examined the disclosures of more than 1,100 listed entities with 30 June 2004 balance dates concerning their progress towards adoption of IFRS and its impact on those entities. General findings were released in November 2004.ASIC wrote to companies that failed to provide the disclosures required by accounting standard AASB 1047 'Disclosing the Impacts of Adopting Australian Equivalents to International Financial Reporting Standards'. Nine of these companies have since disclosed the information in an announcement to the Australian Stock Exchange and/or re-lodged their financial reports. ASIC has issued orders against five of these companies prohibiting them from using lower content prospectuses for a specified period. Similar orders have been made against six other companies that have not lodged their 30 June 2004 financial reports or have lodged them late. Every listed entity that either failed to comply with AASB 1047 or was late lodging its financial reports is unable to use a number of ASIC class orders including prospectus relief to allow the use of shareholder purchase plans.**(c) Qualified audit reports** 'Qualified financial reports alone are of limited use to investors and others for making important investment decisions because the audit qualification is an indication that the financial report is unreliable', Mr Pound said.Twenty-eight of the financial reports of listed entities with 31 March to 30 June 2004 year-ends were subject to qualified audit opinions. ASIC is considering 16 qualified opinions that indicate non-compliance with accounting standards to determine whether further action is warranted. 'ASIC is concerned that some of these entities have previously received qualified audit reports which, prima facie, suggests a culture of non-compliance. When determining whether further action is warranted, we will consider the company's financial reporting history', Mr Pound said. In addition, the financial reports of over 120 companies had audit reports containing a qualification or emphasis of matter paragraph involving going concern issues. ASIC is reviewing these companies to determine whether ASIC's National Insolvency Co-ordination Unit should take further action. **(d) Audit**Where an entity has not complied with accounting standards and the audit report was unqualified, ASIC may refer the auditor's conduct to the Companies Auditors and Liquidators Disciplinary Board.ASIC has also written to those auditors who failed to qualify a listed entity's financial report notwithstanding that the report did not comply with AASB 1047.'The findings to date from our 2004-05 financial reporting surveillance program suggest that overall compliance with the accounting standards continues to be good. As in past years, no systemic concerns or trends were identified', Mr Pound said.ASIC will be reviewing approximately 40 companies with 31 December 2004 financial year ends for overall compliance with accounting standards after their financial statements are lodged. All 31 December year-end financial reports will also be reviewed for compliance with AASB 1047. In addition, a sample of 100 companies with 30 June financial year ends will have their 31 December half-year financial report reviewed for compliance with AASB 1047.**Companies that have provided further disclosures in order to comply with AASB 1047:**Company: Action:Central West Gold NL Re-lodged financial statementsChameleon Mining NL AnnouncementEmpire Oil & Gas NL Re-lodged financial statementsGarratt's Limited AnnouncementHarrington Group Ltd Disclosed in a prospectusIYS Instalment Receipt Re-lodged financial statementsLimited Linden & Conway Ltd Announcement Mount Conqueror Re-lodged financial statementsMinerals NL Telezon Limited Announcement**2.4 ASIC review of high-yield debentures**On 17 February 2005 Mr Jeremy Cooper, Deputy Chairman of the Australian Securities and Investments Commission (ASIC), released the results of an intensive surveillance of high-yield debentures that was conducted in late 2004.'ASIC wanted to see if issuers of high-yield debentures were informing investors of the additional risks of investing in these types of investments', Mr Cooper said.By investing in debentures, an investor is lending money to the issuer of the debenture. Offers of debentures to retail investors usually involve the issue of a prospectus that must disclose all information necessary for an investor to decide whether to invest.ASIC examined the prospectuses and selected advertising for debentures issued by 11 companies that were offering high yields, such as interest rates that were four per cent per annum above bank term-deposit rates. As a result of its surveillance, ASIC prevented four offers that failed to disclose information relevant to the fundraising from proceeding until the defects had been addressed. One of the four prospectuses required a final stop order, which permanently stopped the offer from proceeding. ASIC also stopped two misleading advertising campaigns, and required companies to improve the information provided to investors in two other cases. ASIC identified four common concerns that were especially prevalent, namely:         aggressive or misleading advertising;          poor disclosure about property developments;          related-party transactions; and          bad and doubtful debts.This surveillance campaign follows an ASIC consumer alert relating to investment in debentures inJuly 2004 (Media Release 04-242: $1.8 billion at stake: warning to investors in high-yield debentures) and three previous warnings in 2003–2004 in relation to defective debenture prospectuses and the risks of investing in high-yield debentures.ASIC initiated the surveillance campaign to assess the validity of concerns about high-yield debentures. The main objectives of the campaign were to:         examine whether there were contraventions of the prospectus disclosure requirements and, in particular, to determine whether debenture issuers had properly and fully disclosed the nature of their business and associated risks;         assess whether previous ASIC guidance on debenture prospectus disclosure was being followed; and          pursue suitable enforcement action against issuers in the case of material and significant contraventions of the prospectus, debenture or other provisions.ASIC discovered that many of its concerns relating to debentures were present in the marketplace. **Stop orders issued during the debenture campaign - Company and Action taken/ results:**Fincorp Investments Ltd - Final stop orderAustralian Capital Reserve Ltd - Interim stop order, supplementary prospectus lodgedHargraves Secured Investments Ltd - Interim stop order, supplementary prospectus lodgedVictorian Finance & Leasing Ltd - Interim stop order, supplementary prospectus lodgedA copy of the report containing ASIC's findings ‘High-yield debentures - ASIC surveillance report’ is available on the [ASIC website](http://www.asic.gov.au" \t "_new).**2.5 ASIC provides relief on timing of auditor's independence declarations**On 15 February 2005 the Australian Securities and Investments Commission (ASIC) announced the release of a new Class Order [CO 05/83] “Timing of Auditor's Independence Declarations” to assist auditors in meeting the timing obligations associated with financial reports.For financial years and half-years that start on or after 1 July 2004, the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) requires an auditor to give the auditor's independence declaration to directors at the same time as the auditor's report. The class order allows an auditor's report to be signed after the auditor's independence declaration is given to directors, rather than requiring both documents be completed at the same time.Specifically, [CO 05/0083] provides relief where:         the declaration is given to the directors before the directors resolve to make the relevant directors' report and no earlier than 7 days before the directors' report is signed; and          the relevant auditor's report is made within 7 days after the directors' report is signed and includes a statement or statements to the effect that either the declaration would be in the same terms if it was given to the directors at the time the auditor's report is made, or circumstances have changed since the declaration was given to the directors and setting out how the declaration would differ if it was given to the directors at the time the auditor's report is made.The [Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=78496" \t "default) (CLERP 9) introduced a new requirement that auditors provide a declaration as to whether the auditor is aware of any contraventions of the audit independence provisions of the Act and codes of professional conduct.The Act prescribes that the auditor's independence declaration be included in the directors' report. The auditor is required to give that declaration to the directors with the auditor's report. This meant that the auditor's report would need to be signed before the directors' report.However, the auditing standards, which have the force of law under the Act, require the auditor to comment in the auditor's report on any material inconsistencies between the directors' report and the financial report, and to consider the impact of any material misstatements of fact in the directors' report. This makes it difficult for the auditor to sign the audit report before the directors' report is signed. [CO 05/83] addresses this matter. A copy of the Class Order can be obtained from ASIC's Infoline by calling 1300 300 630 or from the [ASIC website](http://www.asic.gov.au" \t "_new).**2.6 ACCC and ASIC release draft debt collection guideline**On 14 February 2005 the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) released their joint draft debt collection guideline for public consultation. The draft guideline details the provisions of the federal consumer protection legislation most relevant to the debt collection industry, including prohibitions against misleading and deceptive conduct, harassment and coercion, and unconscionable conduct. 'The relevant regulatory framework and the debt collection industry has changed a lot since the ACCC released Debt collection and the [Trade Practices Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) in 1999. This draft guideline provides guidance to the debt collection industry on how to avoid breaches of these laws, as well as to consumers who are subject to debt collection activity, and creditors who use external agencies to collect debts', ACCC Deputy Chair, Ms Louise Sylvan, said.'The draft guideline reflects not only recent relevant court decisions, but also changes in the industry's structure and practices. The joint guideline acknowledges the role of ASIC in enforcing federal consumer protection legislation in relation to financial services. This is a role ASIC did not have in 1999, ASIC Executive Director of Consumer Protection, Mr Greg Tanzer, said.Both the ACCC and ASIC are interested to hear the views of all stakeholders regarding the draft guideline and encourage all interested parties to make written submissions.The draft guideline and discussion paper are available on the [ACCC website](http://www.accc.gov.au/%22%20%5Ct%20%22_new) and the [ASIC website](http://www.asic.gov.au" \t "_new).**2.7 ASIC seeks comment on draft updated practice note: consent to quote**On 27 January 2005 the Australian Securities and Investments Commission (ASIC) announced that it is seeking public comment on its draft update of Practice Note 55 disclosure documents and PDS: consent to quote [PN 55].This practice note discusses how issuers comply with the requirement in the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to obtain the consent of persons to quote them in prospectuses and product disclosure statements (PDS) (s716(2) and 1013K(1)). 'The law requires that where an issuer cites a person as authority for a statement in a prospectus or a PDS, it must obtain the person's consent. That person must be able to control their liability for the statement. However, where the information is important and obtaining consent is difficult, ASIC relief from these requirements may be appropriate', ASIC's Deputy Executive Director, Policy & Markets Regulation, Ms Jennifer O'Donnell said.The changes to draft updated PN55 consider, for example:         proposed class order relief from the consent requirement so that the issuer may cite a credit rating for debt securities offered under the prospectus or PDS;          proposed class order relief from the consent requirement so that historical geological reports may be cited in a prospectus; and         how directors may assume responsibility for a statement, rather than obtaining the consent of another person to quote the statement.The draft updated PN 55 reflects legislative changes arising from the [Corporate Law Economic Reform Program Act 1999](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=18039" \t "default) and the [Financial Services Reform Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=58127" \t "default), in particular, the new application of the consent requirement to a PDS. The changes to draft updated PN 55 are consistent with ASIC practice since 1997, when ASIC released an earlier draft for comment. As a result of this practical experience, ASIC does not expect there will be substantial change to the final PN 55 following public comment.Further information on the Practice Note 55 disclosure documents is available on the [ASIC website](http://www.asic.gov.au" \t "_new). |
| **3. Recent ASX Developments** |
| **3.1 Equity market reforms** Following extensive consultation ASX has made a number of decisions regarding the structure of the equities market. These changes are separate to the introduction of the CLICK XT for all markets although some of the changes will occur with the change to the new system. The key decisions are:         removal of broker numbers for the Equity Market (planned for December quarter 2005);          change in the minimum price step for stocks priced between $0.50 and $2.00 from 1 cent to 0.5 cents (first quarter 2005);          replacing the Undisclosed order type with an Iceberg order type (with the move to CLICK XT planned for March quarter 2006);          a trial of call auctions and market making for some mid and small cap stocks (further consultation to be conducted); and          an increase in the minimum block special size for some stocks.The detail of ASX decisions can be found in the paper: “Enhancing the Liquidity of the Australian Equity market: Decisions on Reform” available on the [ASX website](http://www.asx.com.au/equityreforms%22%20%5Ct%20%22_new).**3.2 Corporate governance – assistance for companies using alternative practices**The Implementation Review Group (IRG) of the ASX Corporate Governance Council (Council) has released its second report on the implementation of the Council’s corporate governance Principles and Recommendations. The IRG’s key conclusion is that whilst the current arrangements offer the best framework for listed companies, many – particularly smaller companies – have not embraced the flexibility of Australia’s: “if not why not” disclosure requirements.Under ASX Listing Rule 4.10.3, listed companies must disclose in their annual reports the extent to which they have adopted the Council’s 28 Recommendations. A company is free to adopt alternative governance practices. However, it must disclose its reasons for doing so.The report follows a review of submissions and actual governance disclosure by smaller companies, predominantly junior mining and exploration companies.The key findings of the IRG’s report are:         there is continued misunderstanding of the governance reporting framework in Australia. Many smaller companies, sometimes on the basis of professional advice, misunderstand the Council’s 28 corporate governance recommendations to be mandatory, rather than advisory;         a number of companies remain concerned that investors will be critical of alternative governance practices that differ from the Council’s recommendations, without considering their appropriateness for that company; and         the current “If not why not” reporting by many smaller companies does not go far enough to explain the board’s choice of governance practice to investors. Many companies went no further than motherhood statements or value judgments without explaining the board’s reasoning.In order to help companies understand how to prepare exception reporting for the annual reports, the IRG has developed examples of “if not, why not?” reporting, covering selected corporate governance recommendations. The examples are not a template and so should not be copied. They guide companies through the thought process involved in constructing disclosure which accurately reflects each company’s situation.The IRG describe good exception reporting as addressing 3 elements:         how the company’s approach is different from the relevant recommendation;         the reasons why the company’s approach has been adopted and how its approach accords with the intent of the relevant Principle; and         that the company understands the relevant issues and has considered the impact of its alternative practices.The report and examples are available from the [ASX website](http://www.asx.com.au/%22%20%5Ct%20%22_new).**3.3 Financial reporting - rule amendment proposals**An Exposure Draft of a small package of rule amendments dealing with financial reporting matters subsequent to the introduction of the Enhanced Disclosure package in January 2003 has been prepared and will be released very shortly. The amendments also include changes in basis and reporting requirements introduced by the adoption of IFRS and are intended to rationalise the reporting requirements of listing rule 19.12, specifically the definition of "net tangible asset backing". ASX intends that these rule amendments will take effect at the same time as the package of rules exposed in September 2004. The draft is available from the [ASX website](http://www.asx.com.au" \t "_new).**3.4 Proposed listing rule amendments - change of implementation date**The Exposure Draft of proposed Listing Rule amendments released on 30 September 2004 indicated an implementation date of 1 March 2005. The proposals included amendments relating to the following:          review of the framework governing debt listings;          chairman's open proxies; and          issue of securities to related parties. ASX considers it preferable for practical reasons that both these amendments and the amendments relating to financial reporting (see 3.3 above) are implemented at the same time. Accordingly, it is now expected that the implementation date for both rule amendments packages will be in May. A further update regarding timing will be provided to companies in late March/early April.**3.5 AIFRS - reminder**Companies will be aware that for reporting periods beginning on or after 1 January 2005, Australian incorporated entities are required under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) to apply Australian equivalents to International Financial Reporting Standards (AIFRS).The Australian Accounting Standards Board has issued Australian Accounting Standard 1047 'Disclosing the Impacts of Adopting Australian Equivalents to International Financial Reporting Standards' which deals with the disclosures required in periodic reporting during the transitional period leading up to a company's adoption of AIFRS.ASX has issued a series of Updates over time which outline the continuous disclosure implications of reporting the effects on an entity of adoption of AIFRS. Companies are reminded that the continuous disclosure obligations of an entity are in addition to any periodic disclosure requirements of accounting standards or the Corporations Act.The Updates also contain more general guidance on continuous disclosure and changes in accounting standards, which will be of assistance to foreign listed entities.   For more information please visit the [ASX website](http://www.asx.com.au" \t "_new).**3.6** **Government gives in principle approval to new ASX clearing support arrangements** On 15 February 2005 the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, announced that he had given in principle approval to an application from the ASX to restructure its clearing support arrangements. Under the ASX’s proposed new arrangements, responsibility for clearing support will be transferred from the National Guarantee Fund (NGF) to the Australian Clearing House Pty Limited (ACH). ACH is a wholly owned subsidiary of Australian Stock Exchange Limited. It operates as the central counterparty for transactions on ASX markets. In recognition of ACH’s additional responsibilities, approximately $70 million is expected to be transferred from NGF to ACH once the application receives final approval. Stringent conditions will be attached to the future use of any funds that are transferred to ACH. Most importantly, the funds can only be used for clearing support. They will not be available for other purposes. ASX plans to contribute capital of its own to ensure that ACH has sufficient financial backing. The restructuring of ASX’s clearing support arrangements will provide ACH with greater flexibility to provide a wider range of services. It will also result in better risk management. The creation of a single body with responsibility for managing clearing risk in relation to ASX markets will enable ACH to become fully compliant with the Reserve Bank’s Financial Stability Standards for Central Counterparties. The change will not affect the NGF’s investor protection role. The rights of clients of ASX participants to make claims against the NGF will remain unchanged. The Government has stated that it has ensured that the NGF will have enough money to deal with future investor protection claims.  |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Universal Resources Ltd: Panel accepts undertakings and declines to make a declaration**On 21 February 2005, the Takeovers Panel announced that it had accepted an undertaking from Universal Resources Limited (Universal) in relation to the application by CopperCo Limited (CopperCo) under section 657C of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) on 9 February 2005 concerning CopperCo’s takeover bids for all of the ordinary shares and options in Universal. In light of the undertaking, the Panel has declined to make a declaration of unacceptable circumstances. CopperCo’s application concerned disclosures made in a letter which Universal sent to its shareholders on 2 February 2005 in advance of Universal’s target’s statement. The Panel considered that there were deficiencies in, and omissions from, that letter in that it included:         total ‘copper equivalent’ resource information in relation to both CopperCo and Universal’s resources, without also presenting the breakdown of that ‘copper equivalent’ information into ‘Measured’, ‘Indicated’ and ‘Inferred’ resources and into copper and gold resources (Universal’s approach was inconsistent with the disclosure requirements of the JORC Code. Although the letter may not have been formally required to comply with the JORC Code, the Panel considered it confusing (and potentially misleading) and unacceptable for Universal to write to Universal shareholders during a takeover bid in terms which were inconsistent with the JORC Code);         an analysis of the comparative values of CopperCo and Universal which was based on the ‘Enterprise Value/Tonne of Copper Equivalent’ (EV/CuEq) metric, without also highlighting to shareholders: (i) the limitations of that metric;(ii) why Universal chose to use that metric;(iii) that other metrics might result in different comparative values for CopperCo and Universal; and(iv) that it is common for listed companies to trade with different EV/CuEq multiples (in many cases with quite wide differences) and that such differences do not necessarily represent any inappropriate undervaluation or overvaluation of the different companies; and         an historical average of takeover premiums and inferred that the premium inherent in the CopperCo bid was demonstrably inadequate by comparison, without also highlighting to shareholders that:(i) the takeover offers included in the average included hostile and friendly offers, and cash and scrip bids;(ii) different types of offers have historically had different premiums; and(iii) aggregation of the different classes of offers may make comparison with CopperCo’s hostile scrip bid less meaningful.The Panel considered that it was appropriate that Universal shareholders be provided with a corrective letter to rectify the above deficiencies. Given that Universal was about to dispatch its target’s statement to Universal shareholders the Panel considered it sensible to require the letter to be sent to Universal shareholders with the Universal target’s statement.The Panel accepted an undertaking from Universal to send a copy of the letter, in the form reviewed by the Panel, to each Universal shareholder at the same time as, and in the same envelope as, the target’s statement. Based on that undertaking, the Panel concluded its proceedings on the basis that it was not in the public interest to make a declaration of unacceptable circumstances and that no order was required. In accepting Universal’s undertaking, the Panel noted that Universal had confirmed that it would commence dispatching its target’s statement (and therefore the letter) by 21 February 2005 (as required by the Corporations Act).Further information about the decision is contained in the Panel’s media release at: [http://www.takeovers.gov.au/display.asp?ContentID=920](http://www.takeovers.gov.au/display.asp?ContentID=920" \t "_new)**4.2 LV Living Limited: Panel makes declaration of unacceptable circumstances and final orders and accepts undertakings**On 15 February 2005 the Takeovers Panel announced it had made a declaration of unacceptable circumstances in response to an application from Geoff Woodham Financial Services Pty Ltd (GWFS) under section 657C of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in relation to the affairs of LV Living Limited (LV Living). The Panel also made final orders and accepted undertakings. The application related to:         a number of issues of shares in LV Living, including to Peridon Management Pty Ltd (Peridon), Aged Care Properties Pty Ltd (ACP) and Retirement Property Solutions Pty Ltd (RPS) following a meeting of LV Living shareholders;         a transfer of shares from Peridon to Wesland Investments Pty Ltd (Wesland); and         a proposed issue of securities in LV Living.The Panel’s declaration and orders, and the undertakings accepted by the Panel, relate to the issues of shares to Peridon and ACP, and ancillary concerns in relation to the level of substantial holding disclosure in relation to LV Living.**(a) Unacceptable circumstances** The Panel considered that unacceptable circumstances existed in that:         each of Mr Robert West, Peridon and ACP acquired shares in LV Living in December 2004 in breach of section 606. In each case, the relevant acquisitions resulted from a fresh issue of shares to the relevant parties;         two associates of ACP, Lidcombe Banner Pty Ltd (Lidcombe) and Mr Anthony Radford, acquired shares in LV Living on-market after the issue of shares to ACP by LV Living in breach of section 606;         Peridon and its associates and ACP and its associates continue to hold voting power in LV Living in excess of 20%; and         a number of persons have not lodged substantial holding notices as required by, and which comply with, the requirements of Chapter 6C.**(b) Associate relationships** In reaching the above conclusions as to voting power:               the Panel reached a number of conclusions concerning which persons were associated with Peridon and which persons were associated with ACP. Mr West and Peridon advised the Panel that they were associates; and                the Panel considered whether Peridon and its associates (on the one hand) and ACP and its associates (on the other hand) were associates of one another in relation to LV Living (and whether RPS was associated with either of them).In the latter regard, ACP and Peridon were both parties (along with other persons, including RPS) to a Cooperation Agreement dated 29 October 2004. The Panel concluded that the Cooperation Agreement evidenced an ongoing business relationship regarding the conduct of a joint venture involving LV Living, but that it did not evidence an ongoing association between the parties to it with respect to the control of LV Living. There was no evidence of an ongoing agreement concerning the accumulation or exercise of voting power, nor any agreement constraining the disposal of shares in LV Living. However, the Panel did consider that an association existed at the time of the shareholder meeting to approve the issues of securities to, amongst others, Peridon and ACP.The Panel reached its conclusion with respect to the absence of an ongoing association with some hesitation. The Panel has noted that if the future conduct of ACP, Peridon and their respective associates evidences an association between the ACP persons and the Peridon persons in relation to the exercise of voting power in LV Living, it will be open to a future Panel to declare that the association constitutes unacceptable circumstances which, given the way in which the associates originally acquired their relevant interests in LV Living shares, justifies that future Panel in making divestment orders to reduce the collective voting power of the associates to 20%.**(c) Inadequacy of shareholder approvals** Although LV Living obtained shareholder approvals in relation to the issue of securities to Mr West, Peridon and ACP, those shareholder approvals were not expressed to be for the purpose of item 7 of section 611 and were inadequate to prevent unacceptable circumstances existing. Amongst other things, the Panel noted that:         none of the resolutions was expressed to apply in relation to the acquisition of a relevant interest in shares (rather the resolutions were expressed to apply in relation to the issue of securities). This was of particular concern in the case of the issue to ACP as the relevant resolution was not even related to the issue of shares, but rather only the issue of convertible notes (which ACP subsequently converted to shares);         the information provided to shareholders did not indicate the maximum extent of the increases in voting power which might accrue to Peridon and its associates or ACP as a result of the share issues; and         the information provided to shareholders did not include all information known to LV Living, Peridon and its associates or ACP that was material to shareholders’ decisions on how to vote on approval resolutions for the purpose of item 7 of section 611.The Panel had a number of other concerns, including that Peridon and its associates voted on the resolution approving the issue of convertible notes to ACP – notwithstanding that Peridon was associated with ACP at the time of the meeting.**(d) Order and undertakings**The Panel noted that, at 22.39%, the voting power of Peridon and its associates was within a single ‘3% creep’ from the 20% threshold in section 606. The Panel also noted that, at 25.48%, the voting power of ACP and its associates was within two ‘3% creeps’ of the 20% threshold.Accordingly, the Panel has made orders and accepted undertakings, with the combined effect that:         until after 29 June 2005, Peridon and its associates (between them) and ACP and its associates (between them) will not be able to exercise more than 20% of the votes exercisable at a meeting of LV Living; and         until after 29 December 2005, ACP and its associates (between them) will not be able to exercise more than 23% of the votes exercisable at a meeting of LV Living.The Panel has also made orders and accepted undertakings restricting the use of the ‘3% creep’ exception and disposals of LV Living shares other than in the ordinary course of trading on ASX by:         Peridon and its associates until 23 December 2005; and         ACP and its associates until 29 June 2006.The Panel has indicated that it would be prepared to vary its orders and waive compliance with the undertakings if shareholders in LV Living ratify the acquisition of all relevant interests consequent on the issue of shares to Peridon or ACP in December or subsequent on-market acquisitions of LV Living shares by Lidcombe or Mr Radford.In addition, the Panel made orders and accepted undertakings requiring complying substantial holding notices to be lodged with ASX and LV Living by 15February 2005.Further information about the decision is contained in the Panel’s media release at:[http://www.takeovers.gov.au/display.asp?ContentID](http://www.takeovers.gov.au/display.asp?ContentID=918" \t "_new)=918**[4.3 Panel releases revised Guidance Note 7: Lock-up devices](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)** [On 15 February 2005 the Takeovers Panel released a final version of its revised Guidance Note 7 on lock-up devices. Minor amendments have been made to the final version in response to comments received when the Panel released a draft for public consultation.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[This revised version follows the Panel’s review of its existing Guidance Note 7 (Previous GN7). The Panel went through several stages in its review process, which commenced in 2004.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Initially, the Panel invited interested parties to provide feedback in relation to their observations of GN7’s operations and application so far and what aspects (if any) should be modified. The Panel asked several specific questions regarding the performance of Previous GN7, in addition to calling for general comments.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The Panel’s review was undertaken in large part by a sub-committee. The Panel wishes to thank the sub-committee members: Panel members Simon McKeon, Simon Mordant, Peter Cameron, Peter Scott and Professor Ian Ramsay. The Panel is also grateful for the input and assistance received from external sub-committee member, David Williamson (Blake Dawson Waldron, Melbourne).](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The sub-committee considered the submissions received regarding Previous GN7, as well as the Panel’s own experiences in proceedings dealing with lock-up devices.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Following its internal review process, the Panel released for public comment a revised draft of Guidance Note 7 (Revised GN7). The respondents were broadly supportive of the Revised GN7, and the sub-committee did not consider that major changes to the public consultation draft issued in October 2004 were needed.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Set out below are the more general issues raised in submissions regarding the consultation draft of Revised GN7, along with a brief explanation of the Panel sub-committee’s responses to those issues:](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[·         Several submissions called for greater use of practical examples in the guidance note, either by reference to previous Panel matters or to hypothetical scenarios. The Panel has included references to previous Panel matters where it considers that those references clarify the key underlying principles of the guidance note. However, it was felt that any further elaboration by example may be interpreted as unnecessarily prescriptive. Market participants should focus on the principles of competitive neutrality and non-coercion which underpin the guidance note when considering lock-up devices; they should not be distracted by trying to apply or distinguish factual examples used in the guidance note.·         The submissions called for further clarification in the guidance note regarding the relationship between break fees and costs. The Panel considers that the revised guidance note is sufficiently clear on this point: costs are not of primary importance to the Panel in assessing whether a break fee satisfies the principles of competitive neutrality and non-coercion, but may be relevant in assessing whether, in specific circumstances, it is acceptable for a break fee to exceed the 1% guideline.·         The issue of break fees payable upon rejection by shareholders of a proposal was raised in submissions (and was also the subject of a specific query by the Panel when calling for submissions on Previous GN7). This issue was considered at great length by the Panel sub-committee. For the reasons set out in [7.16] of the revised guidance note (i.e. that a break fee can operate as an option price paid to secure an opportunity for shareholders), it can be appropriate for a break fee to be paid on rejection by shareholders of a transaction. Of course, the Panel will still consider all of the particular circumstances of any such break fee in deciding whether or not it is unduly coercive.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The revised lock-up devices guidance note is available on the [Panel's website](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new).](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)**[4.4 Southcorp Limited: Panel decision](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**  [On 9 February 2005, the Takeovers Panel announced that it had concluded its proceedings in the application made by Southcorp Limited on 28 January 2005 in relation to the takeover offer by a wholly owned subsidiary of Foster’s Group Limited for Southcorp without making a declaration or orders, and without accepting any further undertakings (see the Panel’s Media Releases TP05/14 of 28/01/05 and TP05/16 of 03/02/05).](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The Panel considers that unacceptable circumstances existed when Foster’s gave its bidder’s statement to Southcorp on 18 January 2005, without including any of a 10 page document (Wrap Document) which Foster’s proposed to bind into the document containing the Foster’s Bidder’s Statement to send to Southcorp shareholders two weeks later.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [However, given that:](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[·         Foster’s did provide an advanced draft of the Wrap Document to the Southcorp directors on 25 January; ·         the Foster’s Bidder’s Statement was not due to be dispatched until Wednesday 2 February; ·         the contentious information in the Wrap Document was relatively short (3 pages);·         Southcorp had been aware since 17 January of a presentation on Foster’s bid which Foster's had posted on ASX, and most of the material information in the Wrap Document had come from that presentation; ·         the Panel did not consider any of the information or statements in the Wrap Document to be materially misleading; ·         Foster’s had provided a letter to Southcorp shareholders clarifying the one item of concern which the Panel had about some of the information in the Wrap Document;](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[the Panel decided that it would not be in the public interest to make a declaration of unacceptable circumstances or any orders.Further information about the decision is contained in the Panel's media release at: [http://www.takeovers.gov.au/display.asp?ContentID=912](http://www.takeovers.gov.au/display.asp?ContentID=912" \t "_new)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)**[4.5 WMC Resources Ltd: Panel concludes proceedings](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)** [On 27 January 2005 the Takeovers Panel announced that it had concluded the combined proceedings arising from the application from Xstrata Capital Holdings Pty Ltd (Xstrata) dated 12 January 2005 (the Xstrata Application) alleging unacceptable circumstances in relation to Xstrata’s takeover offer for all the shares in WMC Resources Ltd (WMC), and the application by WMC dated 14 January 2005 (the WMC Application) in relation to Xstrata’s takeover offer. The Panel’s previous media releases TP05/04, 05/07, 05/09 and 05/10 provide further details regarding these applications.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The Panel has accepted an undertaking from WMC to release and dispatch a supplementary target’s statement, in a form approved by the Panel, which addresses a concern the Panel had in relation to one of the issues raised by Xstrata in its application. The concern relates to disclosures on page 4 of WMC’s target’s statement dated 4 January 2005 regarding the “effective” value of Xstrata’s offer and comparisons made of that “effective” value with an historical WMC share price.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [Based on the undertaking provided by WMC, the Panel concluded the proceedings arising from the Xstrata Application on the basis that it was not necessary to make a declaration of unacceptable circumstances and that no order was required.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The Panel did not consider that any of the issues raised in the WMC Application constituted unacceptable circumstances, and therefore concluded the proceedings arising from that application without requiring any further action to be taken.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Further informatioon about the decision is contained in the Panel’s media release which is available at: [http://www.takeovers.gov.au/display.asp?ContentID=906](http://www.takeovers.gov.au/display.asp?ContentID=906" \t "_new)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)**[4.6 Lachlan Farming Limited: Panel makes declaration:](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**  [On 25 January 2004 the Takeovers Panel announced that it had made a decision in relation to the application dated 13 January 2005 from Lenvat Pty Limited (Lenvat), a major shareholderof Lachlan Farming Limited (LFL), in relation to the 1 for 1.19 rights issue (Rights Issue) recently conducted by LFL, the terms of which were set out in a prospectus dated 17 September 2004 (Rights Issue Prospectus).](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The Panel made a declaration of unacceptable circumstances and orders in relation to an application for shares made by Lenvat under the Rights Issue (Lenvat Subscription). Lenvat applied for the shares it was entitled to under the Rights Issue and also for the shares not taken up by other shareholders in LFL. Lenvat’s voting power in LFL would have increased from 21.4% to 55.4%. It had been a term of the Rights Issue (Shortfall Facility) that shareholders could apply for shares not taken up by other shareholders, and the excess shares would be allotted to shareholders who wished to take them up, in proportion to those shareholders’ shareholding in LFL at the date of the Rights Issue Prospectus.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The terms of the Rights Issue were cast to raise $9 million by the issue of 18 million LFL shares at $0.50 each. Of the 18 million shares on offer, the RFM Australian Cotton Fund, a shareholder in LFL, had underwritten 14 million. The Rights Issue Prospectus mentioned that ACF would be able to subscribe for the 4 million shares not underwritten.](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The Panel considered that the proposed acquisition under the Lenvat Subscription constituted unacceptable circumstances in relation to the affairs of LFL because:](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[·         of the effect the acquisition would have on the control of LFL; and ·         it would give rise to a contravention of section 606 in that Lenvat’s voting power in LFL would increase from 21.4% to 55.4% in circumstances other than those contemplated by a statutory exception to the limit set out in section 606 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [More information about the decision is contained in the Panel media release which is available at:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [http://www.takeovers.gov.au/display.asp?ContentID=905](http://www.takeovers.gov.au/display.asp?ContentID=905" \t "_new) |
| **[5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)** |
| **[5.1 Status of subscribing shareholders and creditors under an administration](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(By Darrel Chia, Mallesons Stephen Jaques)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Crosbie, in the matter of Media World Communications Ltd (Administrator Appointed) [2005] FCA 51, Federal Court of Australia, Finkelstein J, 31 January 2005](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/january/2005fca51.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2005/january/2005fca51.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [The court considered whether shareholders could make a claim as creditors on a company in administration, in circumstances where they alleged they were misled by a prospectus into acquiring shares in the company. The shareholders alleged they were induced to subscribe for the shares by statements in the prospectus about the utility of the company’s intellectual property that were false and misleading.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[The administrator asked the court to determine whether the shareholders were creditors for the purposes of the administration, and could prove for their claim with other creditors in the administration.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[Finkelstein J decided the shareholders were not creditors for the purposes of an administration under Part 5.3A of the Act.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) **[(b) Facts](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [Media World Communications Ltd (“MWC”) issued a prospectus in April 2004 to raise a minimum of $4.6 million in additional capital, and successfully completed the capital raising on 10 May 2004. On 22 September 2004, the directors of MWC appointed Mr Crosbie as administrator. The administrator determined that MWC was insolvent.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[A number of shareholders who subscribed for and were allotted shares in MWC under the prospectus claimed that the prospectus contained statements that were false, and that they would not have subscribed for shares had they known the true position. Those shareholders raised claims in damages against MWC both in tort and statute, which they wished to prove in the administration.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[The administrator applied for directions under section 447D of the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [prior to the second meeting of creditors, to obtain guidance from the court whether the subscribing shareholders should be treated as creditors of MWC for the purposes of its administration. Treating the subscribing shareholders as creditors would mean that the administrator could have admitted their claims to proof. It would also have meant that the subscribing shareholders could vote at the second meeting of creditors, and if it were resolved that the company should execute a deed of company arrangement, they would be bound by that deed as creditors.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[The administrator (supported by Blackburn’s Office Supplies, a trade creditor of MWC) argued that a creditor with a debt or claim which in a liquidation would be subordinated by section 563A may not be admitted to proof and may not be treated as a creditor. Section 563A provides that:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Payment of a debt owed by a company to a person in the person’s capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [Finkelstein J decided that it was not appropriate to dispose of the application unless Mr Naidoo (a subscribing shareholder of MWC) and Blackburn’s Office Supplies, or other appropriate persons, were joined as parties. Otherwise the parties affected by the consequence of any direction given, would not be parties and any decision made would not be binding on them.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Furthermore, he found that an application for directions under section 447D cannot be employed to resolve the substantive rights of third parties, citing the decision in Re Lorenz’s Settlement (1861) 3 Dr & Sm 401, 402 [62 ER 433, 434]. This being the situation, he would grant a remedy in the form of a declaration and treat this application as one in which the administrator seeks a substantive remedy.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[On the main legal issue, Finkelstein J examined the rule established in Houldsworth v City of Glasgow Bank and Liquidators (1880) 5 App Cas 317 (“Houldsworth’s case”) which holds that a person who has subscribed for shares in a company may not, while retaining those shares (that is, if they have not renounced their shareholding), recover damages against the company on the grounds of being induced to subscribe for those shares by fraud or misrepresentation. He relied on the High Court decision in Webb Distributors (Aust) Pty Ltd v State of Victoria (1993) 179 CLR 15 for the proposition that this rule bars not only common law claims but also statutory causes of action, unless the relevant statute overrides the rule.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Finkelstein J decided that in the case of a company in administration, there is a bar to the rescission of a contract for the subscription of shares under section 437F of the Corporations Act 2001. This provision states that:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[A transfer of shares in a company, or an alteration in the status of members of a company, that is made during the administration of the company is void except so far as the court otherwise orders.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The result is that the subscribing shareholders could not renounce their shareholdings during the administration, and the rule in Houldsworth’s case applied to prevent them making a claim against the company.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [On this basis, he granted a declaration that a member of MWC is not a creditor of that company for the purposes of Pt 5.3A of the Corporations Act 2001 in respect of a claim for fraud or misrepresentation by the company which induced the member to subscribe for shares in the company. He considered the possibility that this statutory bar against rescision may disappear in the future. In that case, the right to rescind would revive unless the subscribing shareholders have affirmed their respective contracts to subscribe for the shares in the meantime.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Finkelstein J also expressed his opinion in obiter that the rule and reasoning in Houldsworth’s case could not be extended to the case of a transferee shareholder. In this regard, he referred to Peek v Gurney (1873) LR 6 HL 337, where it was established that a transferee shareholder, unlike a subscribing shareholder, cannot renounce a shareholding against the company, except in limited circumstances. The result of applying the rule in Houldsworth’s case to transferee shareholders would have been that the shareholders would be forever barred from pursuing a claim in damages against the company, which Finkelstein J considered to be an intolerable situation.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[5.2 Non-provision of sufficient information to creditors will result in a failure to ‘fix’ administrators’ remuneration under section 449E of the Corporations Act and the power to ‘fix’ remuneration under the section cannot be delegated to a committee](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(Entcho Raykovski, Mallesons Stephen Jaques)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Korda, in the matter of Stockford Limited (Subject to Deed of Company Arrangement) [2004] FCA 1682, Federal Court of Australia, Finkelstein J, 21 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1682.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1682.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [The case involved the administration of the Stockford Group and was brought before the court because of ASIC’s concern that the administrators’ remuneration was not properly fixed either by the creditors (although the creditors purported to pass resolutions to that effect) or the court. The administrators sought declarations to vindicate their position, however the court disagreed, holding that except for the work performed in the initial two weeks of the administration, their remuneration had not been validly fixed pursuant to section 449E of the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [(‘Corporations Act’).](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[Finkelstein J held that since the administrators’ fees were not validly fixed, the situation needed to be rectified. Accordingly, he held that the administrators have three choices. Their remuneration could be fixed by the court or by the creditors, or the administrators could apply for an order under section 447A of the Corporations Act that some other tribunal fix their fees.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The case is important because it highlights the need for administrators to provide sufficient information to a meeting of creditors, the court or a tribunal in order for their remuneration to be validly fixed. It also confirms that the power to fix remuneration under section 449E of the Corporations Act needs to be exercised by the creditors and cannot be delegated to a committee. Further, it provides guidance on the factors that should be taken into account when a decision is made as to whether sufficient information has been provided to ensure that remuneration is properly fixed or determined.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(b) Facts](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [The companies in the Stockford Group were all subject to a deed of company arrangement. Under section 449E of the Corporations Act, an administrator of a company subject to a deed of company arrangement is entitled to such remuneration as is fixed by a resolution of the company’s creditors or, if they do not fix the remuneration, then such remuneration as the court fixes.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In the present case, the administrators convened an initial meeting of creditors on 28 February 2003, after which they began work on the administration of the companies. At a subsequent meeting, held on 20 May 2003, the administrators put a resolution to a meeting of the company’s creditors to approve their remuneration for two weeks of the administration. The resolution also purported to authorise a committee of creditors of the Stockford Group of Companies to approve the administrators’ remuneration for any subsequent period at given hourly rates. The hourly rates were set out in the form of a report, which was held by the court to be “largely uninformative”, as it seemed to allow persons who occupied the same position to charge different rates for performing the same activity and there was no criteria by reference to which it could be determined which hourly charge would be applied. Further, the report provided no information which would enable the creditors to determine the reasonableness or otherwise of the proposed rates.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In reviewing and confirming the subsequent fees claimed by the administrators, the committee of creditors, which had been delegated the role of approving the administrators’ remuneration by the company’s creditors, never physically met but rather signified their assent to the fees by each signing and returning to the administrators a copy of their statement of fees without any discussion between them. ASIC pointed this out as a deficiency and questioned whether it was valid to delegate the power to approve the administrators’ remuneration to a committee. This led the administrators to call another meeting of creditors, in order to approve the remuneration. The notice to this meeting was accompanied by a report, which referred to the correspondence from ASIC and inferred that ASIC was wrong in its view.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[At this last meeting, held on 28 September 2004, the creditors passed several resolutions the effect of which was to fix the administrators’ remuneration in a specific amount for each week of the administration from 10 March 2003 to 27 August 2004.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [Despite the result of the meeting on 28 September 2004, Finkelstein J held that the resolutions were not legally effective since the report which was sent to creditors was misleading by implying that the position taken by ASIC was wrong in law. Further, it was misleading by implying that the committee had reviewed and confirmed the administrators’ fees, when they had never conducted a meeting.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The court held that the power to fix remuneration under section 449E of the Corporations Act lies with the creditors and the creditors have no power to delegate this authority to a committee. Finkelstein J referred to the case of In re Carton Limited](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[(1923) 39 TLR 194 to support this proposition and emphasised that whilst it may be convenient to delegate the power of fixing fees to a committee, in its present form the legislation does not permit that course. Accordingly, the view taken by ASIC was correct and should have been presented as such to the meeting of creditors.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Overall, it was held that only the remuneration for the initial two weeks of the administration had been approved at the meeting on 20 May 2003 and no subsequent remuneration was validly fixed pursuant to section 449E of the Corporations Act.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In his judgment, Finkelstein J also set out some guidelines as to what would amount to the provision of sufficient information to the creditors to determine whether remuneration was properly fixed. He stated that in the case of a provisional liquidator, the factors to be taken into account are:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         the time given by the liquidator;·         the complexity of the case;·         whether there is any responsibility of an exceptional kind or degree;·         the effectiveness with which the duties have been carried out; and·         the value and nature of the property with which the liquidator has to deal.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Finkelstein J also acknowledged that in complex or large administrations it is inevitable that insolvency practitioners will wish to have their fees calculated on a time basis. However, he also pointed out the incentive for inefficiency presented by calculating fees on a time basis. In any case, he highlighted the need for any remuneration to be calculated based on a reasonable formula or estimate and not just a table of hourly rates.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[5.3 Transferring proceedings pursuant to the Corporations Act: what is in the ‘interests of justice’?](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(By Wendy Ng, Articled Clerk, Freehills)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Dwyer v Hindal Corporate Pty Ltd [2005] SASC 24, Supreme Court of South Australia, Debelle J, 21 January 2005](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/january/2005sasc24.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2005/january/2005sasc24.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**[This case involved an application pursuant to section 1337H(2) of the](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [(‘Act’) to transfer proceedings from the Supreme Court of South Australia to the Supreme Court of Victoria. The proceedings involved were to recover preference payments brought by the liquidators of the Harris Scarfe Group of companies (‘Harris Scarfe companies’) against Arnold Bloch Liebler (‘ABL’) and Hindal Corporate Pty Ltd (‘Hindal’). Debelle J refused the applications and commented on the principles to be applied in determining a transfer application made under the Act.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**[(b) Facts](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[In 2002, Harris Scarfe Holdings Ltd purchased Dstore Ltd (‘Dstore’).The Melbourne office of ABL acted as solicitors for Dstore in that transaction. Hindal, a Melbourne based consultant, advised Dstore in its negotiations with Harris Scarfe. On 3 January 2002, joint liquidators were appointed to the Harris Scarfe companies, which included Dstore. Subsequently, the liquidators commenced 62 actions in the courts of South Australia to recover alleged preference payments including payments made to ABL and Hindal. Thirteen of those actions related to Dstore. Five of those Dstore actions were brought in the Supreme Court of South Australia.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [The liquidators retained an expert to prepare one report in relation to the issue of insolvency of the Harris Scarfe companies which would be relied on in all the proceedings.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[ABL and Hindal both argued that the proceedings brought against them should be heard by the Supreme Court of Victoria as it was the more appropriate forum.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[The applications to transfer the proceedings were dismissed.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(i) Relevant law](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Section 1337H(2) of the Act provides that a court may transfer a civil matter arising under the Corporations legislation to another court if having regard to the interests of justice, it is more appropriate for another court to determine the dispute. Section 1337L states that a court must have regard to the following matters in deciding whether to transfer a proceeding under section 1337H:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         “the principal place of business of any body corporate concerned in the proceeding or application; and·         the place or places where the events that are the subject of the proceeding or application took place; and·         the other courts that have jurisdiction to deal with the proceeding or application.”](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(ii) Reasoning](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Debelle J held that in considering whether to transfer proceedings to another court under section 1337H of the Act, the court must determine which court is the more appropriate forum by reference to the interests of justice.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In general, where a liquidator commences a series of related actions in one court and there are common issues in those actions, then the same court should hear and determine all of those actions. This is because this will result in the expeditious management of litigation, consistent decision making and reduce litigation costs.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[However, where some objective factor exists which means that it is in the interests of justice to transfer the proceedings, the liquidator’s choice of forum may be overridden.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In addition to the factors in section 1337L which must be considered, the following non exhaustive list of factors may be considered when determining whether or not to transfer the proceedings:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         the availability of evidence;·         the forensic advantage or detriment conferred by the procedural law;·         the application of substantive law;·         the reason for the choice of forum by the plaintiff; and·         the balance of convenience to the parties, witnesses and the court system.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The applicant has the onus of proof in identifying the factors affecting the interests of justice that establish that the transferee court is the more appropriate forum and establishing that those factors outweigh those which might be identified by the respondent.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Debelle J also noted that, under s1337H(2) of the Act, the transferor court retains a discretion whether to transfer the proceedings. This is different from section 5(2)(b)(iii) of the Jurisdiction of Courts (Cross-vesting) Acts 1987 of the States and Territories, which provides that if a transferor court must transfer a proceedings if it is satisfied that it is in the interests of justice to do so. (See](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Jurisdiction of Courts (Cross-vesting) Act 1987 (SA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28624" \t "default)[).](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In deciding that it was not in the interests of justice to transfer the proceedings to the Supreme Court of Victoria, Debelle J considered the following factors:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28624" \t "default)[·         the plaintiff was not forum shopping because the administration and liquidation of the Harris Scarfe companies was conducted in Adelaide;·         a substantial volume of documents, records and other source materials to be examined for the purposes of preparing the insolvency report were located in Adelaide;·         Dstore was a wholly owned subsidiary of Harris Scarfe and there might be aspects of the management of other companies in the Harris Scarfe group which affected Dstore’s solvency;·         all the actions in the Supreme Court of South Australia were being managed by the Supreme Court of South Australia as a group. If the action was transferred to the Supreme Court of Victoria there would be a risk of inconsistent findings on the issues common to all the proceedings;·         although the relevant conduct occurred in Melbourne and the relevant witnesses also resided in Melbourne, there would be an equal cost and inconvenience for the applicants’ witnesses to travel to Adelaide as there would be for the liquidator’s witnesses to travel to Melbourne. Debelle J noted that questions of inconvenience to parties and witnesses have less force because of quick and efficient transport and communication, especially where the two courts are as close as Melbourne and Adelaide;·         the additional costs in retaining agents in Adelaide because the applicants’ lawyers did not conduct business in Adelaide would not be substantially more than engaging its lawyers in Melbourne; ·         the real issue in the proceeding is whether the payments constitute a preference. This question does not depend on the terms of the agreement nor the law of Victoria but on the terms of the relevant provisions of the Act, which is a Commonwealth Act, and the common law. Hence a clause in a draft agreement between Dstore and Harris Scarfe which stated that both parties irrevocably submitted to the non-exclusive jurisdiction of Victorian courts was disregarded; and·         if the proceedings were transferred, the liquidators would be required to incur the cost of copying a very substantial volume of documents.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28624" \t "default)**[5.4 Application for a court order approving compulsory acquisition under Part 6A.2 Division 1 of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(By Joel Cox, Phillips Fox)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Dolby Australia v Catto [2004] NSWSC 1222, New South Wales Supreme Court, Campbell J, 21 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswsc1222.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswsc1196.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [This proceeding was brought by the plaintiff, Dolby Australia Pty Ltd ("Dolby Australia") which sought court approval to compulsorily acquire remaining share capital that it did not hold in Lake Technology Limited (Lake) under Part 6A.2 Division 1 (sections 664A to 664G) of the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [('the Act').](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [In accordance with section 664(3) of the Act, Dolby Australia was required to seek court approval after objections to the compulsory acquisition were received from shareholders representing more then 10% of the shares sought to be acquired. At an initial directions hearing the New South Wales Supreme Court directed measures for objecting shareholders to make their objections known to the court and these were considered at the hearing, together with submissions and cross-examination of the plaintiff's valuation expert, by the defendant Robert John Charles Catto.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Justice Campbell held that the terms set out in the compulsory acquisition notice gave a fair value for the securities. Accordingly, the court approved the compulsory acquisition.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The case is a comprehensive summary of the steps required to compulsorily acquire shares under Part 6A.2 Division 1 of the Act. Campbell J's comments also provide a reminder of the relevant considerations in determining a fair value of shares.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(b) Facts](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**  **[(i) Background](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Lake was incorporated on 12 March 1991 and listed on 3 December 1999. At all relevant times its issued securities comprised 136,798,417 ordinary shares and 9,250,000 options to take up shares (at a variety of dates and prices), including some convertible notes that were held by an associated company of Dolby Australia. Dolby Australia is a wholly owned indirect subsidiary of Dolby Laboratories Inc, a company incorporated in California, USA. Dolby Laboratories Inc had a commercialisation agreement with Lake in relation to technology developed by Lake which assisted the Dolby headphone and Dolby virtual speaker products.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[On 12 November 2003, Dolby Australia served on Lake a Bidder's Statement relating to an off-market takeover offer for the shares in Lake, at 13 cents per share. At that time Dolby Australia had a relevant interest in 19.9% of Lake. This offer was extended and Dolby Australia raised the offer price to 16 cents. By the close of the offer on 16 February 2004, Dolby Australia had a relevant interest representing 84.38% of the issued capital of Lake.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[On 25 May 2004 Dolby Australia made a second takeover offer for Lake seeking to acquire the remaining ordinary shares at 16 cents. By 16 July 2004 Dolby Australia held 91% of ordinary shares in Lake. At the time of closure of the second takeover offer Dolby Australia held around 93% of the total issued share capital.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)  **[(ii) The relevant legislative provisions](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[As Dolby Australia had not acquired at least 75% of the securities it had offered to acquire under the second takeover bid, it could not use the provisions of Part 6A.1. Alternatively, Dolby Australia announced its intention to acquire the remaining shares in Lake pursuant to section 664A of the Act.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In accordance with section 664A(3) of the Act, a 90% holder in relation to a class of securities may compulsory acquire all the securities in that class if less than 10% of holders of those remaining securities sought to be acquired object, or if the court approves the acquisition under section 664F of the Act. Shareholders representing 1.8% of the total share capital of Lake, or 25.5% of the remaining shares sought to be acquired by Dolby Australia, objected to the compulsory acquisition within the required time frame. Dolby Australia was therefore required to seek court approval.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Section 664F of the Act provides that if the 90% holder establishes that the terms set out in the compulsory acquisition notice give a fair value for the securities, the court must approve the acquisition for the securities on those terms. Under section 667A of the Act the 90% shareholder must provide an expert's report that states whether, in the expert's opinion, the terms proposed give a fair value for the securities concerned.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[When the matter was first heard before the New South Wales Supreme Court for directions, the court directed measures for objecting shareholders to make their objections known to the court by filing and serving submissions. The court was also provided with the reasons for objection contained in shareholders' objection forms. One objector, Robert John Charles Catto, the defendant, was sought by the Originating Process to be appointed as a representative defendant, however, he objected. He appeared for himself at the hearing, cross-examined the plaintiff's valuation expert and made submissions. The court considered these submissions and the written objections from shareholders.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**  [Campbell J considered several objections that the defendant raised in relation to an expert report prepared by accountancy firm Ernst & Young in accordance with section 667A of the Act. Campbell J summarised the expert report in detail and provided comments on the four measures of valuation methodology adopted by the report (discounted cash flow, net assets, revenue multiples and share price).](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Campbell J rejected the defendant's claims that the valuation report did not establish that 16 cents was a fair value. His Honour's comments included the following points:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [·         'The relevant time for the date of valuation is the date of service of the notice under section 664C of the Act, but events occurring after that date can sometimes cast light on what was the value of the securities as at that date. In the present case, however, there was no evidence of there being any relevant events which occurred after the date of service of the notice.'·         A write down for technology in respect of which management of Lake had said sales of the technology were disappointing and the likely future profits were limited, was justified. Even if it was not justified, Campbell J said that such a write down would affect only the net asset value method of valuing and make no difference to the top of the range value of the expert, which was based on the share price methodology.·         A payment made to settle a dispute over a breach of contract should not be added back for the purpose of the valuation. The expert's representative said in cross examination that, as Lake had no earnings, an earnings based valuation in which abnormal amounts would be added back, could not be undertaken.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Campbell J also considered common themes contained in the reasons for objections on forms returned by objecting shareholders. These common themes were:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         Objection on the basis that the objector purchased the shares at a price well above 16 cents and did not want to take a loss. Campbell J said that section 664F(3) of the Act obliges the court to approve an acquisition if the 90% holder establishes that the terms in the compulsory acquisition notice give a fair value for the securities. Campbell J said that giving a fair value for the securities is not necessarily the same thing as being fair to an individual shareholder.·         Objection to the very principle of shares being acquired without their consent. Campbell J said that objections of this type are to the legislation itself.·         Objection on the basis that the shareholder deliberately purchased the shares intending them to be a long-term investment. Campbell J said that section 664F(3) of the Act did not permit this to be considered by the court. He also said that 'it is inherent in the nature of shares that they can be the subject of a compulsory acquisition.'·         Objection on the basis that the shareholder would rather receive shares in the acquiring company rather than cash. Campbell J said that section 664B(1) of the Act allows no alternative other than acquisition for a cash sum.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In conclusion, Campbell J found that the terms set out in the compulsory acquisition notice gave a fair value for the securities and his Honour therefore approved the acquisition notice.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[5.5 Termination of a partnership agreement](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(Felicity Slater, Solicitor, Clayton Utz)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Ryder v Frohlich [2004] NSWCA 472, New South Wales Court of Appeal, Hodgson JA, Ipp JA and McColl JA, 21 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswca472.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswca472.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)** [If one partner to a partnership agreement repudiates the partnership agreement, is the other partner required to expressly accept the repudiation and declare the agreement to be at an end in order for the partnership agreement to be terminated?](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)[This was the main issue for consideration in Ryder v Frohlich.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **[(b) Facts](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)** [Two investment bankers, Mr Ryder and Mr Frolich, entered into an agreement to create an "absolute return" investment fund and to attract subscribers to it. The Coastal Magma Diversified Performance Fund ("the Diversified Fund") was established in about June 2000.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) [At first instance, Cripps AJ held that the agreement to "work together to establish a fund and obtain subscribers for it and [to] contribute equally in terms of time and effort" was a partnership agreement. He held that the family companies of Mr Ryder and Mr Frohlich (the second appellant and second respondent on appeal) were not parties to the partnership agreement. (This was upheld on appeal.)](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) [By March 2001 the Diversified Fund had not made a profit. Mr Ryder decided in March 2001 to take full-time employment elsewhere, with Salomon Smith Barney ("Salomons").](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)[Due to Mr Frohlich's efforts after Mr Ryder's departure to Salomons, the capital in the Diversified Fund rose from $4 million (as at March 2001) to a little over $30 million at the time of trial. In September 2002, Mr Frohlich established the Coastal International Equity Fund ("the Equity Fund"), which by the time of trial had also captured a number of international investments.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)[Cripps AJ held that the partnership had been dissolved when Mr Ryder went to work for Salomons.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) [On appeal, the appellants accepted that by taking a full time position at Salomons Mr Ryder had repudiated the partnership agreement. They argued, however, that the repudiation was not accepted by Mr Frohlich, so that the partnership agreement was not terminated on the date the Mr Ryder communicated his intention to take the job at Salomons. In the absence of unequivocal words or conduct by Mr Frohlich, the partnership agreement remained on foot until the Amended Defence (which accepted Mr Ryder’s repudiation) was filed by the respondents on 16 June 2003.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)[The respondents argued that Cripps JA had correctly held that where a party to a contract disables himself from performance of the contract, the innocent party is not required to communicate an election to terminate. In any event, the respondents argued that Mr Frohlich had made it clear by his conduct that he had elected to terminate the partnership. After Mr Ryder took up employment with Salomons, Mr Frohlich had relied upon Mr Ryder's statement that Mr Frohlich should “just decide what you want to do with the business. I leave that up to you” and had taken sole responsibility for the business.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) [The respondents argued that the parties’ conduct evinced a clear understanding that the arrangement was at an end, and that it would have been artificial and unjust in the circumstances to require Mr Frohlich to expressly say to Mr Ryder “I accept your repudiation: our contract is at an end.”](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) **[(c) Held](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)** [The Court of Appeal (McColl JA, Hodgson and Ipps JA agreeing) held that acceptance of the repudiation was required, but held that there was acceptance by conduct at the time of Mr Ryder's departure.](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)[Their Honours accepted Cripps JA’s finding that Mr Ryder’s conduct in announcing that he was taking employment with Salomons meant that he had put it out of his power entirely to perform an ‘essential and fundamental term of the agreement he had with Mr Frohlich’ and so was an anticipatory breach in that he had renounced his rights under the partnership agreement. Having considered in the judgment the authorities on repudiation and renunciation, the Court of Appeal held, however, that the anticipatory breach of itself was “ineffective to terminate the partnership agreement unless accepted by Mr Frohlich.”](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)[The court held that, although Mr Frohlich did not expressly terminate the agreement, Mr Frohlich impliedly accepted the repudiation by his words and his conduct. “In a partnership which contained a term requiring each partner to contribute equally in terms of time and effort, Mr Ryder’s announcement was clearly repudiatory (as the appellants accepted) and Mr Frohlich’s agreement to his departure was clear acceptance, communicated to Mr Ryder, that he no longer regarded the partnership as on foot. If confirmation were needed, it was evinced in Mr Frohlich thereafter doing all the work the partners had hitherto undertaken. That conduct was inconsistent with the continuation of the partnership.”](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)**[5.6 Transferring a Western Australian association into a corporation](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(By Janine Dennis, Corrs Chambers Westgarth)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Medical Defence Association of Western Australia Inc v Australian Securities & Investments Commission [2004] FCA 1684, Federal Court of Australia, Stone J, 17 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1684.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1684.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [In this case, the Federal Court of Australia considered the meaning of section 601BC(8) of the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [(Corporations Act). This case affirms that when making an application to ASIC to transfer an association into a company, the application is required to be accompanied by evidence of authorisation from the members of the association rather than the authorisation of the State.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)  **[(b) Facts](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**  [The applicant, a medical defence organisation that trades as ‘MDA National’ was incorporated pursuant to the](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Associations Incorporation Act 1987 (WA)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default) [(Associations Act). The applicant sought, by transfer of its incorporated status, to become registered as a company under the Corporations Act. ASIC expressed the view that the proposed application was incompetent.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Therefore, the applicant sought declaratory relief that ASIC had the power to register the applicant as a company. Part 5B.1 of the Corporations Act provides for the conditions upon which an association can transfer into a company.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default) [Firstly, the application must be accompanied by evidence under the law of Western Australia that the transfer is authorised. Secondly, the applicant must comply with any requirements of Western Australian law. ASIC submitted that because the Associations Act did not contain provisions for a transfer, unlike other states, it meant that Western Australia does not authorise such a transfer and therefore the applicant cannot meet the requirements stipulated under the Corporations Act. In contrast to ASIC’s submissions, the applicant submitted that ASIC was authorised to register the transfer for two reasons. Firstly, the requirement to produce evidence is not mandatory and the failure to do so does not preclude ASIC from registering the transfer. Secondly, and in the alternative, the transfer is implicitly authorised by the absence of any provision for authorisation in Western Australian legislation.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default) [Therefore the issue in the proceedings was the proper statutory interpretation of section 601BC(8) and whether ASIC had the power to register the transfer under the Corporations Act.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)  **[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)** [Stone J determined that the correct statutory interpretation of section 601BC(8) is that the section imposes mandatory obligations on the applicant to provide ASIC with authorisation from the members of the association rather than the State and that authorisation must be given under the law of Western Australia.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default) [The main issues raised in proceedings were:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)[·         whether there was a requirement to provide evidence;·         whether authorisation was required and by whom; and·         whether the possibility of dual registration altered the statutory interpretation.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)**[(i) The requirement to provide evidence](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)** [The court determined that section 601BC(8) of the Corporations Act imposed an obligation on the applicant to provide ASIC with evidence. However, the court rejected the relevance of the classification of the language as either mandatory or directory. Instead, the issue was determined in the same fashion as the issue of authorisation.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default) **[(ii) Authorisation](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)** [The court held that section 601BC(8) imposes mandatory obligations on the applicant to provide evidence as to authorisation. The court rejected the interpretation accepted by both the parties that the authorisation referred to in section 601BC(8) is authorisation of the State of Western Australia. Instead, the court concluded that the evidentiary requirements of section 601BC(8) stem from the members of the association not the State. However, that authorisation must be given under the law of Western Australia.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default) [The reasons for her Honour’s decision were twofold. Firstly, the specific section included the words ‘under the law of the body’s place of origin’. The use of the word ‘under’ not ‘by’ the State indicates that the authorisation must be under the law of that jurisdiction but it does not stipulate by whom the authorisation must come from. Secondly, the absence of any specific statutory requirements for authorisation by the State. Finally, pursuant to section 5F of the Corporations Act, each State has an opportunity to exclude the operation of sections of the Corporations Act. The fact that the Western Australian government did not exclude the matter under consideration provides some support for this interpretation.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)  **[(iii) Dual registration](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default)** [ASIC submitted that upon transfer of registration the body corporate becomes a company under the Corporations Act, but that Commonwealth legislation does not provide for the deregistering of a body corporate under the State legislation. Therefore, there would be a period in which the applicant would be registered under both the Corporations Act and the Associations Act. Her Honour rejected ASIC’s argument as the court was not convinced that dual incorporation would occur. Further, even if dual registration occurred the court was not persuaded that any difficulties would arise to the extent that the court should develop a different interpretation of the relevant provision.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14965" \t "default) **[5.7 Application for an extension of the limitation period for commencing proceedings in respect of voidable transactions](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(Sarah Wilson, Corrs Chambers Westgarth)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[ASIC v Karl Suleman Enterprises Pty Ltd (In Liq) [2004] NSWSC 1244, Supreme Court of New South Wales, Barrett J, 17 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswsc1244.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswsc1244.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)** [This case considered applications made by the liquidators of Karl Suleman Enterprises Pty Limited (“KSE”) and five companies collectively known as “the Froggy companies” under section 588FF(3)(b) of the](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new) [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [for an extension of the limitation period that otherwise applies to applications for court orders in respect of voidable transactions under section 588FF(1).](http://cclsr.law.unimelb.edu.au/judgments%22%20%5Ct%20%22_new)[The orders sought were:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         in relation to KSE, an order that the time for bringing applications under section 588FF(1) against 38 named persons or entities be extended by one year; and·         separately in relation to each of KSE and each of the Froggy companies, an order that the time for bringing applications under section 588FF(1) against persons who are yet to be identified as potential defendants be extended.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Barrett J made orders extending the limitation period under section 588FF(3)(b) in accordance with the orders sought.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(b) Facts](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** **[(i) Legislation](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Section 588FF(3) specifies the time within which a liquidator of a company may make an application under section 588FF(1) for an order in respect of a transaction of the company considered voidable because of section 588FE.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Section 588FF(3) provides that: “An application under subsection (1) may only be made:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         within 3 years after the relation-back day; or·         within such longer period as the Court orders on an application under this paragraph made by the liquidator within those 3 years.”](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The period of 3 years referred to in section 588FF(3)(a) had, at the time of judgment already expired in respect of KSE. However the applications for orders under section 588FF(3)(b) were filed within the 3 year period, which the court found to be sufficient to satisfy the timing requirement of section 588FF(3)(b).](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(ii) Relevant considerations](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[The liquidators of KSE had not placed before the court any material explaining the nature of the claim under section 588FF(1) against any of the 38 identified persons, or the basis on which the claim would be advanced, which is a factor the court usually takes into account in an application to extend a limitation period.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Because of this, Barrett J was of the view that the liquidators required a strong positive finding in their favour in relation to the remaining considerations, namely:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         the explanation for delay in bringing proceedings; and ·         whether the likely actual prejudice resulting from the grant of an extension was sufficiently substantial to outweigh the case for granting an extension.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[As the 38 identified persons had not placed any evidence before the court relevant to demonstrating prejudice, the application therefore fell to be considered on the reasons why the liquidators had not commenced section 588FF(1) proceedings within the 3 year period.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)  **[(iii) Reasons for delay](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[The two main factors causing delay were:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         the lack of KSE records and accounts; and ·         the delay of the Commonwealth Bank of Australia (“CBA”) in providing KSE’s banking records.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The information sought from CBA was accepted by Barrett J to be of crucial importance in reconstructing the accounts, understanding the financial history of the company and detecting fraudulent patterns in the accounts, especially in light of the lack of KSE records and accounts.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The liquidators submitted that they were also hampered by the unreliable information provided by KSE investors, a reluctance of the main individuals involved in KSE to assist in the liquidation (primarily because most had personally misappropriated funds), the absconding of key persons involved and the fact that many transactions were conducted on a cash basis and/or not reduced to writing or properly recorded.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [Barett J granted a 1 year extension of the limitation period under section 588FF(3)(b) in respect of each administration, stating that:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         the liquidation of KSE and each of the Froggy companies had been approached and undertaken with appropriate diligence;·         the liquidators had acted in each case with due regard for the need for a combination of care and dispatch;·         the inability to obtain a full and complete picture of the financial position and financial dealings of the entities was not attributable to delay or inattention on the part of the liquidators;·         this is not a situation where it would never be possible to obtain a full and complete picture; ·         the liquidators had shown a cogent and compelling need for additional time in the interests of the due progress of each administration for the benefit of creditors; and·         to the extent potential defendants had been identified, the requirements of natural justice had been accommodated by notification of this application and none had raised any objection to the extension of time.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[5.8 Article in constitution restricting directors from putting company into liquidation valid](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(By Michelle Burton, Phillips Fox)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Medical Research & Compensation Foundation v Amaca Pty Ltd [2004] NSWSC 1227, New South Wales Supreme Court, Equity Division, Chief Justice Young, 15 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswsc1227.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswsc1227.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [An application was made to restrain winding up proceedings of Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd). The hearing raised the question as to the validity of a provision in the constitution of a corporation restricting or forbidding its directors from putting it into liquidation. It also raised the question as to the principles under which the Court may make an order under sections 232 and 233 of the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [('the Act') amending a corporation's constitution in cases of unfair conduct if it would remove or minimise the oppression.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[His Honour Chief Justice Young held that Article 19, the provision of the constitution in question, was valid and that there was no basis to amend the article for oppression.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [His Honour also held that proceedings to wind up the company, although brought in apparent breach of the terms of the corporation’s constitution, were found to have been validly commenced as allowed under section 462(2) of the Act, and the application was dismissed.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(b) Facts](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [Article 19 of the constitution of Amaca Pty Ltd provides that:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)["The directors or the members must not take any action in order to appoint an administrator (or similar) to, or seek to wind up (whether voluntarily or otherwise), or take any other action under Chapter 5 of the Corporations Law (as amended or replaced) concerning the Company unless:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         at that time an administrator (or similar) may be appointed to the Company on the basis that the Company is insolvent or the Company may be wound up as being in insolvency; or·         the directors have acted in the affairs of the Company in their own interests rather than in the interests of the members as a whole."](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The directors considered that it was just and equitable that the company be wound up. An application was made to restrain the winding up proceedings on the basis that the pre-conditions of Article 19 were not met and the directors were in breach of the company's constitution.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The issues before the Court were:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·          whether Article 19 was valid;·          whether the Court could make an order under sections 232 and 233 of the Act amending the corporation’s constitution to alleviate oppression; and·          whether proceedings for winding up, commenced in apparent breach of the terms of the corporation's constitution, were validly commenced.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [Chief Justice Young dismissed the proceedings and allowed the winding up proceedings to remain on foot. His Honour determined the questions as follows:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(i) Validity of article 19](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[His Honour held that a contract cannot prevent a person from exercising rights given to that person by the Corporations Act. Section 462(2) of the Act entitles the company to apply for an order to wind itself up.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[However, his Honour noted that Article 19 does not prevent the company from presenting process to wind itself up. It seeks to forbid the directors and members from causing the company so to act. The scope and practical effect of Article 19 may be limited by the legislation, but his Honour held that Article 19 itself is not invalid.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)  **[(ii) Possibility of an order under sections 232 and 233 of the Act amending the constitution to alleviate oppression](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[His Honour held that for a finding of oppression for the purposes of section 233, there is a requirement of conduct which is contrary to the interests of the members as a whole. There was no complaint about the action or inaction of the directors - the complaint was about the presence of Article 19 in the company's constitution.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[His Honour discussed the scope of "conduct" as discussed in various cases. Although "conduct" is to be construed widely, his Honour held that the mere fact that there had been changed circumstances since the adoption of articles of association, even coupled with the refusal of the majority to alter the status quo, was not sufficient to constitute unfair conduct. Hence there was no basis to find statutory oppression and his Honour held that section 233 could not be invoked.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(iii) Validity of proceedings for winding up commenced in apparent breach of the terms of the corporation’s constitution](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [His Honour held that the directors' actions to seek to wind up the company, though apparently in breach of the constitution by virtue of Article 19, were validly commenced under the Corporations Act. His Honour noted that there may be scope for application to the court for an injunction preventing a director from breaching the contract by initiating the winding up process. However, as no such application had been made in this case, there was no reason for his Honour to consider the option.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[5.9 Scheme of arrangement utilised to amalgamate subsidiaries and their members](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(Marcus Strohmeier, Clayton Utz)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [SGIC Insurance Ltd v Insurance Australia Ltd [2004] FCA 1638, Federal Court of Australia, Jacobson J, 14 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1638.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2004/december/2004fca1638.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)**[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)*** [Six plaintiff companies obtained an order of the Court approving a reconstruction utilising a members scheme of arrangement pursuant to section 411(4)(b), allowing the companies to amalgamate into their ultimate parent company. The court order also provided for the transfer of assets and liabilities to the parent company and the deregistration of five of the plaintiff companies without winding up. The Court ordered that any legal proceedings pending by or against each plaintiff be continued by or against the ultimate parent.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)
* [The Court also considered whether it was necessary to determine whether a scheme of arrangement between several companies and their members was either a "reconstruction" or "amalgamation." The Court found that it was unnecessary to analyse in detail whether the schemes were for the purpose of "reconstruction" or "amalgamation", because the Court was satisfied that the proposed schemes were for the reconstruction or amalgamation of the scheme companies in accordance with previous authority.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)

**[(b) Facts](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**[Six plaintiff companies, SGIC Insurance Limited, SGIC General Insurance Limited, SGIC Brand Pty Ltd, SGIC Holdings Limited, SGIO Insurance Limited and NRMA (Western Australia) Pty Ltd (Oldcos), sought the approval of the Court for:](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[·         a members reconstruction into one company, the ultimate parent of those companies, Insurance Australia Limited (Newco), utilising a scheme of arrangement pursuant to section 411(4)(b)](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[; ·         the transfer of assets and liabilities of each of the Oldcos to Newco pursuant to section 413(1);·         the deregistration of each Oldco without the necessity for the winding up of each Oldco (save for SGIC General Insurance Limited) pursuant to section 413(1)(d); and·         any legal proceedings pending by or against the plaintiffs to be continued by or against Newco pursuant to section 413(1)(c).](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[Each of the Oldcos was a subsidiary of Newco and each Oldco had either one or two of the other Oldcos as its only member(s) save for NRMA (Western Australia) Pty Ltd which had as its only member Newco.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) * [In an earlier related decision, Mann J approved an application by the Oldcos under section 411(1) to convene meetings of their members for the purpose of approving the schemes of arrangement proposed between each Oldco, its member(s) and Newco. As the member meetings ordered under section 411(1) had approved the schemes, the companies applied to the Court for an order approving the proposed schemes pursuant to section 411(4)(b).](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)

**[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)*** [Jacobson J considered whether it was necessary to analyse in detail whether the schemes were for the purpose of "reconstruction" or "amalgamation". He concluded that, as the schemes of arrangement were either for the reconstruction or amalgamation of the scheme companies, it was unnecessary to do so.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)

[In reaching that conclusion, Jacobson J considered the seminal case on the meaning of the words "reconstruction" and "amalgamation", namely, In re South African Supply & Cold Storage Co](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[(1904) 2 Ch 268 (South African Supply). His Honour cited the oft quoted passage of Buckley J at page 286 that a reconstruction occurs where an undertaking is transferred to persons who are not outsiders so that substantially the same business is carried on by substantially the same persons who previously conducted it. His Honour concluded the test was satisfied because the undertaking of the Oldcos was to be transferred to Newco, the ultimate parent of each Oldco. However, even if the proposed schemes of arrangement for each Oldco were not by way of reconstruction, they were clearly for the purpose of amalgamation because of the consolidation of the constituent elements of the Oldcos into Newco. Jacobson J referred to the decision in Citizens and Graziers Life Assurance Co Limited v Commonwealth Life (Amalgamated) Assurances Ltd (1934) 51 CLR 422. Alternatively he said the Oldcos were to be "rolled" or "blended' into Newco, citing South African Supply at page 287 in support of his conclusion. Jacobson J also made reference to the useful analysis provided by Renard and Santamaria, Takeovers and Reconstruction in Australia (1990) Butterworths, Sydney, in relation to the authorities on the meaning of "reconstruction" and "amalgamation".](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Also of note are the comments of Jacobson J on a number of minor errors and omissions that occurred after his order approving the meetings of members under section 411(1) that is:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [·         the scheme meetings for all but one Oldco were held ahead of the Court appointed time;·         the venue of the meetings was changed; and·         the explanatory statement was not registered before being served.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[In relation to the third item, Jacobson J noted that the explanatory statement was registered late, but that the explanatory statement as served was identical to the statement put before the court at the first court hearing. Jacobson J held that each of the errors and omissions related to a proceeding under the Act was a procedural irregularity for the purposes of section 1322. Such procedural irregularities do not invalidate a proceeding unless the court forms the opinion that the errors and omissions had or may cause substantial injustice and the court declares the proceeding to be invalid. The schemes meetings were therefore validated by section 1322(2).](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Jacobson J made orders, amongst others:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[·         approving the schemes of arrangement between the Oldcos and their members pursuant to section 411(4)(b);·         approving the transfer of assets and liabilities of each of the Oldcos to Newco pursuant to section 413(1);·         for the deregistration of each Oldco without the necessity for the winding up of each Oldco (save for SGIC General Insurance Limited) pursuant to section 413(1)(d); and·         that any legal proceedings pending by or against the plaintiffs be continued by or against Newco pursuant to section 413(1)(c).](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(d) Comment](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [Interestingly, at almost the same time in England, Mann J delivered his judgment in In the matter of Mytravel Group Plc [2004] EWHC 2741 (Ch), High Court of Justice, Mann J, 24 November 2004.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [That decision concerned an application by Mytravel Group for an order convening a meeting of shareholders and certain creditors to consider a scheme of arrangement, due to solvency issues, pursuant to section 425 of the Companies Act 1985 (UK). The proposed scheme would have resulted in existing shareholders being allocated only 4 percent of the reconstructed company's shares.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [In his reasons for judgment, Mann J applied the same passage of Buckley J at page 286 of South African Supply. Mann J held that the proposed reconstruction of the Mytravel Group of companies utilising a scheme of arrangement was not a reconstruction. The decision turned on the proposed scheme's resulting in a significant reduction in percentage shareholding of the old shareholders in the proposed new company - which was fatal to the proposed scheme in this instance.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Clearly the two decisions can be reconciled by applying the meaning of the word "reconstruction" provided by South African Supply to the post reconstruction position of the shareholders in each case. In both cases, counsel raised the possibility that the South African Supply approach to "reconstruction" is too restrictive. In SGIC Insurance, this was not a live issue, because the court held that, even on the South African Supply test, the scheme in question was a reconstruction. As it turned out, this issue went to the heart of the scheme in Mytravel. There, in the face of a comprehensive attack on South African Supply, Mann J held that he was constrained by authority to apply South African Supply.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[5.10 Share valuation and the test of “fair market value”](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(By Emma Wartski, Freehills)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[MMAL Rentals Pty Limited (ACN 008 293 490) v Bruning [2004] NSWCA 451, New South Wales Court of Appeal, Spigelman CJ Mason P Hodgson JA, 9 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) [The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswca451.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2004/december/2004nswca451.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [This case concerned a dispute over the “fair market value” of a minority shareholding. Both parties disputed the trial judge’s valuation of the shares at $675,000 plus interest. The Respondent also asserted that the contract was unfair within the meaning of section 106 of the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Industrial Relations Act 1996 (NSW)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4496" \t "default) [(Industrial Relations Act) and sought relief by way of that section, or alternatively by way of an oppression suit under the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [(Corporations Act).](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)[On appeal Spigelman CJ (Mason P and Hodgson JA agreeing) examined whether the court had applied the correct test of "fair market value". Ultimately, Spigelman CJ held that the phrase “fair market value” tends towards an objective valuation and away from a test of what is fair and equitable between the parties. In this situation the value of the goodwill of the business on a hypothetical liquidation could also be taken into account, notwithstanding the fact that on an actual liquidation certain rights would be surrendered. Furthermore, the “special potentiality” to the Appellants of acquiring 100% ownership could be considered (in businesses that require trust and co-operation, a majority shareholder has an interest in ensuring that a minority shareholding is not acquired by someone who has no relationship with the majority holder). Spigelman CJ also held that the trial judge was entitled to take into account the Appellants’ offer as evidence of value.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Although in some respects Spigelman CJ’s analysis differed from that of the trial judge, he held that his conclusion as to the “fair market value” of the shares was reasonable given the extremely limited information base from which the trial judge was working.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [On the other hand, the contract was found to be unfair under section 106 of the Industrial Relations Act. The share allotment agreement became an unfair contract because of the disparity between the significant commercial advantages received by the Appellants and the minimal financial benefit received by the Respondent, in circumstances where original projections anticipated profit to both parties. The share allotment agreement was therefore varied to allow the shares to be valued according to their “fair value” instead of their “fair market value”. Once interest was calculated and added on, the “fair value” of the shares was calculated to be $2 million.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Spigelman CJ also agreed with the trial judge’s approach to deal with the Respondent’s oppression suit under section 106 of the Industrial Relations Act, stating that it would be difficult to conceive of any factor pertinent to an oppression suit which was not also relevant to the determination of unfairness for purposes of section 106.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(b) Facts](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**  [MMAL Rentals Pty Ltd (MMAL) owned 80% the operating business of a car rental company (Thrifty). The shareholding of MMAL was held 81.25% by Mitsubishi (the Appellants) and 18.75% by Mr Bruning (the Respondent). The Respondent became managing director of the business. The Appellants held an option to acquire the Respondent’s shares upon termination of the management agreement, for a “fair market value”.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [When the Appellants exercised their option to purchase the shares a dispute arose as to the value of the shareholding. The Appellants claimed that the “fair market value” of the shares was $58,911. The Respondent claimed that the value was close to $6 million. Both parties disputed the trial judge’s valuation of the shares at $675,000 plus interest.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [The Respondent also asserted that the contract was unfair within the meaning of section 106 of the Industrial Relations Act or alternatively, by way of an oppression suit under the Corporations Act.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**  [Spigelman CJ Mason P and Hodgson JA agreeing.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(i) The meaning of fair market value](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[At the outset Spigelman CJ distinguished the terms “fair value”, “market value” and “fair market value”. The overall context was said to be determinative [53]. The meaning of the term “fair value”, in some contexts, referred to what was just or equitable in all the circumstances. In these cases the scope of relevant considerations which could be taken into account was wide. On the other hand, a test of “market value” invoked the long standing test of a willing but not anxious purchaser and vendor, bargaining with each other (see Spencer v The Commonwealth of Australia (1907) 5 CLR 418).](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Spigelman CJ rejected the Respondent’s contention that the wide approach (applicable to the determination of a “fair value”) should be applied to the contractual test of “fair market value”. He stated that “in the present contractual context, the intrusion of the word “market” between “fair” and “value” points away from a process of determining what is just or equitable between the parties, towards an objective standard” [59]. However, he went on to say that the word “fair” has work to do”[60]. In a contractual context this additional word suggested:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[“that the valuation should proceed on the assumption, which may be contrary to the facts of a particular contractual relationship, that there is no impediment to the process of bargaining, whether in terms of availability of information or restraints arising from the characteristics of a particular vendor or purchaser or otherwise”[60].](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Spigelman CJ was not able to set out in abstract terms how “fair market value” should be computed; rather, he stated that it was necessary to focus on the particular issues which arose in order to determine the formulation required in a particular case.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(ii) The method of valuation](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [The trial judge had rejected the Appellants’ valuation given by Mr Lonergan (who had valued Mr Bruning’s shares at nil) and stated: “with respect, this valuation, which was based on a “net assets base valuation methodology”, was about as useful as valuing the Sydney Harbour Bridge on the basis of its scrap metal value” [31]. On appeal, Spigelman CJ agreed with the trial judge’s approach. For Spigelman CJ it was implicit that Mr Bruning’s shares had to be valued after taking into account what Mitsubishi would be prepared to pay [32].](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [The Appellants also contested that the trial judge had erred in applying a valuation methodology called the “realistic value rule” (a method of valuation used for family law purposes (see In the Marriage of K D and P A Reynolds (1984) 10 FamLR 388). However, Spigelman CJ stated that a close reading of the trial judge’s reasons “did not suggest that his Honour was putting forward an alternative methodology” [65]. (If he had he would have erred.)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Spigelman CJ stated that the trial judge applied a “net assets value methodology” (the methodology adopted by Mr Lonergan), which also took into account the goodwill of the business on a hypothetical liquidation, setting aside the fact that an actual liquidation could trigger the surrender of certain rights. Spigelman CJ agreed with the trial judge that it may be appropriate to set aside as immaterial the legal consequences of an actual liquidation for the purposes of a hypothetical liquidation.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [Further, in coming to that valuation the “special potentiality” to Mitsubishi of acquiring 100% could be taken into account. In a majority controlled business that requires mutual trust and co-operation, the majority shareholder has an interest in ensuring that the minority shareholding is not acquired by someone who has no relationship with the majority holder and a valuation of the minority shareholding may take into account that the majority holder will be prepared to pay more for the minority than another person.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[On the other hand, the Respondents’ claim that the shares should be valued at $6 million was also rejected. The Respondents sought to value Mr Bruning’s shares based on an “average industry net return percentage”. This valuation method was regarded as “useless” by Spigelman CJ, as the operations of the business were nothing like the other car rental companies cited. In particular, the business was never capitalised or financed on the basis that it would acquire a significant proportion of its fleet on residual leases so that it could make the profits that other car rental companies apparently make by selling ex-rental vehicles [111].](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(iii) Minority discount](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[The Appellants’ contention that the trial judge had erred by not accepting Mr Lonergan’s evidence that a minority discount applied was also rejected on appeal. Spigelman CJ was of the view that a majority shareholder obtains a special value by obtaining complete control in situations where it avoids nuisance shareholders. In such situations a minority discount was not appropriate.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[(iv) Offer as evidence of value](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Spigelman CJ also held that the trial judge was entitled to take into account Mitsubishi’s offer as evidence of value. Where a valuation involves the special potentiality of particular property for a specific purchaser, an offer by that purchaser to purchase that property is admissible. The offer in this case was cogent evidence of, at least, a minimum value to the purchaser with a special interest, and accordingly probative evidence of at least a minimum price for Mr Bruning’s shareholdings.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(v) The trial judge’s valuation of the shares was correct](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Spigelman CJ ultimately found that the trial judge was correct to reject all of the expert evidence before him despite the fact that this left him with a limited basis for valuation. Although in some respects Spigelman CJ found that his analysis differed from the trial judges, he held that given the extremely limited information base that the trial judge was working from, his conclusion was a reasonable one. Therefore, Spigelman CJ found that there was no basis for the court to interfere with the trial judge’s judgment](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Section 106 of the Industrial Relations Act confers power to vary a contract which has become unfair in its operation, irrespective of whether or not it was unfair at its inception. It was on this basis that the trial judge dealt with Mr Bruning’s oppression suit. Spigelman CJ agreed with this approach and stated that it would be difficult to conceive of any factor pertinent to an oppression suit which is not also relevant to the determination of unfairness for the purposes of section 106 [146].](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[The share allotment agreement became an unfair contract within the meaning of section 106(2) of the Industrial Relations Act because of the disparity between the significant commercial advantages received by Mitsubishi and the minimal financial benefit received by Mr Bruning in circumstances where original projections anticipated profit to both parties [207]. As such, the Share Allotment agreement was varied by Spigelman CJ to allow the shares to be valued according to their “fair value” instead of their “fair market value” [207].](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [A “fair value” required recognition of the value of the business, not merely an interest rate type rate of return on investment. Mr Bruning was to be rewarded for his significant assistance in building the business. In computing “fair value” Spigelman CJ took into account the share of profits that Mitsubishi had actually received over the seven years. This figure was $7,886,000 (15% of which was close to $1,250,000). Once interest was included the value was $2 million.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) **[5.11 Removal and appointment of directors and officers](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm%22%20%5Cl%20%22top)**[(By Amelia Tooher, Blake Dawson Waldron)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[Saltwater Studios Pty Ltd v Hathaway [2004] QSC 435, Supreme Court of Queensland, Atkinson J, 7 December 2004](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top)[The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/december/2004qsc435.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2004/december/2004qsc435.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)](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%2090.htm#top) **[(a) Summary](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**[This case concerned the appointment and removal of directors and officers of two companies. The Court held that where the constitutions of the companies required that the director be an employee of the companies, the managing director's powers did not by implication extend to removing the only other director of the companies from his employment so to enable his removal as a director.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)**[(b) Facts](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new)** [The third applicant ("PH") initiated the proceeding. PH successfully sought leave to bring the proceeding under section 236 of the](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) [("Corporations Act") on behalf of the first applicant, Saltwater Studios, and the second applicant, Saltwateroz Holdings Pty Ltd ("the Companies"). PH and the first respondent ("MH") were the directors of the Companies. They were also employees of and, from time to time, guarantors of the Companies. MH, who was also the managing director of the Companies, purported to terminate PH's employment, and claimed that this termination was effective to remove him as a director.](http://cclsr.law.unimelb.edu.au/judgments/%22%20%5Ct%20%22_new) [The pivotal question for the Court was whether PH had been validly removed. The applicants sought a number of declarations regarding the validity of several subsequent board appointments to the Companies, as well a declaration that PH remained a duly appointed director of the companies.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(i) Removal of PH as a director](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[The constitutions of the Companies ("the Constitutions") provided that the office of a Director who is also an employee of either of the Companies is terminated on the Director ceasing to be so employed. On 19 April 2004, after a series of disagreements between the parties, MH purported to remove PH as a director of both Companies by dismissing him as an employee of one of the Companies. The Constitutions also set out a detailed dispute resolution mechanism involving notice of the dispute and outcome sought, to be followed by good faith negotiations. Failing resolution, the parties were required to choose an independent person to be appointed to the board. MH argued that he had the power, as managing director, to dismiss the only other director, PH, from his employment with the Companies, leading to the automatic termination of his directorship. The constitutions were silent on the position and powers of the managing director.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(ii) Appointment of AH as a director](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[On 21 April 2004, MH purported to appoint his son as a director of the Companies "to constitute a quorum" in order to appoint his wife, the second respondent ("AH"), as a director of the Companies to replace PH. There was no resolution appointing AH as a director of the Companies and PH was not given notice of this meeting. The Constitutions required that Directors hold a percentage of the Companies' share capital. The shareholder register did not show AH as a shareholder in either company.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(iii) Appointment of MH and AH as governing directors](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[On 23 April 2004, MH and AH met purportedly as the boards of the Companies and resolved to appoint themselves as governing directors of the Companies. As "duly appointed" governing directors they confirmed, inter alia, the removal of PH as a Director. The boards had the power to appoint no more than two members to the office of governing director, however, the respondents conceded that their capacity to appoint themselves as governing directors depended on the validity of the removal of PH as a director.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(iv) Appointment of directors at the EGM of 28 September 2004](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[On 2 September 2004, PH called an Extraordinary General Meeting ("EGM") which was held on 28 September 2004 where he sought to (1) remove MH as director; (2) confirm (inter alia) PH as director; and (3) appoint several others as directors. The respondents were notified but did not attend. They argued that the meeting was not validly held on the basis that (1) the meeting did not have a relevant quorum (the Constitutions provided that a quorum cannot be constituted without the presence of a governing director); (2) notice was not properly given to all the shareholders; and (3) notice of the EGM was not properly given to the Companies contrary to the requirements in section 249N(1) of the Corporations Act. The respondents further argued that the notice was not served on the correct registered address of the Companies because the registered addresses had been changed by PH without the authority of the boards.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(c) Decision](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)** [Atkinson J granted leave under sections 236 and 237 of the Corporations Act to PH as trustee for his family trust, as a shareholder in the Companies, to bring the proceedings on behalf of the Companies. Her Honour noted that it was unlikely that the Companies would bring any action against the respondents given that the respondents (purportedly) constituted the boards of the Companies. Further, she acknowledged that while PH had a personal interest in bringing this matter, it was in the best interests of the Companies that their directors were validly removed and appointed in accordance with their Constitutions.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(i) Removal of PH as a director](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Atkinson J held that PH remained a duly appointed director of the Companies. Atkinson J noted that while the managing director had the implied authority to do all things that fell within the usual scope of that office (ie, day to day management of the companies and personnel decisions), such powers are not unlimited. Her Honour referred to Re Quintex Ltd (No 2) (1990) 2 ACSR 479 where it was held that the position of managing director did not carry with it authority to make certain critical decisions. Atkinson J decided that where the constitution of the companies required that a director be an employee, the managing director's powers did not by implication extend to removing the only other director of the companies from his employment so to enable his removal as a director.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Her Honour noted that while the dispute resolution procedures in the constitutions had been initially followed, they were "abruptly aborted" when MH purported to terminate PH's employment. The fact that these procedures were not followed in their entirety suggested that the removal of PH was done in bad faith. Atkinson J referred to Lord Atkin in Southern Foundries (1926) Ltd v Shirlaw [1940] AC 701 at 717:"One director cannot get rid of the only other director by disabling the other director from continuing. When each party may only be a director when a certain state of affairs exists, it is an implied term of the contract between the parties and each party and the company that neither may do something of his or her own motion to prevent the other from satisfying that state of affairs."](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)[Accordingly, MH's action in removing PH as the only other director by terminating his employment was a breach not only of the implied terms of his contract with PH, but also his contract with the Companies.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[(ii) Directorship appointments](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)**[Atkinson J held that the appointments referred to in paragraphs (b)(ii)-(iv) above were invalid. Her Honour held that:](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)* [AH was not validly appointed as a director as there was no resolution actually appointing her (nor did she meet the shareholding requirement). Her appointment could not be implied in the circumstances because the only other director, PH, was not given notice of the meeting.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)
* [Because AH was not validly appointed as a director, she could not be appointed as a governing director. In respect of MH, her Honour followed the principles in Grant v John Grant & Sons Pty Ltd (1950) 82 CLR 1 at 49 (per Fullagar), and concluded that MH's appointment as a governing director was invalid because the appointment was not made in good faith.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)
* [The EGM was not validly held because notice was not properly served on the Companies and for this reason the meeting could not pass valid resolutions.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default)

[Her Honour ordered that the companies be directed to file documents to rectify the Australian Securities and Investment Commission's register to reflect the fact that the only two current directors were MH and PH, and there were no governing directors, and to record the correct registered addresses of the companies.](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) |
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