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| **1. Recent Corporate Law and Corporate Governance Developments** |
| **1.1 World Bank releases large new governance data source**On 15 September 2006, the World Bank launched "Governance Matters 2006: Worldwide Governance Indicators". The report indicates that reforming countries can make significant improvements in governance and in curbing corruption in relatively short periods of even less than a decade.For example, the report shows that reforming countries such as Tanzania, Ghana, Botswana, Nigeria, Mozambique, and Senegal have made progress in one or more dimensions of governance over the past decade. And countries that implement governance reforms can expect a huge development dividend, with an improvement in governance raising per capital incomes about three-fold in the long run. The indicators also show that over a dozen non-OECD countries, including for example, Slovenia, Chile, Botswana, and Estonia, score higher in rule of law and in control of corruption than some industrialized countries, for example, Greece and Italy. Some emerging economies exhibit this kind of improvement in other dimensions of governance as well. Strong reformers over the past decade include countries as diverse as Peru, Ghana, Tanzania, Mexico, Bosnia, Serbia, and Croatia with strong improvements in Voice and Accountability, Bulgaria, Slovak Republic and Romania in Government Effectiveness; Armenia, Hungary, Slovak Republic, and Lithuania in Regulatory Quality, and Georgia, Latvia and South Korea on Control of Corruption.The indicators for well over 200 countries are based on hundreds of variables and a compilation of more than 120,000 responses from citizens, experts and enterprises worldwide, distilled from 30 underlying sources.The release of these indicators and their data sources represents one of the largest publicly available data resource on governance in the world. These evidence-based empirical measures help development stakeholders track the quality of institutions, support capacity building, improve governance, and address corruption. The worldwide governance indicators measure the following six components of good governance:1. Voice and Accountability - measuring political, civil and human rights;2. Political Stability and Absence of Violence - measuring the likelihood of violent threats to, or changes in, government, including terrorism;3. Government Effectiveness - measuring the competence of the bureaucracy and the quality of public service delivery;4. Regulatory Quality - measuring the incidence of market-unfriendly policies; 5. Rule of Law - measuring the quality of contract enforcement, the police, and the courts, including judiciary independence, and the incidence of crime; and6. Control of Corruption - measuring the abuse of public power for private gain, including petty and grand corruption (and state capture by elites).The indicators provide rich information on the links between institutional quality and socioeconomic outcomes in countries, and on worldwide and regional trends in governance. In particular, improved governance leads to higher standards of living and poverty alleviation. Research on governance shows that improved standards of living are largely the result of improved governance, and not the other way around. Improving governance in poor countries, such as in Sub-Saharan Africa, for example, would yield significant results. Good governance delivers a large "development dividend" in the form of higher standards of living and poverty alleviation. The indicators show that when governance is improved by one standard deviation, incomes rise about three-fold in the long run, and infant mortality declines by two thirds.Because such an improvement in governance constitutes just a fraction of the difference between the worst and best performers, it is within reach. For example, on the dimension of rule of law, one standard deviation is all that separates Somalia from Nigeria, Nigeria from El Salvador, El Salvador from Italy or Botswana, and Botswana from the United Kingdom. On control of corruption, to take another example, one standard deviation divides Equatorial Guinea from Tanzania, Tanzania from Lithuania, Lithuania from Chile, and Chile from Finland. On voice and accountability, one standard deviation separates North Korea or Myanmar from Kazakhstan or Chad, Chad from Zambia or Singapore, Singapore from the Republic of Korea or Botswana, and Botswana from Denmark.Where there is resolute leadership and reform, improved governance outcomes can take place relatively quickly. While not the norm, the governance indicators show that a number of countries have made significant progress even in the very brief period since 2002, as for example in Ukraine, Serbia, and Liberia in Voice and Accountability; Georgia in Political Stability and Control of Corruption; and the Slovak Republic on Government Effectiveness.Global trends in governance are sobering. On average the quality of governance around the world has not improved much. In spite of improvements in a number of countries, there has been a similar number of countries where deterioration has taken place, and many where no significant change is yet apparent. Further information is available on the [World Bank website](http://web.worldbank.org/WBSITE/EXTERNAL/WBI/EXTWBIGOVANTCOR/0%2C%2CmenuPK%3A1740542~pagePK%3A64168427~piPK%3A64168435~theSitePK%3A1740530%2C00.html%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.2 Consultation conclusions on possible reforms to the Hong Kong prospectus regime**On 22 September 2006 the Hong Kong Securities and Futures Commission (SFC) released the Consultation Conclusions on the reform initiatives proposed as the final phase of a three-part review and reform exercise designed to modernise the regime governing the public offering of shares and debentures in the Companies Ordinance (CO). In August 2005, the SFC consulted the public on 21 reform initiatives relating to the CO prospectus regime and received 26 submissions from market practitioners, issuers and professional bodies. There was broad support for the majority of the initiatives and certain initiatives have been revised in light of public comments received. Of the 21 reform initiatives, 12 will be pursued in principle and 3 have been revised in light of public comments. **(a) Summary of key initiatives proposed to be taken forward**1. To consolidate securities laws in a single piece of legislation, the provisions in the CO relating to the public offering of shares and debentures will be moved to the Securities and Futures Ordinance (SFO) as a discrete part separate from the investment advertisement regime in Part IV of the SFO (Proposal 1). To harmonise the legal and regulatory treatment of investment arrangements and instruments with broadly similar risk and reward exposure, public offers of structured products will be subject to regulation under Part IV of the SFO, whilst plain vanilla share or debenture offers will be governed under the separate prospectus regime (Proposal 5). This should reduce regulatory arbitrage.2. The focus of the prospectus regime will be changed from a "document-based" to a "transaction-based" approach by regulating the act of offering rather than any document containing the offer (Proposal 2). Offerors will also be regulated without regard to place of incorporation or their legal form (Proposal 4). 3. To attach liability unequivocally to specified persons responsible for the prospectus, prospectus liability will be imposed on (i) the issuer and/or the offeror of the shares or debentures; and (ii) each person who accepts, and is stated in the prospectus as accepting, responsibility for the prospectus (Proposal 8). 4. In recognition of the role pre-deal research reports play in price discovery in the initial public offering process, the relevant proposal in the Consultation Paper (Proposal 15) has been revised in a number of ways including, subject to compliance with internal control and compliance procedures, an advanced draft prospectus may be provided to selected analysts for the purposes of preparing the research report. 5. In order to provide investors with withdrawal rights where materially adverse new developments occur prior to the results of allocation being announced, the issuer of the prospectus will be required to publish a supplemental prospectus and provide successful applicants with a right to withdraw their allocations and be repaid in full (Proposal 16). **(b) Proposals not be taken forward at this stage**1. Proposal 9 - to extend the classes of persons who may claim compensation for a misstatement in a prospectus to subsequent purchasers who buy in the secondary market;2. Proposal 10 - to remove the requirement for claimants to prove that they have actually read and relied on the prospectus when making a claim for compensation;3. Proposal 17 - to extend the 3-day waiting period before allotments of shares or debentures in the case of initial public offers of shares or debentures and the removal of the 3-day waiting period for allotments in the case of public offers of shares or debentures of a class already listed;4. Proposal 18 - to provide that an application form or procedure for shares or debentures may not be distributed or implemented by any person unless it is accompanied by or contained in a prospectus which complies with the prospectus provisions or is exempted from them;5. Proposal 20 - to introduce a separate regulatory regime to regulate offers to employees and their dependants, including a requirement for a declaration of solvency and going concern by the directors and auditors of the company; and6. Proposal 21 - to provide that an issue or sale of securities in contravention of the law should be void or voidable.The Consultation Conclusions are available on the [SFC website](http://www.sfc.hk/sfc/doc/EN/speeches/public/consult/06/conclusions_prospectus_060922.pdf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.3 Better co-operation in banking supervision with New Zealand** On 14 September 2006, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, announced that the [Financial Sector Legislation Amendment (Trans-Tasman Banking Supervision) Bill 2006](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=92609" \t "Default) has been introduced into the Australian Parliament. This Bill represents a significant step towards fulfilling the Australian Government's commitment to develop a single economic market between Australia and New Zealand. It delivers on the agreement, between the Treasurer and the New Zealand Minister of Finance, to develop a seamless regulatory environment for banking services by implementing the legislative changes that were announced by the Ministers on 22 February 2006.New Zealand is currently progressing its own reciprocal legislation through its Parliament.Given the high level of commercial integration between the Australian and New Zealand banking markets, there are key benefits in moving towards seamless regulation of banks on both sides of the Tasman, including minimising compliance costs and promoting efficiency.The legislative amendments are expected to improve the ability of the Australian Prudential Regulation Authority to cooperate with the Reserve Bank of New Zealand, which should reduce impediments to banks in choosing the location of their systems and functions within the trans-Tasman market. This is expected to bring compliance cost and efficiency benefits for banks with operations in both Australia and New Zealand and have flow on benefits for consumers of banking services.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.4 UK Treasury announces enhanced FSA powers in relation to recognized exchanges** On 12 September 2006, the Economic Secretary to the UK Treasury, Ed Balls, announced that the UK Government is to legislate to enhance the Financial Services Authority (FSA's) powers in relation to recognized exchanges. According to Mr Balls, the legislation will confer a new and specific power on the FSA to veto rule changes proposed by exchanges that would be disproportionate in their impact on the economic role that exchanges play in the UK and EU economies. It will, according to Mr Balls, "outlaw the imposition of any rules that might endanger the light touch, risk based regulatory regime that underpins London's success". Mr Ball's speech outlining this change is available from the [UK Treasury website](http://www.hm-treasury.gov.uk/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.5 European Commission acts to improve supervisory approval process for mergers and acquisitions** On 12 September 2006, the European Commission put forward a proposal that will tighten the procedures that Member States' supervisory authorities have to follow when assessing proposed mergers and acquisitions (M&A) in the banking, insurance and securities sectors. Current EU rules allow supervisory authorities to block proposed M&A if they consider that the 'sound and prudent management' of the target company could be put at risk. The proposed new Directive, which amends various existing Directives in these sectors, will in particular clarify the criteria against which supervisors should assess possible M&A operations. This will improve clarity and transparency in supervisory assessment and help to ensure a consistent handling of M&A requests across the EU. **(a) What the new Directive will introduce**The proposed Directive provides supervisory authorities with a transparent process for decision-making and notification. In particular, there is now a closed list of criteria on which the acquiring company should be assessed, such as reputation of the proposed acquirer, reputation and experience of any person that may run the resulting institution or firm, financial soundness of the proposed acquirer, compliance with relevant EU Directives, and risk of money laundering and terrorism financing. Also, the Directive reduces the assessment period from three months to 30 days and allows the supervisory authority to 'stop the clock' only once, under clear conditions.It amends the following existing Directives: the Banking Directive (2006/48/EC), the Third Non-life Insurance Directive (92/49/EEC), the Recast Life Assurance Directive (2002/83/EC), the Reinsurance Directive (2005/68/EC), and Directive 2006/48/EC on markets in financial instruments.**(b) Background**The issue of low cross-border consolidation in the financial sector was discussed at the informal meeting of Economic and Finance Ministers (ECOFIN) in September 2004. Ministers asked the Commission to study possible obstacles to cross-border mergers and acquisitions in the financial sector, arising both from differing supervisory practices and from other, broader factors.Consequently, the Commission began a review of the existing rules in the banking sector on the supervisory assessments of shareholdings that allow Member States to block on prudential grounds the acquisition of shareholdings above certain thresholds. As this legislation is very similar to corresponding legislation in the securities and insurance sectors, it was considered appropriate to extend the review to include these sectors as well, in order to maintain and enhance further cross-sectoral consistency.To gather stakeholders' views on the subject, the Commission carried out an online consultation in 2006 (IP/06/320). The results indicated that EU companies were aware of the problems with the supervisory approval process, and were supportive of the need to introduce clearer procedures and criteria and to improve consistency.Further information is available on the [Europa website](http://ec.europa.eu/internal_market/finances/cross-sector/index_en.htm%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.6 East Asian finance: The road to robust markets** On 14 September 2006, a new World Bank report, "The Road to Robust East Asian Financial Markets", was released at the Bank-IMF Annual Meetings in Singapore. It is argued in the report that East Asia needs and is well positioned to enhance its financial systems to meet the growing and increasingly sophisticated demand for financial intermediation in the region.The report examines the agenda if the financial sector is to fulfill its role. It argues that the demands for financial intermediation in the region are changing. In the past, the financial sector focused largely on the needs of the corporate sector. But as per capita incomes rise, the sector will face growing demands from consumers. At the same time, businesses in the region are looking for a broader range of services, including investment banking services. And with the deepening of intra-regional trade, firms will require cross-border financial services.A vibrant East Asian financial sector, according to the report, should have at least three characteristics:* highly diversified in its ability to cater to the needs of increasingly complex and sophisticated economies;
* able to provide financial services efficiently; and
* robust enough to withstand a variety of shocks in a fast changing globalizing world economy.

The report notes that although securities markets have grown by 300 percent in the last nine years, the banking sector, with US$5.5 trillion in assets, still dominates East Asia's financial sector. The region's institutional investor base of US$1.5 trillion is large, but has considerable potential for future growth given the large pool of savings in commercial banks.To further develop the securities markets the report stresses the need for greater liquidity and efficiency. It says that the efficiency and liquidity of markets is affected by the availability of information to price securities accurately, by high transactions costs, and by the limited size and heterogeneity of the investor base. To enhance efficiency, the report notes, policy makers will need to address each of these elements.The report also notes that the emergence of initiatives for regional financial cooperation is providing an impetus for deepening and diversifying financial markets by identifying impediments to cross-border investments, providing greater liquidity, and facilitating issuance by private sector participants. But the experiences with implementing the Asian Bond Funds Initiative shows that measures also need to be taken at the domestic level. Regional financial integration can significantly enlarge the gains from domestic policy measures and make the development of domestic financial markets more viable.The agenda to strengthen securities markets and a more robust financial system overall will require concerted efforts on three fronts:* Strengthening implementation of corporate governance and information disclosure is extremely important to enable investors to price securities accurately. Countries in the region have made considerable progress in strengthening the legal and regulatory framework around corporate governance and disclosure requirements and in strengthening accounting and auditing standards but greater focus on implementation and enforcement are needed.
* Developing complementary or supporting infrastructure such as report markets, margin trading and derivatives. If developed within an appropriate framework, these can be important means of reducing transactions costs. It also allows market participants to manage and transfer risks to those better able and willing to bear them and so helps advance the development of robust financial systems overall. The report also notes the potential danger of inappropriate risk transfers-through the use of such instruments--to institutions with weaker risk management capacity and to more weakly regulated segments of the financial markets. This is especially the case for transfers from private banks to public banks and from banks to non-bank financial institutions. Proactive measures by regulators are needed to monitor and contain these risks.
* Developing a broader and more diversified investor base. The participation of investors with different preferences and appetites contributes to greater trading and liquidity and more efficient markets. This will require further developing the domestic institutional investor base-pension funds, insurance and mutual funds-as well as fostering greater regional financial integration.

The full report is available on the [World Bank website](http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/EXTEAPREGTOPFINFINSECDEV/0%2C%2CcontentMDK%3A20968028~pagePK%3A34004173~piPK%3A34003707~theSitePK%3A589810%2C00.html%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.7 Corporation Amendment (NZ Closer Economic Relations) Bill 2006** On 11 September 2006, the Parliamentary Secretary to the Treasurer, the Hon Chris Pearce MP, released the draft Corporations Amendment (NZ Closer Economic Relations) Bill 2006 for public exposure. New Zealand's regulations are due to be released for comment in the near future. The Bill will implement the Agreement between the Government of Australia and the Government of New Zealand in Relation to Mutual Recognition of Securities Offerings, signed on 22 March 2006, and will reduce the filing requirements for New Zealand companies doing business in Australia.When enacted, the provisions will allow the offer of securities and managed investment interests to be made in either country with the same offer documents, therefore reducing duplication and cost which are passed on to consumers. The reduced filing requirements provisions of the draft bill are intended to exempt New Zealand companies operating in Australia from lodging the same information with ASIC that the companies have already lodged with the New Zealand Companies Office. The draft Bill and commentary are available on the [Treasury website](http://parlsec.treasurer.gov.au/cjp/content/pressreleases/2006/032.asp%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.8 Amendment to takeovers law** On 7 September 2006, the Australian Treasurer released the draft Corporations Amendment (Takeovers) Bill 2006 for public exposure.The Bill will amend provisions in Chapter 6 of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) which relate to takeovers and the powers of the Takeovers Panel.According to the Treasurer, two recent decisions relating to the Takeovers Panel interpreted the limits of the jurisdiction of the Takeovers Panel, as set out in the current legislation. As a result of those cases, concerns were raised that it may be open to read the Panel's powers and jurisdiction in a way that is too narrowly formulated to enable the Panel to perform effectively the role envisaged for it by Parliament.The Bill is designed to ensure that the market for control of companies and their shares continues to operate effectively and efficiently and that the Panel continues to contribute to that outcome. When enacted, the Bill will ensure the Panel can continue to act in an effective, efficient and expeditious manner as the primary forum for resolving disputes during takeover bid periods, relying on the specialist expertise of its members, so that the outcome of any takeover bid can be resolved by the target shareholders on the basis of its commercial merits. Further information is available on the [Treasury website](http://www.treasurer.gov.au/tsr/default.asp%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.9 New guidance on ethics education proposed by IFAC's International Accounting Education Standards Board** On 7 September 2006, the International Accounting Education Standards Board (IAESB), an independent standard-setting board within the International Federation of Accountants (IFAC), proposed new guidance to help professional accountants meet one of their most difficult challenges: making ethical decisions. The proposed new International Education Practice Statement (IEPS), Approaches to Developing and Maintaining Professional Values, Ethics and Attitudes, is designed to assist IFAC member bodies in developing ethics education and continuing professional development programs for their members.The proposed practice statement provides guidance to IFAC member bodies on how to achieve good practice in developing and maintaining professional values, ethics and attitudes in accordance with the requirements in International Education Standard (IES) 4, Professional Values, Ethics and Attitudes. It suggests that member bodies may adopt an approach to ethics education based on the IAESB's "Ethics Education Framework," developed in its recently published information paper, Approaches to the Development and Maintenance of Professional Values, Ethics and Attitudes in Accounting Education Programs. The proposed IEPS also highlights good practice in ethics education and the assessment of ethics education, stressing the importance of workplace learning and a period of practical experience as being essential in the development of ethical judgment and decision making.Further information is available on the [IFAC website](http://www.ifac.org/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.10 Cost of audit to increase - but also audit quality and public confidence: CPA Australia survey** In a media release of 6 September 2006, CPA Australia announced that Australia's new legally enforceable Auditing Standards are expected to increase the cost and time required to complete an audit, but will also improve audit quality and public confidence in financial reports, auditor's reports and auditors.These views reflect responses from nearly 80 finance, accounting and business professionals and academics who took part in CPA Australia's Auditing Standards Briefing sessions in Sydney, Melbourne, Brisbane, Perth and Adelaide over the past two months. The survey also captured views on other key audit-related CLERP 9 reforms.The majority of survey respondents provide audit and assurance services and of these, most were from small and medium accounting practices as well as the public sector.Key findings are:* Nearly 80 per cent of survey respondents believe the new standards will improve audit quality, with nearly the same proportion (75 per cent) expecting an increase in time taken to complete an audit;
* Nearly 7 out of 10 respondents anticipate an increase in audit costs, but the survey did not ask whether increased costs would mean increased fees for clients;
* More than 3 out of 4 respondents believe regulators will benefit from the new standards; and
* Around two-thirds believe auditors, directors and investors will benefit.

At least 60 per cent of the survey respondents believe the new standards will improve public confidence in financial reports, auditor's reports and auditors, but only 43 per cent expected improved confidence in Australian capital markets.Impact of other audit-related CLERP 9 reforms:* In all cases the majority of respondents expect the survey's 11 audit-related CLERP 9 reforms to improve audit quality.
* The impact of the reforms on public confidence was more varied ranging from 36 per cent to 77 per cent.
* The new audit competency standard is the reform most respondents felt would improve audit quality (84.6 per cent).
* The extended reporting of significant breaches to ASIC by auditors is the reform most respondents felt would improve public confidence in financial reports (76.6 per cent).

The report is available on the [CPA Australia website](http://www.cpaaustralia.com.au/cps/rde/xchg/SID-3F57FEDF-1B01D16B/cpa/hs.xsl/14131_19772_ENA_HTML.htm%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.11 UK pensions regulator publishes report on governance survey** An in-depth survey into the way UK pension schemes are run has found that while many schemes are well-governed, a 'significant minority' have shortcomings in important areas of good practice. These findings were announced in a report published on 5 September 2006 by the UK Pensions Regulator as part of its commitment to improving the way pension schemes are governed. Key findings from the survey are that: * there are clear links between good governance, training and established risk management processes;
* larger schemes are better governed than smaller schemes although not all big schemes are well-governed in every respect;
* scheme trustees considered on the whole that they are performing well; and
* a significant minority of schemes have shortcomings in important areas.

Work already carried out by the Pensions Regulator in this area includes the development of free online learning and the introduction of codes of practice and guidance. The full report is available on the [Pensions Regulator website](http://www.thepensionsregulator.gov.uk/mediaCentre/pressReleases/pn06/pn06-31.aspx%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.12 Australian CEO pay** The CEOs of Australia's largest companies are receiving an average $2.5 million more remuneration than is disclosed to shareholders, according to research published on 4 September 2006 by institutional governance advisor ISS Australia.ISS found that companies nearly always under-report the value of options granted to executives, even though Australian companies are required to disclose in annual reports the "fair value" of options when they are granted. The average "fair value" of options given to CEOs of top 100 companies at the time of grant was $931,713. In contrast the actual value received after the options were exercised was $3,572,513.After reviewing 46 different option exercises by 24 CEOs of top 100 companies between May 2005 and August 2006, ISS Australia found that, in 45 out of 46 cases the fair value was lower than the actual value realised. On average the reported value was 26% of the actual value.The finding was consistent with ISS Australia's earlier research for the periods between 2003-2005 where the average fair value reported to shareholders was 31% of the actual value realised by CEOs.According to ISS Australia, the systematic under-reporting of options values is permissible in Australia due to lax accounting standards. Options values are frequently over discounted for the probability of performance hurdles being met without any supporting evidence or disclosure.Some have claimed that under-valuation is the result of error. One Australian company, Oxiana, recently revised the valuation of options granted to its CEO and other executives in its 2005 annual report by more than $1 million. Low option valuations reduce the apparent size of executive pay. This may lead to many grants of equity slipping "under the radar" of shareholder scrutiny at the time of approval and in non-binding votes on remuneration practices.The biggest valuation disparity in 2005/6 was at Alinta, where the CEO was granted options in 2003 with a reported fair value of $0.20 at the time of grant. The actual value of each option on exercise was $6.68 - more than 33 times the reported fair value.For financial years ending on or after 31 December 2005, under-valuation of options also has a direct impact on reported profit and loss. Under IFRS, Australian companies must expense, at "fair value", grants of equity to employees, including executives.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.13 Study of women in Australian business leadership** The results of the 2006 EOWA Australian Census of Women in Leadership, released on 31 August 2006, show that Australia's top 200 companies have made little progress in increasing the numbers of women in their boardrooms.Conducted by the Federal Government's Equal Opportunity for Women in the Workplace Agency (EOWA), the Census shows that there has been only incremental improvement in the number of women board directors (now 8.7%) since the Census was first conducted in 2002.The number of women executive managers in the ASX 200 has increased slightly to 12.0% from 11.4% in 2004, however the increase is based on only a small rise in the number of women in executive manager positions and a decrease in the size of executive management teams. The number of female CEOs has not increased since 2003. Just six ASX 200 companies (3%) - GasNet Australia Group, Harvey Norman Holding, Macquarie Airports, Macquarie Countrywide Trust, St George Bank and Telecom Corporation of New Zealand - are led by women.According to EOWA Director, Ms Anna McPhee, the disappointing Census results highlight that 47% of Australia's employees and 40% of shareholders remain under-represented at the most senior levels of business. At board director level there are 10 men to every one woman and at CEO level there are 33 male CEOs for every female CEO in the ASX 200.While the number of companies with no women on their boards is almost unchanged (50.0%), boards with more than one female member are increasing. The Census shows there is a considerable increase in the percentage of companies which have two or more women board directors and which have 25% or more board women or executive managers. 12.0% of companies (from 7.1% in 2004) have 25% or more board directors and 18.0% of companies (from 13.7% in 2004) have 25% or more executive managers. This is almost on par with the USA where 12.8% of Fortune 500 companies in 2005 had 25% or more women board directors.60.5% of ASX 200 companies have at least one woman in an executive management position, which is almost 10 percentage points higher than in 2003.Only five ASX 200 companies have 25% or more women on both their board and senior executive team. They are David Jones, Great Southern Plantations, Just Group, Telecom Corporation of New Zealand and Ventracor.The number of women who have the necessary experience in profit and loss roles is continuing to grow the pipeline to the top jobs. Women hold 7.4% of line roles, an increase from 5.0% since the Census was first conducted in 2002. Nearly three-quarters of male executive managers are in line positions.Australia's progress is greater only than New Zealand's, and continues to lag behind the USA, the UK, Canada and South Africa in the numbers of women board directors and executive managers. Women in the US, for example, reached Australia's current level of board representation, 8.7%, back in 1994.The EOWA Census was conducted in partnership with ANZ, Macquarie University and the US research organisation, Catalyst.The report is available on the [EOWA website](http://www.eowa.gov.au/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.14 New Zealand review of financial providers and products** On 31 August 2006, the New Zealand Commerce Minister Lianne Dalziel released a series of nine discussion papers as part of the review of financial products and providers. The papers propose a framework of regulation for the non-bank financial sector. The review is the fourth and final part of the government's reform program for the non-bank financial sector and follows the introduction of the Takeovers Code, the work on regulation of securities exchanges and regulatory institutions and the changes in the Securities Legislation Bill.Lianne Dalziel said the aim of the review was to develop an effective and consistent framework for the regulation of non-bank financial institutions and financial products to promote confidence and participation in financial markets by investors and institutions, and ensure a sound and efficient financial sector.Most of the options for reform contained in the discussion documents were developed in conjunction with advisory groups made up of industry participants. The discussion document on financial intermediaries has already been released and the deadline for submissions has been extended by one month to 1 October 2006.The remaining discussion documents cover:* Registration of Financial Institutions;
* Insurance;
* Supervision of Issuers;
* Consumer Dispute Resolution and Redress;
* Non-Bank Deposit-Takers;
* Collective Investment Schemes;
* Mutuals' Governance;
* Securities Offerings; and
* Platforms and Portfolio Management Services.

Submissions on these documents close on 1 December 2006 and final policy decisions will be presented to Cabinet in the first half of next year.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.15 CEBS report on industry practices on large exposures** On 31 August 2006, the Committee of European Banking Supervisors (CEBS) published a final report on industry practices for the measurement and management of large exposures, including the use of credit risk mitigation (CRM) to manage large exposures. The report also provides feedback on the industry's views on the current regulatory environment. The report responds to a Call for Advice issued by the European Commission in December 2005, in which CEBS was invited to carry out a number of pieces of work to inform the Commission's review of the Large Exposures rules in the Capital Requirements Directive. On the basis of information provided via an on-line questionnaire, CEBS reports on the methods used by institutions in measuring, managing, and monitoring single-name concentration risk (the risk arising from large exposures to a single counterparty or a group of connected counterparties) and other forms of concentration risk (such as that posed by sectoral or geographical credit concentrations). CEBS found a wide variety in the methods used by EU institutions to measure and manage concentration risk. Smaller institutions often rely largely on limits on the size of their large exposures, expressed as a fraction of the institution's capital, or (less often) of assets, and often closely linked to regulatory limits on large exposures. Larger, more sophisticated institutions also use internal limits, but their methods for calculating them are more varied, using economic capital models which capture the impact of large exposures on the riskiness of the institution's overall credit portfolio, and stress-testing or scenario analysis. The information collected in this report together with the CEBS report on supervisory practices published in April 2006 should contribute to the assessment of whether revisions in the current rules are warranted. In this respect, CEBS is studying the fundamental prudential principles underlying a large exposures regime and the degree to which credit risk management techniques (including the use of credit risk mitigation) should be included in large exposures rules. Further information is available on the [CEBS website](http://www.c-ebs.org/Advice/advice.htm%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.16 Institute of Chartered Accountants quality review program report** On 30 August 2006, results were announced in relation to the Quality Review Program conducted by the Institute of Chartered Accountants in Australia. Quality review results in the last financial year indicated that 85 per cent of practices are meeting the majority of standards, but there are still some issues to address. The Annual Report on the Quality Review Program 2005-2006 is available on the [Institute of Chartered Accountants in Australia website](http://www.icaa.org.au/upload/download/Quality_review_Report_2006.pdf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.17 Joint Forum issues paper on business continuity** On 29 August 2006, the Joint Forum released a paper entitled "High-Level Principles for Business Continuity". The paper is a revised version of the draft issued for consultation in December 2005.The paper promotes a common base level internationally for the resilience of financial systems to major operational disruptions. It provides authorities with a broad framework for developing business continuity arrangements that are more closely tailored to their unique sectoral and local circumstances. The principles outlined in the paper apply to both financial industry participants and financial authorities and are applicable across the banking, securities and insurance sectors.The paper is available on the [Bank for International Settlements website](http://www.bis.org/%22%20%5Ct%20%22_new), the [International Organization of Securities Commissions website](http://www.iosco.org/%22%20%5Ct%20%22_new) and the [International Association of Insurance Supervisors website](http://www.iaisweb.org/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.18 Sustainability and the role of professional accountants in business** To help accountants better understand how they can advance, measure and report on sustainable development, the Professional Accountants in Business (PAIB) Committee of the International Federation of Accountants (IFAC) published on 29 August 2006, two new information papers on the topic.The first information paper, 'Why Sustainability Counts for Professional Accountants in Business' provides an overview of enterprise sustainability and sets out the business case for addressing the risks and opportunities of sustainable development at the enterprise level. It also discusses the ways in which professional accountants in business, especially those working for organizations with significant environmental or social impacts, will be involved with the measurement, recording and interpretation of sustainability-related information. 'Professional Accountants in Business - At the Heart of Sustainability?', the second paper, provides first-hand commentary from eleven senior professionals working in various enterprises around the world on the role of accountants and the challenges they face in promoting and implementing sustainable development strategies. The information papers are available on the [IFAC website](http://www.ifac.org/store/%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.19 Long-term incentive plans are not delivering best results for UK companies** On 20 August 2006, a report was published by PricewaterhouseCoopers LLP in which it is argued that long-term incentives at many top UK companies are failing to meet the needs of executives or shareholders, forcing some organizations to make constant adjustments to their reward plans. The report, entitled "Executive Compensation Review of the Year 2006", compares how different types of long-term incentive plans align executive pay with returns delivered to shareholders. Traditional compensation models give outstanding reward for outstanding performance but can give rise to anomalies where performance is anything less than stellar. The report shows how two FTSE100 companies delivering similar returns to shareholders over a decade can have an average level of reward that differs by a factor of five, if traditional designs are used.The research shows that a focus on stock ownership rather than performance conditions may provide a more effective system of reward. In many circumstances, a better alignment of reward and shareholder value can be achieved by simply delivering more of an executive's total pay in company shares and requiring them to hold this stock for a significant period of time. The report also found that Britain's top CEOs saw their salaries rise by an average of 6% last year compared to a high of 14% in 2000. Use of share options continues to fall with only one third of FTSE100 companies granting options to their CEO, down from over half a year ago. Fifty-three FTSE100 CEOs remain in final salary (defined benefit) pension schemes. An increasing number are in defined contribution schemes. Incentive opportunities in the top 25 FTSE100 companies are markedly higher. This is largely driven by global benchmarks for compensation with bonus opportunities reaching an average of 175% of salary, compared to around 100% for the remaining FTSE100 companies. Total compensation in the top 25 FTSE100 companies is much closer to US levels. Bonuses are playing a greater part in total compensation packages for CEOs with average maximum bonus opportunities reaching 120% of salary in the FTSE100 (compared to 45% in 2000) and an average of over 75% actually paid. Cash bonuses now constitute on average 23% of a total reward package compared to 18% a year ago.Almost all CEOs now get a bonus of some kind. There has been a fall in the number of FTSE CEOs receiving no bonus at all - only 4, compared to 23 in 2000. This is a consequence of changes in bonus design rather than bonus targets getting easier. Bonuses now tend to be offered based on a basket of targets, rather than a 'hit or miss' basis. This has also meant that instances of CEOs getting maximum bonus have also become rarer - fewer than 10% in the FTSE100 last year. The report also looks at compensation for senior executives and board members, compares executive reward to national average earnings and examines the increasing influence of private equity compensation practices. The report is available on the [PricewaterhouseCoopers website](http://www.ukmediacentre.pwc.com/Content/Detail.asp?ReleaseID=2003&NewsAreaID=2" \t "_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**1.20 CEO turnover: study** A new study examining CEO turnover in US companies has been published by the National Bureau of Economic Research. Titled "How Has CEO Turnover Changed?", the authors are Steven Kaplan and Bernadette Minton. The authors study CEO turnover - both internal (board driven) and external (through takeover and insolvency) - from 1992 to 2005 for a sample of large US companies. Annual CEO turnover is higher than that estimated in previous studies over earlier periods. Turnover is 14.9% from 1992 to 2005, implying an average tenure as CEO of less than seven years. In the more recent period since 1998, total CEO turnover increases to 16.5%, implying an average tenure of just over six years. Internal turnover is significantly related to three components of company performance - performance relative to industry, industry performance relative to the overall market, and the performance of the overall stock market. Also in the more recent period since 1998, the relation of internal turnover to performance is more strongly related to all three measures of performance in the contemporaneous year. External turnover is not significantly related to any of the measures of stock performance over the entire sample period, nor over the two sub-periods. The authors discuss the implications of these findings for various issues in corporate governance. The paper is available on the [National Bureau of Economic Research website](http://www.nber.org/papers/w12465%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif |
| **2. Recent ASIC Developments** |
| **2.1 ASIC provides information about how it reduces burdens on business**On 14 September 2006, the Australian Securities and Investments Commission (ASIC) issued a revised policy statement outlining how it uses its powers to reduce the burden on business. This policy statement is a product of ASIC's Better Regulation Initiatives which aim to achieve better and more transparent regulation. Policy Statement [PS 51] Applications for Relief updates and clarifies ASIC's previous policy on: * how it deals with requests to reduce regulatory burdens;
* what information applicants need to provide in order for ASIC to make a decision; and
* what factors ASIC will take into account when making a decision.

The revised policy provides details on lodging electronic applications and how ASIC endeavours to provide early indications if it has concerns about a particular request.In addition to the updated policy statement, ASIC also intends to provide further guidance on how to make an application for relief through developing templates. These are anticipated to be developed by 31 December 2006.A copy of the policy statement is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**2.2 ASIC to develop policy on listed managed investment scheme buy-backs** On 5 September 2006, the Australian Securities and Investments Commission (ASIC) announced plans to develop a policy which will allow buy-backs of interests in listed registered schemes in certain circumstances.ASIC's policy will take into account industry concerns that existing regulation of buy-back offers for managed investment schemes makes it difficult for listed schemes to use the capital management techniques available to listed companies. Currently, on-market scheme buy-backs are difficult to implement due to the application of the withdrawal procedures under Part 5C.6 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to schemes that have non-liquid assets.ASIC recently approved relief from various requirements of the Act to an ASX-listed entity to facilitate a proposed on-market scheme buy-back. This relief was granted subject to a number of conditions, including: * that the number of interests to be acquired under the buy-back be limited to no greater than 10 per cent of the smallest number, at any time during the last 12 months, of interests on issue,
* buy-back price ceilings ensure that members who do not participate in the buy-back do not have the value of their holdings unfairly diluted as a result of the buy-back. These ceilings were calculated both by reference to net asset backing of the interests and by reference to the average market price of the interests, and
* that adequate notice of the intended buy-back be provided to allow equal opportunity to participate in the buy-back.

In the interim, ASIC will consider any applications for relief in relation to on-market buy-backs by listed schemes on a case-by-case basis.Further information is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif |
| **3. Recent ASX Developments** |
| **3.1 ASX integrated trading system**ASX has contracted OMX Technology to supply a version of its CLICK XT software for the trading of all securities quoted on the financial market operated by the Australian Stock Exchange Limited. The CLICK XT system has been tailored for the Australian market, and is known as the Integrated Trading System or ITS.Products that are currently traded on the SEATS platform are being progressively migrated to ITS to give a fully integrated trading platform with derivative products.ITS Phase 2 Warrants and Interest Rate migration was completed on 2 September 2006. These products commenced trading on ITS on 4 September 2006, which is the Interest Rate Products Commencement Date and Warrants Commencement Date under the Market Rules. Market Rules 32.1.2 and 32.1.3 explain the consequences.ITS Phase 3 Equities migration rehearsal and implementation is planned to be implemented by 30 September 2006.Under the current plan SEATS will be decommissioned following implementation on 30 September 2006.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**3.2 ASX warrants market rule amendments** Following an extensive consultation process with Warrant-Issuers, ASX has made numerous amendments to Section 10 of the ASX Market Rules. The amendments took effect on 4 September 2006. Key amendments include:Rule 10.2: The amendments to Rule 10.2 are intended to:* codify the criteria which an applicant for approval as a Warrant-Issuer must meet; and
* clarify the existing powers of ASX to approve Warrant-Issuers and to suspend or revoke such approval.

Rule 10.3.11: This Rule is intended to promote liquidity in the Warrants Market. The Rule has been amended so that Warrant-Issuers may continue to comply with the Rule by meeting the existing "initial spread of Warrant-Holders" requirement, or may alternatively comply with the Rule by making a market in the relevant Warrant Series, on an ongoing basis, in the manner set out in the Rules.A number of new ASX Market Rules Procedures have been introduced to complement the Rule amendments described above. In addition, ASX has extensively revised ASX Market Rules Guidance Note 17, which relates to the liquidity requirements imposed by Rule 10.3.11. The revised Guidance Note provides guidance on the interpretation and administration of Rule 10.3.11 as amended.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**3.3 Relief granted by the Commodities Futures Trading Commission (CFTC) to participants of SFE and ASX for trading on behalf of us clients** SFE has released an updated Practice Note concerning:* the circumstances under which the CFTC will grant relief to SFE participants from certain registration requirements in the US, where such participants wish to trade on behalf of US clients; and
* where trading may take place from locations within or outside the US.

ASX has released an updated circular concerning the circumstances under which the CFTC will grant relief to ASX participants from certain registration requirements in the US, where such participants wish to trade ASX futures contracts on behalf of US clients. In summary, provided that participants meet conditions specified by the CFTC and by SFE/ ASX, the relief available is as follows:* SFE participants may trade most SFE futures contracts and options over futures contracts on behalf of clients located in the US.
* ASX participants may trade most ASX futures contracts on behalf of clients located in the US.
* SFE participants may trade approved contracts on certain overseas (non-US) exchanges on behalf of clients located in the US.
* SYCOM terminals may be placed in the US offices of SFE participants or their clients.

For details of the relief available and the conditions which must be met before the relief applies, see SFE's Practice Note relating to Operating Rules 2.2.6 and 2.2.30 (entitled 'Trading on behalf of US clients and trading from locations within the US'), which may be found on the [SFE website](http://www.sfe.com.au/content/aboutsfe/sfe_rules/procedures_determinations.pdf%22%20%5Ct%20%22_new).http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif |
| **4. Recent Takeovers Panel Developments** |
| **4.1 Australian Pipeline Trust 01R - Panel final orders**On 23 September 2006, the Takeovers Panel advised that it had made final orders in relation to acquisitions (Acquisitions) of 10.25% of the units in Australian Pipeline Trust (APT) by Alinta Limited (Alinta) in the period 16 August to 22 August (inclusive). The orders follow the Panel's decision on 20 September 2006 to make a declaration of unacceptable circumstances (TP 06-90). The Panel received applications dated 5 September 2006 and 8 September 2006 from Alinta (TP 06-83) seeking a review of the decision of the APT01 Panel's decision to make a declaration of unacceptable circumstances and final orders in relation to the Australian Pipeline Trust 01 proceedings (TP 06-82, TP 06-85).The Panel decided that the Acquisitions constituted unacceptable circumstances having regard to: 1. the fact that the Acquisitions constituted, or gave rise to, a contravention of section 606 of the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default); and 2. the effect of the Acquisitions on the control or potential control of APT. The Panel has ordered that the units in APT which Alinta acquired under the Acquisitions (Sale Units) be vested in ASIC for sale by a stockbroker or investment bank selected by ASIC (Appointed Seller) and that the net proceeds be returned to Alinta. The Appointed Seller will be instructed to:1. maximise competition for, and the price of, the Sale Units; 2. sell the Sale Units either under a bookbuild or into a takeover bid, as long as the takeover bid is: a. for all units in APT; b. subject at most to a prescribed occurrence defeating condition; c. for cash, or including a cash alternative of equivalent value (which the Appointed Seller will select); and 3. sell the Sale Units within 6 weeks, without (in its opinion as an expert) unreasonably depressing the market price of units in APT. Alinta and AGL (and their associates) will be prohibited from acquiring the Sale Units under a bookbuild, but may acquire them under takeover offers for all of the units in APT.Alinta is prohibited from acquiring or disposing of units in APT (or dealing via derivative instruments) until the schemes of arrangement (Schemes) to merge Alinta and The Australian Gaslight Company (AGL) are implemented or the Merger Implementation Agreement (MIA) between Alinta and AGL concerning the Schemes lapses if the Schemes are not implemented.The Panel has allowed Alinta Infrastructure Holdings (AIH) additional time to make submissions as to whether or not it should be included as an associate of Alinta in the orders. If it were included as an associate it would be subject to the same restrictions as Alinta. AIH has given the Panel undertakings restricting it dealing in units in APT prior to the Panel deciding the issue.Under the Panel's orders, any bidder (whether Alinta or a rival) will have a reasonable time within which to bid for APT and acquire the Sale Units if it is the highest bidder. A bidder is free to make a scrip only takeover bid for all of the units in APT, however, the Appointed Seller will be instructed not to accept the Sale Units into a takeover bid without an equivalent cash alternative consideration. The Appointed Seller (under the guidance of ASIC) will determine how and to whom to sell the Sale Units. The Appointed Seller will be instructed by ASIC to seek to maximise the competition, and the price, for the Sale Units within the time initially allowed for the sale process.The Panel considers that this will put the market for control of APT back as closely as possible as it was prior to the Acquisitions. At the time of the Acquisitions Alinta was free, under the Corporations Act, to make a takeover bid for all of the units in APT. It could have acquired the Sale Units under a full takeover bid instead of making the Acquisitions and the unitholders of APT could then have chosen to sell into an Alinta takeover bid. Under the Panel's orders that will remain the case, as will the competitive position of any person who wishes to make a rival offer for APT.In the proceedings before the Panel Alinta submitted to the Panel that AGL was free to sell the 26% of units in APT which AGL holds (AGL Parcel), to the highest bidder if there were a bid for APT, and, under the terms of the MIA, Alinta was not entitled to withold its consent unreasonably from AGL selling the AGL Parcel. The proceeds of the AGL Parcel sale would be included in the AGL Infrastructure Assets which Alinta would acquire under the Schemes. The parties made a number of requests to the Panel as to restrictions to be placed on the sale process. The Panel's strong preference was to leave the dynamics of the sale process to the Appointed Seller and the market. Therefore, it did not include those restrictions on disposal of the Sale Units.The Panel has expressly allowed all parties to come back to the Panel for variation of its orders if circumstances appear to require changes to the orders.Alinta has announced that it is seeking judicial review in the Federal Court in relation to the decision and orders of the Takeovers Panel.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**4.2 Aztec Resources Limited - Decision** On 12 September 2006, the Takeovers Panel advised that it had considered the application (Application) by Aztec Resources Limited (Aztec) in relation to the off-market scrip takeover bid for Aztec by Mount Gibson Iron Limited (Mount Gibson) (see TP06/75). The Panel has accepted an undertaking from Mount Gibson to provide additional information in a supplementary bidder's statement. The information relates to Mount Gibson's forecast consolidated net profit after tax for the six month period to 31 December 2006. The Panel had advised Mount Gibson that, in the absence of such disclosure, it was minded to make a declaration of unacceptable circumstances. The Panel intends to dismiss the Application once the Panel is satisfied that Mount Gibson has complied with its undertaking.**(a) Background** Aztec submitted that there were deficiencies in the disclosure made in the Mount Gibson bidder's statement. Aztec submitted that these related to issues including:a. a possible merger of Mount Gibson (after the takeover bid for Aztec) with Gindalbie Metals Limited (Gindalbie) (the "3 Way Merger"); and b. production and financial information relating to Mount Gibson. Aztec also submitted that Mount Gibson and Gindalbie were associates in relation to the affairs of Aztec and the 3 Way Merger.Mount Gibson submitted that there were no disclosure deficiencies in its bidder's statement. Mount Gibson and Gindalbie each submitted that they were not, and had not been, associates in relation to Aztec.**(b) Decision** The Panel did not consider, on the material presented to it, that Mount Gibson and Gindalbie are currently associates. The Panel did not consider it necessary to make a decision regarding whether an association had previously existed between Mount Gibson and Gindalbie at the time of the 3 Way Merger discussions because the evidence provided to the Panel indicated that any such association, if it had existed, had been terminated.The Panel accepted Mount Gibson's submissions that it had had commercial reasons for its decision not to pursue the 3 Way Merger discussions (in addition to any reasons it may have had relating to the difficulty of implementing a 3 Way Merger). In relation to Aztec's submissions regarding disclosure, the Panel noted the supplementary bidder's statement released by Mount Gibson on 6 September 2006 (and despatched to Aztec shareholders) which contained disclosure concerning, among other things, the 3 Way Merger discussions. Except in relation to a forecast as to Mount Gibson's financial performance (discussed below) the Panel did not consider that any additional disclosure beyond the 6 September 2006 supplementary bidder's statement was required by Mount Gibson.In relation to forecasts, the Panel considered that it would be reasonable for Aztec shareholders and their professional advisers to expect to find a forecast of Mount Gibson's financial performance to 31 December 2006, in the bidder's statement relating to Mount Gibson's scrip offer. The Panel advised Mount Gibson that it was minded to make a declaration of unacceptable circumstances in relation to the failure of Mount Gibson to provide such a forecast. However, the Panel accepted undertakings offered by Mount Gibson in relation to the provision of forecast financial information in a supplementary bidder's statement which it considered remedied the possible unacceptable circumstances. Accordingly, the Panel did not make a declaration of unacceptable circumstances.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**4.3 Orion Telecommunications Limited - Panel declaration and orders** On 29 August 2006, the Takeovers Panel advised that it had made a declaration of unacceptable circumstances and final orders in relation to an application dated 3 July 2006 from Orion Telecommunications Limited (Orion) in relation to acquisitions of shares in Orion by TelEurope Ltd and various associates (TelEurope), and Lewis Securities Ltd and various associates (Lewis Associates). As at 24 April 2006, TelEurope had a relevant interest in 19.9% of Orion shares, and the Lewis Associates had relevant interests in 6.66% of Orion shares. Between 24 April 2006 and 30 June 2006, the Lewis Associates acquired approximately 5.4% of Orion shares (Lewis Acquisitions).On the basis of the evidence presented in the proceedings, the Panel found that TelEurope and the Lewis Associates:a. had, by 24 April 2006, formed an understanding that they would use their combined voting power (if necessary) for the purpose of influencing the composition of Orion's board and the conduct of Orion's affairs; b. subsequently acted in concert with respect to the operations of, and the composition of the board of, Orion; c. accordingly, were associates under both paragraphs (b) and (c) of section 12(2) of the Corporations Act from, at least, 24 April 2006; and d. accordingly, each of the Lewis Acquisitions in Orion gave rise to a contravention of section 606 of the Corporations Act. Neither TelEurope nor the Lewis Associates disclosed their association, and aggregated voting power, in substantial holding notices.The Panel considered that the circumstances constituted by the association of TelEurope and the Lewis Associates and the Lewis Acquisitions were unacceptable because they constituted, or gave rise to, a contravention of section 606(1) and 671B of the Act.The Panel, having taken into account the matters set out in section 657A(3) of the Act (and in particular the fact that the Lewis Acquisitions had not taken place in an efficient, competitive and informed market in accordance with section 602(a) of the Act), considered that it would not be against the public interest to make a declaration of unacceptable circumstances. The Panel therefore made the declaration.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif |
| **5. Recent Corporate Law Decisions** |
| **5.1 Damages for material non-disclosure**(By Guy Foster and Steven Fleming, Allens Arthur Robinson)Kim Riley in his Capacity as Trustee of the KER Trust v Jubilee Mines NL [2006] WASC 199, Supreme Court of Western Australia, Master Sanderson, 6 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/september/2006wasc199.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/september/2006wasc199.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Background** In the recent case of Kim Riley in his Capacity as Trustee of the KER Trust v Jubilee Mines NL, Master Sanderson held that a past shareholder of Jubilee Mines NL, Kim Riley, was entitled to damages from Jubilee Mines, a West Australian-based mining company, for failure to comply with the continuous disclosure requirements of the Corporations Law (now the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)) (the Act). Mr Riley alleged that the failure to disclose information about a potentially significant sample testing result was negligent and that as a result of this negligence he suffered loss. In simple terms, that loss was calculated as the difference between the price of the shares after the material announcements were eventually made to the market, and the price of the shares when Mr Riley sold his shares (which were at a time before the information had been disclosed to the market). The Jubilee Mines case was decided on an application of provisions of the Act which have since been moved or replaced by those contained in Chapter 6CA of the Act (most particularly s1001A(1)). The provisions of Chapter 6CA of the Act are similar to those under which Jubilee Mines was decided, and set out the obligations of listed companies to disclose information which is not generally available to the market, if a reasonable person would expect that information would have a material effect on the price of the securities of the company. Unlike the present provisions of the Act, s1001A contained a requirement that the non-disclosure must not be intentional, reckless or negligent. While this requirement is no longer present in the Act, the broad power of the court to award damages for a breach of the provisions of Chapter 6CA means that similar claims might be brought by shareholders (or classes of shareholders) under the current provisions of the Act. Such claims might also be encouraged by the High Court's recent decision on litigation funding arrangements (see item 5.3 of this Bulletin). **(b) The facts** In 1993, Jubilee Mines was a junior explorer with limited cash resources struggling to establish a worthwhile prospect. Its focus was exploring for gold. Mr Riley had been the managing director of Jubilee Mines and had been allotted a significant number of shares as part of his remuneration package. Mr Riley resigned on 31 December 1993. On 1 August 1994, Jubilee Mines received a letter from Western Mining Corporation (the WMC letter) which notified Jubilee Mines that WMC had inadvertently undertaken sample drilling on a portion of Jubilee Mines' tenement. Accompanying the letter were a number of documents including details of the holes that had been drilled and what had been found during this drilling process, namely deposits of nickel. The significance of the information contained within the WMC letter was one of the central issues in this case: Mr Riley asserted that a reasonable person would have known that the information in the WMC letter was market sensitive information which, had it been released to the market, which it was not at the time, would have led to a significant increase in the share price of Jubilee Mines.Between September 1994 and July 1995 Riley (after his resignation from Jubilee Mines) sold the great majority of his 3,300,000 shares in Jubilee Mines. In May and June 1996 there were discussions, meetings and correspondence between representatives of Western Mining Corporation (WMC) and Jubilee Mines during the course of which WMC provided Jubilee Mines with its interpretation of the 1994 drilling results. Following these meetings and correspondence, Jubilee Mines announced to the market the results of WMC's drilling. There were three further announcements, the last of which was made on 1 September 1997 when Jubilee Mines announced to the Australian Stock Exchange (ASX) that it had received 'spectacular results from the mining' of the nickel deposit. The market's reaction to this announcement was a dramatic rise in the company's share price. **(c) The main issue for the court** Mr Riley's claim, put simply, was that the WMC letter contained information of a market sensitive nature which the defendant was obliged to release to the ASX and, moreover, was negligent in failing to do so. Mr Riley asserted that if the information contained in the letters had been released then he would not have sold his shares in Jubilee Mines when he did, but rather would have retained them and sold them after further exploration work had been undertaken. As a result, Mr Riley sought an award of damages against Jubilee Mines for this alleged negligent conduct.Jubilee Mines's defence was mainly focused on establishing that it was not required to disclose to the market the information contained in the WMC letter. It was submitted that the recipients of the WMC letter correctly took the view that the drilling results were not of interest or significance because they indicated the ore body was deep and too low-grade to suggest commercially viable nickel opportunities. It was therefore alleged that the information was not sufficiently definite to lead a reasonable person to consider that it would have had a material effect on the price of shares. Jubilee Mines also relied upon the fact that, at the time, its operations were focused on gold, not nickel. **(d) The court finding**After considering all of the evidence (expert and lay), the court made the following material findings: 1. First, the court held that under the then relevant provision of the Act (which, in relation to this finding, is materially the same as the present provision), it was important to decide who would invest in Jubilee Mines' shares. The court found that Jubilee Mines' shares were traded by professional traders, who invest to make a capital gain in the short-term. In the junior mining market, market rumour is important and announcements, (which for a large corporation may not be so significant), can make a difference. 2. The WMC letter contained significant results. They did not establish that there was an economic deposit at the tenement but provided a basis for further exploration work. On this basis alone, the results should have been released to the market. 3. There was no proper justification for the delay in disclosing the information contained in the WMC letter between 1994 and 1996. The significant point for the court was that the importance of the information should have been appreciated by Jubilee Mines at the time it was received. 4. The information in the WMC letter was information 'likely' (which the court interpreted to mean 'probable') to have influenced investment and therefore share prices. The information would have had a material effect on Jubilee Mines' share price. On the basis of these findings, the court held that Jubilee Mines negligently failed to notify ASX of information of which it was aware, and which a reasonable person would expect would have a material effect on the price of its shares. The court further held that Mr Riley had suffered a foreseeable loss as a result of this negligent conduct. Central to the finding of negligence was the finding that the recipients of the WMC letter at Jubilee Mines did not give the WMC letter proper consideration, and therefore failed to exercise reasonable care in all the circumstances. The application of the principles of the tort of negligence to the relationship of a company and shareholder was dealt with only briefly in the judgment, with the court simply finding that not giving the WMC letter proper consideration was negligent, and that it was foreseeable that the information in the WMC letter would have an effect on the market and, therefore, not disclosing it could lead to loss.The quantum of damages turned on questions of fact. After considering all of the evidence, the court held that Mr Riley was entitled to damages of approximately $1.8 million, which was significantly less than the approximately $3 million sought by Mr Riley. **(e) Conclusion**In a 'postscript' to the judgment, Master Sanderson notes that 'in an area of the market where rumour is rife, material information must be disclosed' and that if there is any doubt about whether or not information is material, the company ought to err on the side of caution. Therefore, from the dual perspective of ensuring compliance with the continuous disclosure requirements of the Act, and minimising litigation risk from shareholders, companies that operate in speculative industries (such as mining, medical research and pharmaceutical industries) may need to be particularly cautious when considering whether or not to disclose information to the market.While Jubilee Mines was decided on an earlier manifestation of the current disclosure provisions of the Act, Mr Riley's success is likely to encourage shareholders (or, following the recent encouragement by the High Court of litigation funding, groups of shareholders) to bring claims to similar effect under the current provisions of the Act.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.2 Doing just enough with applications for derivative proceedings** (By Christopher Case, Clayton Utz)Ehsman v Nutectime International [2006] NSWSC 887, Supreme Court of New South Wales, Austin J, 1 September 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc887.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/september/2006nswsc887.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This case deals with an application to bring derivative proceedings under section 237 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"). The application was made by a shareholder (who is also a director) of a company, which through the manoeuvring of the other directors, had its assets transferred to another company which had been established and was controlled by the other directors. Austin J's judgment may be considered an uncontroversial application of the requirements for applying for leave to bring derivative proceedings, but it nevertheless provides an instructive guide to the important distinction between an applicant's personal claims and the derivative claims sought to be pursued by the applicant on behalf of the company. The case is also noteworthy because even though the successful applicant's pleadings (draft as they were) were "seriously defective", they nevertheless conveyed plainly enough for the purposes of the leave application the nature of the derivative claims that the applicant wished to pursue.**(b) Facts**The plaintiff, Patricia Ehsman ("Ehsman") and the second defendant Mr Brady ("Brady") were directors and shareholders in Timentel Pty Ltd ("Timentel"). Timentel was set up in 1998 to commercially exploit Ehsman's watch design patents under a licence agreement between Ehsman and Timentel. The licence was royalty free and assignable without Ehsman's consent.Brady, on behalf of Timentel, subsequently entered into a development agreement with Renaissance Management (a company associated with Brady). Renaissance Management then entered into another development agreement with DNB Global Corporation ("DNB") (another company associated with Brady and of which Brady was a director). It appears from the evidence that DNB undertook development work and directly invoiced Timentel for this work.In mid 2002, Mr Frasca ("Frasca") and Mr Paix ("Paix") were invited to join Timentel as directors and shareholders and in doing so they provided additional capital. Following the capital contribution, the shareholder percentages were: Ehsman (35%), Brady (35%), Frasca (15%) and Paix (15%).Shortly thereafter, the relationship between Ehsman on one side and Brady, Frasca and Paix on the other began to disintegrate. By March 2005, Brady alleged Ehsman had not contributed her share of the development costs and was personally owed $86,000 in arrears. The overall debt ballooned and in May 2005 it was alleged that Timentel owed DNB $216,000 for invoiced development work undertaken by DNB. In response to the financial situation, Brady, Frasca and Paix loaned Timentel $246,000 for a 60 day period at an interest rate of 17%. The loan was secured by a registered charge. This loan was essentially executed without Ehsman's involvement. On 11 July 2005 Brady, Frasca and Paix made a formal notice of demand to Timentel for about $247,000, however, the security was not enforced and it was proposed that (to effectively discharge its debts to DNB) Timentel would enter into an asset sale agreement and a deed of assignment of the licence. The buyer was Nutectime International Pty Ltd ("Nutectime"), which Brady, Frasca and Paix formed in August 2005. The asset sale agreement and the deed of assignment were entered into by Timentel and Nutectime on 2 September 2005. The total sale price was $277,000 and the sale proceeds were mainly used to repay the loan Timentel owed to Brady, Frasca and Paix. Ehsman was not in attendance at the Timentel board meeting that approved the transaction. In the circumstances, Ehsman remained a director of Timentel but its assets were now held by Nutectime. Further, while Ehsman's royalty free licence agreement remained, she would not be entitled to participate in any benefits from further exploitation of the licensed rights because she was not a shareholder of Nutectime (the assignee licensee). Ehsman subsequently brought an application for leave under section 237 of the Act to bring proceedings on behalf of Timentel by filing and serving a further amended originating process and amended points of claim.**(c) Decision**Austin J held that Ehsman successfully established that leave should be granted to bring derivative action proceedings on behalf of Timentel pursuant to section 237 of the Act.**(d) Principles**Austin J proceeded to analyse the application by applying the five criteria set out in paragraphs (a) to (e) of section 237(2) of the Act.In this case, paragraphs (a) (company will not bring proceedings) and (e) (written notice) were quickly dealt with.Austin J then analysed the three remaining criteria and reached the conclusion that "this is a plain case in which all three criteria have been established, and that extensive exposition is unnecessary." Accordingly, the principles (and their application) concerning derivative action are largely uncontroversial in this case. Nevertheless, Austin J's analysis of the 3 remaining criteria is briefly examined.**(i) Good faith**Section 237(2)(b) provides "The court must grant the application if it is satisfied that the applicant is acting in good faith." At [49], Austin J referred to Palmer J's formulation of the good faith tests in Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR 313 ("Swansson"). Austin J's formulation of the two essential questions reads "whether the applicant honestly believes that a good cause of action exists and has reasonable prospects of success; and whether the applicant is seeking to act in a derivative capacity for such a collateral purpose as will amount to an abuse of process." In the event, Ehsman provided a sworn affidavit attesting her belief that Timentel had a good cause of action with reasonable prospects of success. From this Austin J at [50] remarked "I can see no proper basis in the evidence for doubting that this belief is honest." Seemingly in response, Frasca attempted to point to a collateral purpose on behalf of Ehsman. However, this raised a contested fact and so supported the criteria that there was a serious question to be tried (see below). Consequently, Austin J adopted the approach of Brereton J in Maher v Honeysett (at [33]), where the "objective facts and circumstances speak louder than the applicant's words" and in that context he was readily satisfied Ehsman was acting in good faith.**(ii) Best interests of the company**Section 237(2)(c) provides "The court must grant the application if it is satisfied that it is in the best interests of the company that the applicant be granted leave."Austin J again referred to Brereton J's reasoning in Maher v Honeysett at [44] where he "observed 'best interests' directs attention to the company's separate and independent welfare, a notion that imports the familiar concept of interests of the company as a whole." However, in this case, the pleadings also intermixed what could be described as traditional derivative claims with personal claims. In this regard, Austin J referred to and agreed with Brereton J's comments at [45] in Honeysett where Brereton J points out "the existence in a applicant of a personal interest in the outcome of a proposed derivative action, or even of a personal animus against the company or other members of it, cannot be significant, let alone decisive, because they are usual concomitants of the types of disputes which lead to derivative actions, and few if any such actions would be brought but for personal interest on the part of the relevant applicant and in the absence of animus against the company or other shareholders." There is nothing that precludes including both derivative claims and personal claims in the same pleading. It has even been suggested that where the factual substratum is common to both claims there can be a "considerable advantage" in allowing a single proceeding. However, given Austin J's criticism of the pleadings, care must be taken to make sure the personal claims (e.g. claims for oppression remedies under section 232 of the Act, claims for breach of the licence agreement and claims from misrepresentation by Brady etc) stand independently of the derivative claims (e.g. breach of directors' duties). Austin J considered that if Ehsman's personal claims are successful the result will be orders restoring Timentel's property, which is an "outcome which will be in the best interests of the company, although obviously not in the best interests of the majority shareholders." Despite this conclusion, Austin J remained critical of the original pleadings, providing instructive words to the effect that personal claims and the derivative claims should carefully describe the "ingredients of the case to prove each category".**(iii) Serious question to be tried**Section 237(2)(d) provides that the court must grant an application for leave to bring proceedings if it is satisfied that "there is a serious question to be tried."In this regard, Austin J referred to Barrett J in Charlton v Baber at [55] where Barrett J stated that "the applicant bears the onus of proving sufficient material to enable the court to make this determination." Austin J continues "The evidence must reach the same standard as applies for an interlocutory injunction, set out in such cases as Castlemaine Tooheys Ltd v State of South Australia (1986) 161 CLR 148 and Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199." Austin J observed that the standard is "relatively low".In the circumstances where Ehsman had filed quite substantial evidence and there were many disputed questions of fact, Austin J was readily convinced that there was a sufficiently "serious question to be tried" in order for leave to be granted. **(iv) Other considerations**Throughout his reasoning, Austin J remained critical of Ehsman's draft amended points of claim and further amended originating process going so far as in [40] to say "My conclusion is that the draft [amended points of claim] and the draft [further amended originating process] are seriously defective … What is needed is a carefully considered pleading by statement of claim. However, my view is that the draft [amended points of claim] identifies in broad terms, although imprecisely and at times in a confused way, some derivative and personal causes of action that emerge on Mrs Ehsman's account of the evidence." Overall, even though Ehsman's pleadings were defective, Ehsman had "done enough" to permit Austin J to consider and grant the application for leave to bring proceedings. Leave was granted on condition that Ehsman provide an indemnity in favour of Timentel for costs arising from any derivative proceedings.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.3 The High Court of Australia allows speculative litigation funding** (By Simon Connal, Blake Dawson Waldron)Campbell's Cash & Carry Pty Limited v Fostif Pty Limited [2006] HCA 42, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 30 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/high/2006/august/2006hca41.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2006/august/2006hca41.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**On 30 August 2006, the High Court of Australia by 5-2 majority held that the actions of a litigation funder who promoted and funded a representative proceeding were not contrary to public policy nor did they lead to an abuse of process. This indicates that litigation funding can and will likely play a role in facilitating access to justice.**(b) The facts**The appellants in this case were tobacco wholesalers. They were being sued by retailers of their products who were seeking recovery of unconstitutional state-based licence fees. The proceedings were promoted and funded by a third party (Litigation Funder). The Litigation Funder canvassed retailers and encouraged them to join in the action. But for the steps taken by the Litigation Funder there was no controversy between the retailers and the wholesalers. The claims were brought as representative proceedings on behalf of all retailers that chose to "opt in" to the class after signing up to certain funding arrangements. To constitute a valid representative proceeding, the relevant NSW Supreme Court rules (the NSW rules) required that "numerous persons have the same interest in the proceeding". This rule has since been replaced by slightly different terms. Similarly worded rules exist in the rules of other Supreme Courts.The Litigation Funder undertook to pay all costs in relation to the proceeding, and in return to take a fee of one-third of any judgment or settlement plus amounts recovered by way of costs. The Litigation Funder accepted that its involvement in the proceedings was for the purpose of generating a profit and that the proceedings constituted "a speculative investment ... in other persons' litigation". The retailers sought orders that the wholesalers assist, by way of discovery, the Litigation Funder by identifying all other members of the class and, furthermore, that the proceedings continue as representative proceedings. Against this, the wholesalers sought to prevent the proceedings from continuing. Their principal arguments were that:* the proceedings were not valid representative proceedings within the NSW rules; and
* the form of the proceedings, the funding arrangements, and the conduct of the Litigation Funder, when taken together, amounted to "trafficking in litigation" and gave rise to an abuse of process.

**(c) Decision****(i) The decisions of Einstein J and the NSW Court of Appeal**Einstein J, of the NSW Supreme Court held that the proceedings were an abuse of process and that the representative proceedings fell outside the NSW rules. The Litigation Funder appealed to the NSW Court of Appeal which allowed appeal, set aside the orders of Einstein J and ordered that the proceedings continue as representative proceedings. The Court of Appeal noted that many issues as between the retailers and the wholesalers were virtually identical. The Court also commented that it would be completely impractical and uneconomic for the class members' claims to be brought individually. It concluded that the procedure for representative proceedings under the NSW rules had been properly invoked.**(ii) The appeal to the High Court**In argument before the High Court factors relevant to striking the correct balance between access to justice and containing abuse of process were examined. The High Court overturned the NSW Court of Appeal decision in relation to the proper scope and operation of representative proceedings under the NSW rules. The High Court, however, upheld the Court of Appeal decision that the funding arrangements did not constitute a ground to stay the proceedings.**(iii) Representative proceedings**Gummow, Hayne and Crennan JJ delivered a joint decision which examined the nature of the representative action under the NSW rules. It was noted that the rules governing representative or group proceedings vary greatly between courts and that it is not useful to speak of "class actions" as identifying a single, distinct kind of proceeding. Even when regulated by similar rules of procedure, each proceeding in which one or more named plaintiffs represents the interests of others will present different issues and different kinds of difficulty. Close attention must be given to the particular rules of Court upon which the particular litigation is based.Under the NSW rules, a critical element to constitute a representative proceeding was the existence of "numerous persons [having] the same interests" in the proceeding. This did not require separate identification of, or consent from, those who were said to be the "numerous persons". However their Honours went on to say [at 55]:"What the rules were intended to achieve was a single determination of common issues in a way that binds those who were interested in those issues. Whether the present matters fell within [the NSW rules] must be considered having regard to what the summons said about parties, what issues were raised in the proceedings, and what relief was sought in the proceedings."An examination of the summons revealed that it did not seek any order that would resolve or determine any question common to the retailers alleged to have the same interest in the proceedings. The only relief claimed was for the benefit of the named plaintiff.Callinan and Heydon JJ reached the same conclusion. They considered that the failure to plead facts showing that the members of the "class of unnamed persons" had the same interest was fatal to the proceedings continuing as representative proceedings. The majority decision relied on the High Court decision in Carnie v Esanda Finance Corporation Ltd (1995) 182 CLR 398. That was the last occasion on which the High Court considered the nature of the representative action. In that decision it was said that the representative action required "a significant question in common to all members of the class and they stand to be equally affected by the declaratory relief which the [plaintiffs] seek".Both Gleeson CJ and Kirby J also relied on Carnie v Esanda for their separate dissenting decisions holding that the proceedings could continue as representative proceedings. Gleeson CJ considered that there were common questions of fact and law affecting the rights and obligations between the retailers and wholesalers resulting from the invalidity of the state-based licence fees. Kirby J said that to make the NSW rules effective, the meaning and interpretation of the NSW rules must be construed in a beneficial and facultative way. **(iv) Litigation funding**The wholesalers argued that the particular nature of the funding arrangements in these proceedings was contrary to public policy or an abuse of process. In particular, the wholesalers pointed to the Litigation Funder:* speculating in and profiting from the litigation of others;
* seeking out and encouraging persons to sue who may not otherwise have done so;
* effectively controlling the proceedings; and
* subverting the interest of the retailers to its own interests.

Gummow, Hayne and Crennan JJ (with whom Gleeson and Kirby J agreed) rejected these arguments, at least in respect of States such as NSW which have abolished maintenance and champerty as torts and crimes. None of the elements in the funding arrangements identified by the wholesalers, alone or together, were contrary to public policy or led to any abuse of process. In particular their Honours said [at 89]:"… many people seek profit from assisting the process of litigation. That a person who hazards funds in litigation wishes to control the litigation is hardly surprising."Class actions involving litigation funding did not therefore give rise to special consideration in terms of public policy or abuse of process. There was no basis for "treating actions financially supported by third parties differently from other actions". Callinan and Heydon JJ gave a strong dissenting judgment on this issue. In relation to the factors identified by the wholesalers, their Honours said [at 286]:"In short, the proceedings as structured by [the Litigation Funder] depended on a harnessing of the alleged wrongs of the plaintiffs and of the curial process established to remedy alleged wrongs for the primary purpose of generating profits for [the Litigation Funder]. That was an abuse of process."**(v) Implications**A clear majority of the High Court has indicated that litigation funding, of itself, will not make class actions more susceptible to being challenged on the grounds of public policy or an abuse of process. This confirms the role that litigation funding can and will likely play in facilitating access to justice. The traditional representative proceeding will continue to have a limited role where the "same interest" requirement can be met. The particular rules of Court in which such an action is contemplated will need to be considered closely to determine the validity of such a proceeding.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.4 When will a court order rectification of the ASIC register?** (By Justin Fox and Paul Martin, Corrs Chambers Westgarth)Lavercombe v Auscott Ltd [2006] NSWSC 867, Supreme Court of New South Wales, Barrett J, 29 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc867.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc867.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The plaintiff sought an order to wind up the defendant for non-payment of a statutory demand. Following payment by the defendant of the outstanding debt, the application was dismissed by consent. The defendant then sought an order that the court rectify the ASIC register pursuant to section 1322(4)(b) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) so as to remove all references to the winding up application having been lodged with ASIC.Barrett J decided that a register did not exist that he could potentially rectify. Lodgement of a prescribed form with ASIC did not automatically mean the existence of a corresponding register. Where the relevant provision of the Corporations Act 2001 (Cth) referred both to 'lodgement' and 'registration', a register existed for the purposes of section 1322(4)(b). However where 'lodgement' only was mentioned, a register did not necessarily exist. The provision relevant to the present case fell into the latter category.Barrett J proceeded to examine whether he could have made the order sought had a relevant register existed. After examining related authority, Barrett J decided the court's power to rectify was limited to circumstances where the statutory register did not reflect the requirements of the statute, that is, it lacked something that it should have contained or retained something that it should not have retained based on the statute. The court did not enjoy a broader reformatory power to rectify based on some general notion of fairness or ability to expunge what one party might view as an inconvenient reality.In the present case, records were regularly and properly made in line with statutory requirements and in consequence of lodgements reflecting undisputed facts. As such, there was nothing to be rectified.**(b) Facts**On 18 July 2006, the plaintiff filed an originating process under section 459P of the Corporations Act (Act) seeking an order that the defendant be wound up in insolvency and a liquidator be appointed. The application was based on a statutory demand served on the defendant on or soon after 19 June 2006 which was not paid within the period required by section 459F of the Act. The plaintiff had lodged notice of the winding up application with ASIC in accordance with the requirement to do so set out in section 465A(a) of the Act. The defendant subsequently paid the amount the subject of the statutory demand, and the winding up application was dismissed by consent.On 10 August 2006, the defendant filed an interlocutory process seeking rectification of the register to remove all references to the winding up application having been made. **(c) Decision**Section 1322(4)(b) of the Act empowers the court to make an order "directing the rectification of any register kept by ASIC under this Act".The defendant requested the court to rectify the register by removing reference to the plaintiff's winding up application having been made.The first issue considered by Barrett J was whether any relevant register existed in relation to the section 459P application. While the Act required notice of the winding up application to be lodged with ASIC. Barrett J considered that it did not consequently follow that a register existed. In this regard, Barrett J noted that certain provisions of the Act contemplated 'lodgement' and 'registration' of documents while others contemplated 'lodgement' only. While section 1274(8) of the Act allowed ASIC to 'refuse to register or receive' a document, it did not follow that every document 'submitted for lodgement' in relation to which that power was not exercised was both 'received' and 'registered'.Instead, Barrett J concluded that only those documents which, under some particular provision, were to be 'registered' in consequence of lodgement are placed on a register. Other documents are merely 'received'. This remains the case even where ASIC makes an image of the form and includes that in its 'national database'. As the provision of the Act requiring the plaintiff to lodge a notice of the winding up application contemplated only "lodgement" and not "registration" of the relevant forms, Barrett J was persuaded that no register existed in relation to which the court could make an order for rectification.Despite this conclusion, Barrett J proceeded to examine whether the order sought would be one for 'rectification' of the register. The answer to this issue turned on the nature of the rectification power contained in section 1322(4)(b).Citing a line of English authority including In Re Calmex [1989] 1 All ER 485, Barrett J concluded that the power of rectification existed for the purpose of ensuring that things which should not be on the register under the relevant statutory regime could be omitted, and that things that should be recorded on the register under the statutory regime could be included, and for this purpose only. Barrett J refuted the proposition, attributed to Finkelstein J in Onesteel Reinforcing Pty Ltd v Westpoint Constructions Pty Ltd [2005] FCA 808, that the power included a wider reformatory jurisdiction to rectify the register in other circumstances (eg where broader notions of fairness compelled rectification).Given no irregularities attached in the present case, the relevant power could not have been exercised had a relevant register been found to exist. As Barrett J noted, this was not a case where something was recorded by ASIC without reasonable cause. The records of the winding up application had been regularly and properly made in accordance with the statutory requirements and in consequence of lodgements reflecting undisputed facts. As such, there was nothing to rectify.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.5 Whether an application for security for costs should be granted** (By Peter Mordue, Phillips Fox)Mt Nathan Landowners Pty Ltd (in liq) v Morris [2006] QSC 225, Supreme Court of Queensland, Mullins J, 22 August 2006The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/august/2006qsc225.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2006/august/2006qsc225.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**Applications were made by numerous defendants against the plaintiff, seeking security for costs of the proceeding as the plaintiff would be unlikely to be able to pay any of the defendants' costs of the proceeding, if ordered to pay them, if the plaintiff did not succeed at trial against any of the defendants.Although there were factors in this matter which supported making orders for security for costs such as the impecuniosity of the plaintiff and that available funds were used to secure the liquidator's costs of the proceeding, there were also many factors which favoured refusing security for costs. The strength of the plaintiff's case, that prima facie its impecuniosity had been caused by the defendants' conduct, the public importance involved in considering the actions of the defendants in relation to using Part 5.3A of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') and that the proceeding would have been stifled if security for costs were ordered were compelling factors in favour of the plaintiff. When all the relevant factors were considered and taken into account, Mullins J found that in this case the balance of the factors favoured refusal of the applications for security for costs.**(b) Facts**The plaintiff was incorporated by a number of neighbouring landowners as a vehicle to jointly develop and sell their land. The landowners entered into a shareholders agreement, transferred their land to the plaintiff and became the shareholders of the plaintiff.A dispute arose between the board and one of the shareholders, who claimed that the shareholders agreement had been breached by the directors. The shareholder foreshadowed making an application to the court for a declaration that the directors were liable for the breach of the shareholders agreement and as a result the directors obtained legal advice and later appointed a voluntary administrator (with the directors, administrator and solicitors forming the defendants in these proceedings).The plaintiff claimed damages against the former directors for breach of fiduciary or statutory duties on the basis that the decision to appoint the administrator was made in breach of their duties as directors. The claim against the administrator was for breach of statutory duties, contract, fiduciary duties and the duty of care. It was alleged that the administrator should have been aware that the plaintiff was solvent, or did not discharge his duty to investigate the affairs of the plaintiff and form an opinion pursuant to section 438A(b) of the Act. The claim against the firm of solicitors was based on the allegation that they were in possession of the shareholders agreement and were therefore aware that the plaintiff was solvent and the substantial motivating purpose for the directors in seeking legal advice and appointing the administrator was an improper purpose.In July 2005, the plaintiff's solicitors advised the defendants' solicitors that the matter had been delayed for some months pending the current liquidator for these proceedings ('liquidator') arranging finance and as the issue had been resolved, the plaintiff had given instructions to apply to have the matter listed on the commercial list. As a result of an objection to placing the matter on the commercial list taken by some of the defendants, the plaintiff's solicitors applied for the matter to be placed on the supervised case list. The proceeding was ordered to be placed on that list on 24 November 2005. The defendants then filed for security for costs on 12 December 2005, 5 January 2006 and 7 March 2006.It was common ground amongst the parties that the plaintiff would be unlikely to be able to pay any of the defendants' costs of the proceeding, if ordered to pay them, if the plaintiff did not succeed at trial against any of the defendants. Mullins J was therefore required to consider the discretionary considerations relevant to whether security for costs should be ordered, as set out in r 672 UCPR; KP Cable Investments Pty Ltd v Meltglow Pty Ltd (1995) 56 FCR 189.**(c) Decision****(i) Means of those standing behind the proceeding**Mullins J noted that the plaintiff being in liquidation was one of the factors in favour of making an order for security for costs. It was therefore necessary to consider the means of those who stand to benefit from the proceeding, being the shareholders and some of the defendants. His Honour concluded that none of these people were in a position to provide more money or security than already provided.**(ii) Merits of the proceeding**Mullins J observed that consideration of the merits of a plaintiff's claim is particularly relevant when the plaintiff claims that its impecuniosity has been caused by the defendants' conduct which is the subject of the claim.The plaintiff's respective claims arose out of different relationships, involved different duties and depended on different facts, even though the claims related to the same events. Mullins J was satisfied that the plaintiff had shown a strong prima facie case against the majority of the defendants even allowing for the defences respectively raised and the factual issues which would need to be resolved at a trial.**(iii) Whether plaintiff's impecuniosity is attributable to the defendants conduct**It was argued that the plaintiff was impecunious, because the liquidator paid unsecured creditors in full in June 2003. Mullins J noted that the concept of impecuniosity on an application for security of costs relates to the inability of a company to pay a defendant's costs in litigation brought by the company. The unsecured creditors were paid out when the plaintiff had funds to do so and before the liquidator had commenced his investigations that resulted in this proceeding.Mullins J noted the strength of the prima facie case the plaintiff had shown, and that its impecuniosity was due to the conduct of the defendants and this justified taking this factor into account against ordering security for costs.**(iv) Whether security for costs would be oppressive**There was no suggestion that any of the defendants brought the application for security for costs for an improper purpose. That did not, however, conclude the issue of whether ordering security for costs in this matter would be oppressive, in the sense of being used to deny an impecunious plaintiff the right to litigate.The only feasible source of funding the proceeding for the plaintiff was one of the potential beneficiaries of the case who did not have the means (and refused) to put up adequate security for the costs of the defendants. If such security was ordered against the plaintiff, it would prevent the plaintiff from pursuing the proceeding, which Mullins J found would be oppressive having regard to the history of the dealings in the proceeding.**(v) Whether security for costs would stifle the proceeding** Mullins J considered that the proceeding would be stifled if security for costs were ordered in favour of the defendants.**(vi) Public importance**The plaintiff submitted that the proceeding raised the issue of the "use and abuse" of Part 5.3A of the Corporations Act 2001.His Honour found that allegations of breach of duty and negligent advice have to be considered in the context of the application of Part 5.3A and whether it was used in the circumstances for which it was appropriate. It was held that there was a matter of public importance arising out of the use of Part 5.3A in circumstances that were precipitated by the claim foreshadowed by one shareholder against the directors of the plaintiff.**(vii) Delay**The applications for security for costs were flagged when the proceeding was placed on the supervised case list. Therefore there was no delay by the defendants in bringing the applications that would count against the applications being granted.**(d) Conclusion**Having considered the various factors outlined above, Mullins J was satisfied that the balance of the factors favoured refusal of the applications for security for costs.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.6 Another failed attempt to sidestep the clawback limitation period** (By Paul James and Polat Siva, Clayton Utz)Davies v Chicago Boot Co Pty Ltd [2006] SASC 241, Supreme Court of South Australia, Debelle J, 19 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2006/august/2006sasc241.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2006/august/2006sasc241.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**After the expiry of the three year limitation period for clawback actions under section 588FF, the Rules of Court cannot be used to add fresh applications to existing proceedings.**(b) Facts** The same liquidators were appointed to both HSL and HSW. The relation-back day was 3 April 2001.On 2 April 2004, the liquidators of HSL began proceedings against Chicago Boot Co Pty Ltd (under section 588FF of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)) seeking the recovery of alleged unfair preference payments. The application was made in the Supreme Court of South Australia.Chicago Boot subsequently applied to amend its defence to raise the issue of whether it was a creditor of HSW, rather than HSL. The liquidators did not oppose the amended defence, but wanted leave to begin alternative clawback actions in respect of HSW (essentially, to mirror the application in respect of HSL).Under section 588FF(3), a clawback application may only be made within three years of the relation-back day. That period had expired on 3 April 2004. The liquidators argued that the court could, under rule 53.03 of the South Australia Supreme Court Rules, grant them leave to amend their original applications to add claims in relation to HSW.**(c) Decision** The court allowed Chicago Boot to amend its defence, but dismissed the liquidators' application to be allowed to amend their claim to include a claim in respect of HSW.**(i) Judiciary Act**The court's first point was that the Corporations Act is a Commonwealth statute. The clawback proceedings were therefore an exercise of federal jurisdiction.Section 79 of the [Judiciary Act 1903](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "Default) allows State Courts exercising federal jurisdiction to apply State rules of court "except as otherwise provided by ... the laws of the Commonwealth".The question to be determined, therefore, was whether the limitation period in section 588FF(3) "otherwise provided" in relation to rule 53.03, such that the court could not apply the rule in the manner sought by the liquidators.**(ii) David Grant**The court noted that section 588FF(3) says that a clawback application "may only be made ... within 3 years after the relation-back day". It applied the High Court's strict interpretation of "may only", in David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265. Therefore, it followed that section 588FF(3) effectively covered the field, leaving no room for the application of the State Rules of Court (BP Australia Ltd v Brown (2003) 58 NSWLR 322 cited). The result was that a clawback application had to be made within:* three years after the relation-back day (section 588FF(3)(a)); or
* any longer period allowed by the court on an application under section 588FF(3)(b) made within those three years.

**(iii) Other authorities**The court noted that there are conflicting authorities on this issue (primarily, the Full Court of the Federal Court decision in Rodgers v Commissioner of Taxation (1998) 88 FCR 81 and the NSW Court of Appeal decision in BP Australia (supra)). It preferred to follow the reasoning in BP Australia, on the grounds that the Full Federal Court "failed to address the fact that an essential element of the application is the fact that it is commenced within the three year period prescribed by section 588FF(3) and that section 588FF(3) provides an exclusive régime for extending that time."**(iv) "Relation-back" principle**An amendment to an application takes effect from the date of the original application, not from the date of amendment. Could it be argued that the amendment sought by the liquidators would avoid the time limit problem of section 588FF(3) because it would, in effect, be backdated to before the expiration of the limitation period?The court thought not. The amendment sought by the liquidators was only an amendment on its face; it was, in fact, a fresh application. That fresh application would be out of time.**(d) Comment**The court acknowledged that its decision might appear to have been harsh. However, it said that the liquidators could have avoided that outcome by pleading the HSW action in the alternative from the outset or by applying for an extension of time under section 588FF(3)(b) within the three year time limit, on the ground that they had not completed their investigations.Although stated as alternatives, both suggestions go to the heart of the current problem with section 588FF. On the one hand, liquidators complain that the three-year limitation period does not leave them with sufficient time to investigate potential clawback actions. The problem is exacerbated if the liquidation was preceded by a voluntary administration (although the Federal Government has flagged an intention to extend the limitation period in those circumstances).On the other hand, there is a clear legislative policy of providing creditors of failed companies with "closure". The limitation period is designed to give creditors some commercial certainty, so that they do not have to wait for an unreasonably long period of time before knowing whether or not they will be faced with a clawback action.This case is a good illustration of how those policies can conflict and produce a less than optimal outcome. Without access to the relevant documents before the court, the court's suggested course of action for the liquidators in this case must be assumed to have been appropriate to the situation in which the liquidators found themselves. However, the court's advice to the liquidators in this case -- that they could have made an earlier application seeking an extension of time -- would not necessarily be of general application, as the circumstances of each case differ and not all liquidators will be able to satisfy the court that an extension of time ought to be granted.Similarly, the court's suggestion that the original applications could have pleaded cases in respect of both HSL and HSW would not easily be carried over to other situations. It would carry the risk of shotgun applications, with consequential detriments to the creditors against whom there was ultimately no case and to both the liquidators and the unsecured creditors, who could expect to face the detrimental effect of adverse costs orders.The section 588FF limitation issue has, it appears, emerged as a very significant practical issue over the last few years. Without wishing to overstate it, there is, as the court in this case commented, a degree of judicial disagreement about how to deal with it. The provision, and its interaction with rules of court, is currently being considered by the High Court in Gordon v Tolcher [2006] HCATrans 461. Although that case might turn on a fairly specific point and arose out of a possibly unique set of circumstances, the High Court's judgment in Gordon v Tolcher may provide some authoritative guidance on section 588FF(3) generally.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.7 The extent of a court's power to make orders in respect of the winding up of a managed investment scheme under section 601EE of the Corporations Act**(By Peter Olds, Freehills)Australian Securities and Investments Commission v Primelife Corporation Limited [2006] FCA 1072, Federal Court of Australia, Goldberg J, 18 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/august/2006fca1072.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/august/2006fca1072.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Australian Securities and Investments Commission v Primelife Corporation Limited relates to an application by, amongst others, the investors in two unregistered managed investment schemes (Schemes) in the process of being would up for orders that:* the liquidator of the Schemes be entitled to bring in his own name any proceeding on behalf of the Schemes and/or their managers against any person; and
* one of the defendants in the proceedings, a subsidiary of Primelife Corporation Limited (Primelife), be injuncted from taking any step to rescind or terminate a contract which was integral to the business of the Schemes, save with the leave of the court or the consent of the liquidator.

Goldberg J made the first of the above orders on the basis that it would ensure that there could be no challenge to the liquidator's right to bring proceedings on behalf of the investors comprising the Schemes, who, as the people legally constituting the Schemes, are the proper parties to an action brought on behalf of the Schemes.However, his Honour did not make the second order. He reasoned that any cause of action that the Schemes or their investors may have against the defendants did not depend on the relevant contract remaining on foot and therefore there was no basis for granting the injunction sought by the applicants.**(b) Facts**In 1999 Primelife established the Schemes as two "syndicates" (contractual arrangements between prospective investors). The Schemes were managed by Kastabon Pty Ltd (Kastabon) and Novena Pty Ltd (Novena) respectively. In their capacities as managers of the Schemes, Kastabon and Novena entered into a partnership. The partnership entered into contracts with a subsidiary of Primelife (McKinnon Road) to purchase a property from McKinnon Road and have McKinnon Road develop a retirement village on the property. The property's purchase was funded by capital contributions from the Schemes' investors. Kastabon and Novena entered into a number of other contracts with Primelife associates in relation to the management and marketing of the property and profit sharing between the Schemes and the Primelife group.In 2004, ASIC sought and obtained orders for the winding up of the Schemes on the grounds that they were managed investment schemes which were required to be registered under the [Corporations Act](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) but were not registered. In making these orders, the court appointed Colin McNicol (Liquidator) as trustee and manager of the Schemes, and as their liquidator for the purpose of winding up the Schemes. The court gave the Liquidator all the powers of a company liquidator, as if the Schemes were companies, along with the power to apply to the court with respect to the exercise of those powers and for such other orders under section 601EE of the Act as he considered necessary or desirable for the winding up of the Schemes.Following the making of these orders, a number of the investors in the Schemes, among others, applied for the orders referred to above in the Summary.**(c) Decision****(i) Is the liquidator entitled to bring in his own name any proceeding on behalf of the Schemes and/or their managers against any person?**Goldberg J found that there were "conceptual difficulties" with giving the Liquidator the power to bring proceedings on behalf of the Schemes, neither of which were legal entities. His Honour therefore found it desirable that the Liquidator have the power to bring proceedings on behalf of the investors who constituted the Schemes. In his Honour's view, this removed the possibility of a challenge to proceedings brought by the Liquidator being made on the grounds that the entities comprising the schemes were not properly parties to those proceedings.**(ii) Should McKinnon Road be injuncted from rescinding or terminating the Development Contract?**Goldberg J found that McKinnnon Road should not be injuncted from terminating the Development Contract. His Honour reasoned as follows:* as the proposed injunction sought only to preserve the status quo and not to aid an ultimate cause of action, there was no equitable basis for granting it;
* as the Development Contract was "an integral and important asset" of the Schemes, section 601EE(2) of the Act empowered the court to grant the proposed injunction in order to preserve the Schemes' assets;
* however the causes of action potentially open to the Schemes and their investors did not depend for their existence on the Development Contract remaining on foot and therefore there was no reason for granting the injunction.

http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.8 Without prejudice offers to settle a claim can constitute an "admitted amount" under section 459H of the Corporations Act** (By Mark Cessario, Corrs Chambers Westgarth)Roluke Pty Ltd v Hennessy trading as P J Hennessy & Co [2006] NSWSC 814, Supreme Court of New South Wales, Barrett J, 15 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc814.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc814.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**In this case Hennessy trading as P J Hennessy & Co ("Hennessy") issued a statutory demand to Roluke Pty Ltd ("Roluke") in relation to a debt Hennessy claimed was owing for work he performed as an expert witness for Roluke in other proceedings.Roluke claimed that the amount Hennessy charged for this work was excessive and commenced proceedings seeking to set aside the statutory demand on the grounds that there was a genuine dispute as to the amount of the debt and that it had an offsetting claim.In this decision Barrett J considered the authorities on what needs to be proved for a finding to be made that there is a genuine dispute as to the existence or amount of a debt. On the basis of the evidence before him, his Honour found that there was a genuine dispute as to the amount of the debt, but not the existence of the debt. In doing so, his Honour relied on a without prejudice offer made by Roluke to find that there was an "admitted amount" for the purposes of section 459H(5).Barrett J then considered the authorities in relation to what needs to be proved for a finding to be made that there is an offsetting claim. His Honour held that there was such a claim and, even though this claim had not been raised prior to the proceedings being commenced, that did not matter because section 459H(1)(b) simply requires that there be a genuine offsetting claim at the time the court comes to its decision.Barret J therefore set aside the statutory demand.**(b) Facts**Pursuant to a November 2003 agreement, Roluke retained Hennessy to prepare an expert witness report in relation to NSW Supreme Court proceedings to which Roluke was a party ("Other Proceedings"). That agreement included an estimate from Hennessy that his fees would be in the vicinity of $15,000 to $25,000, but also stressed that it was an estimate only and that the fees would be charged on an hourly basis.Hennessy prepared that report and gave evidence in the Other Proceedings. Hennessy issued a number of instalment accounts totaling $84,915.62. In December 2005 Hennessy issued a final account for $12,518.Between December 2005 and February 2006, correspondence passed between the parties wherein Roluke informed Hennessy that, in its view, the amount being claimed was "excessive in the extreme" and offered, on a without prejudice basis, to pay $2,200 to settle the dispute.In February 2006 Hennessy issued a statutory demand to Roluke claiming that a debt of $12,518 was owing to him. Roluke commenced these proceedings seeking an order to set aside the statutory demand and relied on both of the grounds made available by section 459H, namely that there was a genuine dispute as to the existence or amount of the debt claimed and that an offsetting claim existed.In relation to its claim that an offsetting claim existed, Roluke relied on the evidence of a forensic accountant to argue that, apart altogether from the December invoice, Hennessy was guilty of over servicing and overcharging Roluke.**(c) Decision**Barrett J held that the principles upon which it was to be determined whether or not there was a "genuine dispute" were those referred to in McLelland CJ's decision in Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ACSR 785. In that case his Honour said that the expression "genuine dispute" "connotes a plausible contention requiring investigation".Barrett J also referred to his own decision in Solarite Air Conditioning Pty Ltd v York International Australia Pty Ltd [2002] NSWSC 411 where his Honour said that a company will fail in challenging a statutory demand only if the contentions it is raising are "so devoid of substance that no further investigation is warranted".His Honour held that the evidence left him in no doubt that there was a dispute as to the amount, but not the existence, of the debt. In its letters Roluke admitted that Hennessy had performed some work for which he was entitled to be paid. Further, his Honour found that Roluke's offer to pay Hennessy $2,200, even though made on a without prejudice basis, must be seen to reflect the sum by way of remuneration Roluke admitted it owed Hennessy. In those circumstances, Barrett J considered that the sum of $2,200 was not the subject of a dispute between Roluke and Hennessy, and was therefore an "admitted amount" for the purposes of section 459H(5).Barrett J then turned to Roluke's claim that it had an offsetting claim. Roluke's contention was that it had a monetary claim against Hennessy because the charges he made were not in accordance with the November 2003 agreement. His Honour found that the fact that Roluke had not raised this offsetting claim prior to its application to have the statutory demand set aside did not matter. This was because section 459H(1)(b) was not concerned with whether a complaint was made, but whether a genuine claim exists at the time the court comes to its decision.His Honour relied on the statement of Palmer J in Macleay Nominees Pty Ltd v Belle Property East Pty Ltd [2001] NSWSC 743 that a "genuine offsetting claim" means a claim advanced in good faith. That is, that the claim is arguable on the basis of facts asserted with sufficient particularity to enable the court to determine that the claim is not fanciful.Barrett J also repeated his comments in Elm Financial Services Pty Ltd v MacDougal [2004] NSWSC 560 that it is not necessary for the party seeking to set aside a statutory demand to precisely quantify the exact sum of its offsetting claim and that it is sufficient for there to be a plausible and coherent basis for asserting a claim to a sum which is greater than the amount of the debt claimed in the statutory demand.On the basis of the evidence of Roluke's forensic accountant, Barrett J was satisfied that Roluke's cause of action against Hennessy was maintainable in good faith. In his Honour's assessment the amount of that claim would have been greater than $2,200 and therefore would have offset the "admitted amount".Barrett J therefore set aside the statutory demand.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.9 Principles and considerations applicable when seeking to reinstate a deregistered company** (By Jessica Huntington, Mallesons Stephen Jaques)Jerry Pilarinos v Australian Securities and Investments Commission [2006] VSC 301, Supreme Court of Victoria, Gillard J, 11 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/august/2006vsc301.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2006/august/2006vsc301.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The case concerns an appeal from an order dismissing an application made by three plaintiffs seeking reinstatement of a company that had been deregistered. The court considered the basis and considerations on which a company can apply to the court for reinstatement under section 601AH of the [Corporations Act 2001](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). With reference to the numerous modifications made to corporations law legislation over time, the court found that when determining whether a person is aggrieved by deregistration, the phrase 'person aggrieved' must take on a wide and inclusive definition. The current legislation does not prohibit an application being made after the date of deregistration or subject to any qualifications regarding the type of grievance. There must however, be a nexus between the deregistration and the grievance. **(b) Facts**The principles entertained in this case are set against a complex factual situation involving a lease of land granted to Palais de Danse Pty Ltd by the State of Victoria commencing 1 April 1956 for a period of 50 years. A series of events led to the Secretary for Lands terminating the existing lease and issuing a new lease for a term of 60 years commencing in 1969 pursuant to conditions that were ultimately fulfilled by Palais de Danse.Palais de Danse was deregistered on 21 February 1998.After an assignment and sublease of the interest originally granted to Palais de Danse, Bradto Pty Ltd became the registered proprietor of the lease over the premises and Maztan Pty Ltd held a sublease. On 25 August 2005, the State of Victoria commenced a proceeding in VCAT seeking access to the leased premises. The three plaintiffs to this proceeding were Jerry Pilarinos, a director and shareholder of the third plaintiff, Bradto, and the second plaintiff, Leslie Albert Hyams, a former shareholder and director of Palais de Danse. Bradto contended in the VCAT proceeding that it was entitled to the benefit of an equitable lease granted to Palais de Danse by the State of Victoria many years ago. It argued in the alternative that, if the assignment was not held to have granted to Bradto the rights of Palais de Danse to an equitable lease, then Bradto wished to reinstate Palais de Danse and take from it the benefit of an equitable lease as this would have provided a defence to the State's claim for possession. In order to enable a defence against the State's claim for possession, the three plaintiffs entered into a deed on 24 December 2005 called a "Deed of Sales of Shares." The vendors included Jerry Pilarinos and Leslie Albert Hyams and the purchaser was Jerry Pilarinos. The recitals stated that the vendors owned or held in trust 20,000 shares issued in Palais de Danse. The deed set out the value and the terms on which the vendors would sell the shares to the purchaser. It was also a term of the deed that the purchaser makes an application to the Court to reinstate the company.**(i) Reinstatement principles - Section 601AH Corporations Act 2001**Gillard J interpreted the reinstatement provision in section 601AH(2) which allows a court to make an order to ASIC for a company's reinstatement in circumstances where the applicant can prove:a. that the application for reinstatement is made by a person aggrieved by the deregistration; andb. that it is just that the company's registration be reinstated.**(ii) Person aggrieved**In her interpretation of "person aggrieved", Gillard J traced the historical interpretations of the phrase spanning more than 125 years and cautioned against a restricted understanding so as to apply the legislative intent. In the past, the legislation qualified the type of person who could bring an application to the court (the company, a member, or a creditor) and the courts held that the application had to be brought within a specified time and on the basis that the person was aggrieved by the deregistration, not merely that the company had been struck off the register.Accordingly, the phrase has been subject to a progressive widening over various amendments to corporations legislation. The question for determination is whether as at the date of the application (as distinct from the date of deregistration), the person is subject to a grievance that is genuine, real and not merely theoretical, petty or fanciful. Further, the grievance must not be limited to a particular type. The guiding characteristic is whether there is a link between the deregistration and the grievance. **(iii) Whether it is just that the company be reinstated**The court was not asked to consider, where a person is aggrieved, whether it is then unjust to reinstate the company. Gillard J commented however, that, once it has been established that there are persons aggrieved and that such persons have a valuable right to be heard in court, it is accordingly just that the company be reinstated.**(iv) Application to ASIC and the State of Victoria** The defendant to this appeal, ASIC, served the State of Victoria with the originating process. The State of Victoria opposed, with ASIC, the plaintiffs' application on the grounds that the plaintiffs were not aggrieved. Gillard J considered whether the State of Victoria should have leave to be heard on application in the appeal. The State of Victoria was not a party to the proceeding and accordingly, did not have the right to be heard unless the Rules of Court permit leave to be granted as an "interested person." The court noted that in cases such as this, it is common practice for the parties to the application to be the applicant and the body responsible for the registration of companies. Moreover, in the present case, it was held that because ASIC opposed the reinstatement of Palais de Danse, it was not necessary to grant the State of Victoria leave to achieve the same purpose. It was held that any dispute between the parties should be aired in a court, not via an application for reinstatement. Further, the court dismissed the defendant's argument that, if Palais de Danse was reinstated and brought a proceeding against the State, it would fail on the grounds of futility. The court determined that, again, this question is outside the ambit of the application for reinstatement.**(c) Decision**On the facts before the court, Gillard J found that two of the three plaintiffs were persons aggrieved within the meaning of the Act and accordingly the appeal would be granted to pursue the company's reinstatement. Jerry Pilarinos and Bradto were held to be persons aggrieved on the basis that they were seeking to enforce an equitable right against the State of Victoria; that is, the agreement for a lease of 60 years. They would acquire this right by the deed of sale of shares upon reinstatement of Palais de Danse. However, Mr Leslie Albert Hyams was held not to be a person aggrieved because the only benefit he could derive under the deed of sale of shares would be the value of $100, which the court held not to be a real loss. The court found no grounds for exercising its discretion against the relief sought.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.10 An application for approval of a compulsory acquisition under Part 6A.2 of the Corporations Act and the issue of "fair value" under section 667C(1)** (By Susan Goodman, Freehills)Regional Publishers Pty Limited v Elkington [2006] FCA 1017, Federal Court of Australia, Emmett J, 11 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/august/2006fca1017.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/august/2006fca1017.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The defendants, Gordon Bradley Elkington and Gepps Pty Limited, held preference shares in Harris and Co Pty Ltd ('the Company'). They objected to the compulsory acquisition of their shares by the Plaintiff, Regional Publishers Pty Limited ('Regional'). Regional applied to the Court pursuant to section 664F(1) for approval of the compulsory acquisition under Part 6A.2 of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act').In order to compulsorily acquire the remainder of preference shares, Regional had to satisfy the prerequisites of Part 6A.2 and establish that it was offering a fair value for the preference shares. The main issues were:* whether Part 6A.4 of the Act only permits the nomination of an individual (not a company) as an appropriate person to prepare an expert report;
* whether the expert report prepared by Ernst and Young satisfied the requirements of section 667C in determining what was fair value for the preference shares; and
* whether the price of $2.50 (as contained in the notice of compulsory acquisition) for each preference share was a fair value.

The plaintiff was successful in its application and Emmett J held:* the nomination of an individual includes the nomination of a company for the purposes of Part 6A.4;
* Ernst and Young approached the fair value question inappropriately, however by working backwards the requirements of section 667C(1) were essentially met, and the defendants did not suggest that this invalidated the process nor did they present any contrary evidence as to fair value; and
* on the evidence presented in the expert report, the compulsory acquisition notice did give a fair value for the preference shares, and the court approved the compulsory acquisition.

**(b) Facts** Regional became a 90% holder in relation to fully paid ordinary shares and preference shares of the Company on 29 September 2005. On 18 October 2005, Regional requested the Australian Securities and Investments Commission ("Commission") to nominate a person for the purpose of preparing an expert's report under section 667AA of the Act. On 2 November 2005, the Commission made a mistake and nominated 'Ernst and Young Advisory Services Ltd' (a non-existent company), rather than 'Ernst and Young'. Ernst and Young provided Regional with an expert report dated 20 March 2006 ('the EandY Report') assessing the fair value of the preference shares in the Company. **(i) Fair value in the EandY Report**In the EandY Report, Ernst and Young's first step was to determine the value of the ordinary shares in the Company, using prices paid for ordinary shares. On that basis, Ernst and Young concluded that the fair value of 'the ordinary equity' in the Company was $55,821,000, as at 20 March 2006. The EandY Report then considered the reasonableness of this value by reference to the earnings before interest, tax, depreciation and amortisation ('EBITDA') of the Company and comparable listed entities and transactions. Ernst and Young's next step was to determine the total value of the issued preference shares in the Company by capitalising future maintainable dividends, including an allowance for franking credits. Ernst and Young also took into account the recent share trading history of the preference shares. The final step taken by Ernst and Young in the EandY Report was to aggregate the value that had been determined for the 'ordinary equity' in the Company and the value for the preference shares. Ernst and Young concluded that the value of the Company as a whole was between $55,871,000 and $55,878,000, giving a mid point of $55,874,000. **(ii) Special value in the EandY Report**Ernst and Young considered the potential 'special value' of synergies and financial benefits that would be derived by Regional increasing its interest to 100 percent of the preference shares. Ernst and Young concluded that, even if special value is to be taken into account, the fair value for each preference share was still well below the price of $2.50 to be paid by Regional under the compulsory acquisition notices. **(c) Decision** **(i) Misnomer: nomination of Ernst and Young**The defendants argued that Ernst and Young was not nominated as the expert, rather a non-existent company, Ernst and Young Advisory Services Ltd was. Notwithstanding the reference to Ernst and Young Advisory Services Ltd in the November 2005 letter, Emmett J held that the letter should be construed as referring to Ernst and Young. This was held to be no more than a procedural irregularity and a nomination by the Commission pursuant to section 667AA(2) is a proceeding under the Act. Regional called in aid section 1322 of the Act, which deals with relief from the consequence of irregularities. **(ii) A company is a person**The defendants also argued that Part 6A.4 only permits the nomination of an individual as an appropriate person to prepare a report and does not permit the nomination of a company. Emmett J disagreed and held the nomination of Ernst and Young to be effective, providing numerous arguments to the contrary, including:* Section 22(1)(a) of the [Acts Interpretation Act 1901 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "Default) provides that the word 'person', when used in a statute, includes a corporation unless the contrary intention appears.
* A corporation can act only through its agents, including its directors and employees. There is no reason, in principle, why a corporation cannot, through appropriate agents, form an opinion.

**(iii) Fair Value in accordance with section 667C(1)** Emmett J held that Ernst and Young approached the fair value question from the wrong direction. Under section 667C(1), to determine what is fair value for shares for the purposes of Chapter 6A, the following steps must be taken in the following order:* first, assess the value of the relevant company as a whole,
* then allocate that value among the classes of issued shares in the company, taking into account the relative financial risk, and voting and distribution rights, of the classes, and
* then allocate the value of each class pro rata among the shares in that class, without allowing a premium or applying a discount for particular shares in that class.

**(iv) Ernst and Young took the wrong direction** The EandY Report carried out a valuation in relation to the two classes of shares first and then the two valuations were aggregated to arrive at the value of the Company as a whole. Ernst and Young did not directly consider the second step required by section 667C, although, by working backwards, the allocation of the value of the Company as a whole between the two classes of shares is simply a matter of examining the two valuations that were aggregated to produce the value of the Company as a whole. Section 667C(1) provides that the starting point is to determine the value of the Company as a whole. Emmett J held that the value of the Company as a whole could be postulated from the EandY Report by applying appropriate multiples to the Company's EBITDA for 2005 and the Company's forecast EBITDA for 2006. **(v) Section 667C(1)(b) and the value of the preference shares** The real issue in the proceeding was the way in which the second step in section 667C(1) should be undertaken. That step requires the value of the Company as a whole to be allocated between the ordinary shares and the preference shares. Section 667C(1)(b) does not provide any formula for this exercise. The EandY Report suggested that the appropriate manner of allocation is by reference to the market value of the two classes of shares. Emmett J held that although Ernst and Young's approach to fair value was inappropriate, the defendants accepted that it is a matter for the court, on the basis of the evidence before it, which was limited to the EandY Report, to determine whether Regional had established that $2.50 per preference share gave shareholders a fair value. Emmett J allocated the total value of the Company as a whole between the preference shares and the ordinary shares on the basis of their respective values, as determined by Ernst and Young. Unlike, Ernst and Young, Emmett J conducted the analysis under section 667C(1)(b) directly, although using figures and multiples provided in the EandY Report, arriving at a fair value of $1.35. Emmett J held that although this figure is greater than the figure determined by Ernst and Young, it is significantly below the price proposed in the compulsory acquisition notice of $2.50. It follows that the terms of the compulsory acquisition notice were held to give a fair value for the preference shares.Emmett J approved Regional's acquisition of the preference shares under the compulsory acquisition notices. **(vi) Special value**Emmett J held that the addition for the special value identified in the EandY Report was inappropriate, having regard to the language of section 667C. The first step requires the determination of the value, as at the date of the compulsory acquisition notice, of the Company as a whole. It is impermissible, in determining fair value, to make any allowance for synergies or special benefits to be achieved by the acquisition. Even if special value is to be taken into account, it is taken into account in the assessment of the value of the Company as a whole. There is no warrant in the Act for allocating special value of the kind in question between classes of shares on a basis different from the basis upon which the value of the Company as a whole is to be allocated.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.11 The exercise of the casting vote by a fiduciary in a creditors' voluntary winding up** (By Warwick Taylor, Phillips Fox)Krejci as liquidator of Eaton Electrical Services [2006] NSWSC 782, New South Wales Supreme Court, Barrett J, 8 August 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc782.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2006/august/2006nswsc782.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The plaintiff was first the administrator, and then the liquidator of Eaton Electrical Services Pty Ltd. As chairman of the second meeting of creditors, the plaintiff exercised casting votes in favour of resolutions fixing his remuneration as both administrator and liquidator. The plaintiff sought relief from the court.Barrett J held that the exercise of the casting votes was in breach of the plaintiff's fiduciary duty not to bring his personal interests into conflict with those of Eaton's creditors. However, as:* the creditors who had opposed the resolutions were given notice of the plaintiff's application for remedial orders and none objected to these being granted; and
* in the court's opinion, the plaintiff had acted 'thoughtfully, responsibly and conscientiously', and with due regard to the legal advice he had received,

Barrett J fixed the plaintiff's remuneration in the same terms as those of the resolutions. No order was made as to costs, but the plaintiff was not permitted to recoup his costs out of the company's assets. **(b) Facts** Eaton Electrical Services Pty Ltd ('Eaton') was under administration in accordance with Part 5.3A of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Corporations Act'). The plaintiff, as Eaton's administrator, was chairman of the second meeting of creditors. At that meeting, the creditors resolved to wind up Eaton. The plaintiff also became Eaton's liquidator. Two additional resolutions were then put to the creditors in relation to the plaintiff's remuneration as administrator and liquidator.A majority of creditors by value voted in favour of the resolutions, but 12 of 20 creditors voted against. In this situation, in accordance with regulation 5.6.21 of the [Corporations Regulations 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default), the chairman of the meeting has the casting vote. Accordingly, the plaintiff cast votes in favour of the resolutions fixing his remuneration as administrator and liquidator.The plaintiff sought one of the following from the court:* declarations that the resolutions were validly passed; or
* orders determining that his remuneration should be as set out in the purported resolutions.

In accordance with Barrett J's previous directions, each of the creditors had been notified of the application that the plaintiff be allowed to receive and retain remuneration in the sum set out in the purported resolutions. None of the creditors objected to the proposed relief being granted. **(c) Decision** **(i) Breach of fiduciary duty**Barrett J held that the plaintiff's decision to vote in favour of the resolutions was in breach of the administrator's fiduciary duty not to bring his personal interests into conflict with the interests of Eaton (as the embodiment of the interests of its creditors). There was a clear conflict in this instance as the plaintiff had a personal interest in having his remuneration fixed so that he could 'receive and enjoy it.'**(ii) Order that plaintiff's remuneration to be fixed by court**Barrett J did not conclusively determine whether the resolutions would be void as a result of the breach of fiduciary duty or would merely be voidable. Taking into account the following factors:* that the creditors who had opposed the resolutions were given notice of the plaintiff's application for remedial orders and none objected to these being granted; and
* that, in the court's opinion, the plaintiff had acted 'thoughtfully, responsibly and conscientiously', and with due regard to the legal advice he had received,

Barrett J was of the opinion that the court should itself act to fix the plaintiff's remuneration. Accordingly, Barrett J ordered that, to the extent that the resolutions were invalid or impeachable by reason of the improper exercise of the casting vote, the remuneration be fixed on the terms set out in the purported resolutions.**(iii) Costs**Barrett J made no order as to costs because of the breach of fiduciary duty. He characterised the application as 'a salvage exercise' for the plaintiff's personal financial benefit, and held that the plaintiff was therefore not entitled to recoup costs from Eaton.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.12 Assignment of a security secures only the debt specified in the deed of assignment** (By Kate Clennett, Mallesons Stephen Jaques)Windslow Corporation Pty Ltd v Olympic Holdings Pty Ltd [2006] WASC 158, Supreme Court of Western Australia, Hasluck J, 8 August 2006The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/august/2006wasc158.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/august/2006wasc158.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**The plaintiff, Windslow Corporation Pty Ltd, sought an account under certain securities that were held by the defendant, Olympic Holdings Pty Ltd. There was a running account between Windslow and Olympic under which Windslow owed Olympic money. On 10 April 2005, Windslow ceased trading as a property developer and went into liquidation. HSBS Bank Australia Ltd had a mortgage and a number of other securities over money that had been advanced to Windslow. On 19 April 2005, the Bank assigned the securities by way of Deed of Assignment to Olympic for consideration of $304,220.28. Olympic took the view that the securities secured not only money owed by Windslow to the Bank as at 10 April 2005 ($304,220.28) but also money owed to Olympic by virtue of the running account. Olympic referred to the definition of "Bank" and "secured money" in the mortgage to support its view. Counsel for the liquidator of Windslow argued that those definitions should not be construed to allow Olympic to retain moneys in excess of $304,220.28. His Honour held that the securities assigned to Olympic by the Deed of Assignment secured only the debt of $304,220.28 specified in the Deed of Assignment.**(b) Facts****(i) Background**Windslow was carrying on a business as a property developer until 19 April 2005 soon after which a liquidator of the company was appointed. There was a running account between Windslow and Olympic prior to the creation of securities under which moneys had been advanced and paid by set-off between the two companies. At all material times, amounts were owed to Olympic before and after the creation of the securities. Windslow borrowed funds from HSBS Bank Australia Ltd and gave the bank a mortgage dated 16 October 2002, two fixed and floating charges, assignments of contract, and bonds. For the purposes of the judgment, only the terms of the mortgage were considered by Hasluck J as the relevant definitions in the charges were the same and the assignments of contracts and bonds had no real bearing on the issue of construction to be resolved. **(ii) Deed of Assignment**The Bank assigned the benefit of the securities to Olympic by way of Deed of Assignment on 19 April 2005. In return, Olympic paid the bank $304,220.28, being the amount that Windslow was indebted to the Bank at that time. Olympic adopted the stance that the securities not only secured the debt owed by Windslow to the Bank as at the date of the Deed of Assignment but also money owed to Olympic by virtue of the running account.The justification for this position was that on one interpretation of the mortgage, "Bank" was defined to include any "assignee" and the security extended to any moneys owing to the Bank (or assignee) "on any account whatsoever". This stance led to amounts of money being paid by Windslow to Olympic well in excess of the debt of $304,220.28 specified in the Deed of Assignment. It was believed that Olympic received not less than $629,129 from the realisation of Windslow's assets.**(iii) Olympic's submissions**Counsel for Olympic argued that the mortgage clearly allows for the assignment of the Bank's rights under the mortgage, being essentially the right to receive payment of any amounts owing to the Bank "on any account whatsoever". Each reference to "the bank" in the mortgage may be regarded as a reference to Olympic. This is because the definition of bank states that, unless a contrary intention appears, a reference to any person includes that person's assigns.The basic submission by Olympic was therefore that it is clear from the construction of and the language used in the mortgage and Deed of Assignment that the intention was that any reference to the "Bank" or the "mortgagee" extended to an assignee on "any account whatsoever".**(iv) Submissions for the liquidator of Windslow**Counsel for the liquidator of Windslow submitted that there was no scope for interpreting the term "Bank" as defined in the mortgage to mean "any assignee of the Bank". Further, Windslow submitted that it was not the intention of the parties at the time the mortgage was executed that the definition of "Bank" would be extended to include "any assignee" of the Bank.The amount was therefore limited to the sum advanced by HSBC under the agreement made between the Bank and Windslow. Windslow contended that there was no basis for arguing that the amount which was secured by the securities exceeded the sum specified in the Deed of Assignment ($304, 220.28).**(c) Decision**Hasluck J analysed the relevant case law and decided that he would follow the approach of Hill J in Murphy, Re Bankrupt Estate of; Donnelly v Commonwealth Bank of Australia Ltd (1996) 140 ALR 46 and proceed on the basis that the intention of the parties is to be ascertained from the language which they have used in the documents.The key definition in the mortgage is the definition of "secured money" which relevantly refers to "any transaction entered into or undertaken by the Bank at the request (express of implied) of the mortgagor". Hasluck J considered that the words "at the request" of the mortgagor suggest that the commercial purpose of the mortgage was the provision of funds to Windslow in response to Windslow's request. Further, the words "on any account whatsoever" appear in the context of provision for payment "by the mortgagor to the Bank". His Honour contended that the phrase spoke of a payment in respect of money advanced by the Bank on any account maintained by the borrower (Windslow) with the Bank.Hasluck J held that the tem "Bank" when considered in the context of the definition of "secured money" could not be construed to include "any assignee of the Bank". Hasluck J concluded that there was no basis for expanding the definition of either "the Bank" or "secured money" so as to include pre-existing or other debts owed by Windslow to Olympic as an assignee of the mortgage, or so as to include debts claimed to have been incurred after the Deed of Assignment was executed. It was held that the securities assigned to Olympic by the subject Deed of Assignment secured only the debt of $304, 220.28 specified in the Deed of Assignment.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.13 Clarification of unfair contract terms** (By Dr Elizabeth Lanyon, Senior Policy Advisor, Consumer Affairs Victoria)Director of Consumer Affairs Victoria v AAPT ([2006] VCAT 1493), Victorian Civil & Administrative Appeals Tribunal, Justice Stuart Morris, 2 August 2006 The full text of this judgment is available at:[http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Listing-Utility+Buttons-Decisions?OpenDocument&1=10-Listing%7E&2=-Utility+Buttons%7E&3=20-Decisions%7E](http://www.vcat.vic.gov.au/CA256DBB0022825D/page/Listing-Utility%2BButtons-Decisions?OpenDocument&1=10-Listing%7E&2=-Utility+Buttons%7E&3=20-Decisions%7E" \t "_new)**(a) Facts**The Victorian Civil & Administrative Appeals Tribunal (VCAT) considered claims by Consumer Affairs Victoria (CAV) that key terms contained in AAPT's mobile phone and pre-paid mobile phone contracts were unfair within the meaning of the Fair Trading Act 2003 (FTA). CAV sought declaratory and injunctive relief.* AAPT provides a mobile phone and prepaid mobile phone service.
* Detailed terms and conditions in relation to its services are published on its website.
* AAPT entered into mobile phone and prepaid mobile phone contracts with people who intended to use the service for domestic or personal use.
* CAV brought the proceeding against AAPT on 13 December 2004.
* AAPT had commenced a review of its terms and conditions of its mobile phone contracts a few months earlier.
* The review process included several meetings with CAV.
* AAPT prepared new terms and conditions which came into force on 1 May 2005 and were applied retrospectively.

**(b) Decision**In his decision handed down on August 2, the President of VCAT, Justice Stuart Morris, found that "many of the terms identified by the CAV were unfair terms within the meaning of section 32W of the FTA and are void". Key terms found to be unfair were those giving AAPT powers to vary the terms, its charges or its services; to charge a reconnection fee if it suspended or terminated its services for a reason other than the consumer's breach; to require the consumer to continue to pay charges during the time it suspended its services, including where it had done so for a reason other than the consumer's breach; and to terminate the agreement for inconsequential breaches or for a reason other than the consumer's breach.While clarifying how the legislation works, the application for declarations, injunctions and orders was, however, dismissed on the basis that AAPT had changed its mobile phone contracts in May 2005 and applied the changes retrospectively. CAV brought the landmark case before VCAT in late 2004. The case was a litmus test of Victoria's unfair contract legislation, which is also the first of its kind in Australia. Victoria's FTA 1999 was amended in 2003 to insert Part 2B to deal with unfair terms in consumer contracts and to provide for CAV to administer the new legislation. Section 32W of the FTA provides that "a term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer".The judge was firstly required to consider what is meant by "consumer contract". Section 3 of the Act defines a consumer contract as "an agreement, whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services".The judge found that AAPT's mobile phone and mobile prepaid contracts were consumer contracts since mobile phone contracts are ordinarily acquired for personal use and the substantive purpose of AAPT's contracts was to supply services for ordinary personal use, as characterised by the terms of the contract and AAPT's advertising. This was illustrated by examples including AAPT's request for personal information such as residential address, and types of plans that referred to personal use, such as MY CALL 30. The judge rejected AAPT's argument that the issue was the supplier's subjective intention. In considering the meaning of an "unfair" term, the judge rejected AAPT's contention that CAV had to show that it had not acted in good faith, and accepted CAV's contention that the "requirements of good faith" have a procedural aspect and a substantive content, such that a term in a consumer contract might cause such a significant imbalance in the parties' rights and obligations that it is unfair even if the term is individually negotiated or brought to the attention of the consumer (substantive aspect); but that there will be other terms causing less, but still significant imbalance, which will not be regarded as unfair if the supplier can show that they are individually negotiated or brought to the attention of the consumer (procedural aspect). Justice Morris also rejected APPT's argument that the implied obligation to act in good faith limited its ability to use any term unfairly and so counterbalanced any unfairness. He added that even if a contract contains terms that favour the consumer, they will not counterbalance the unfair terms if the consumer (or the supplier's employees administering the contract) are unaware of such terms, for example, if they are merely implied terms, or are hidden in fine print, in a schedule, in another document etc, or are in legalese.In declining to grant declarations or injunctions the judge stated that: "Insofar as other companies are concerned, there is no need for the tribunal to make declarations or injunctions in order for a signal to be sent that Part 2B of the FTA is an important and powerful tool that may be used to ensure that consumer contracts do not contain unfair terms" (para 73).The application for declarations, injunctions and orders was dismissed.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.14 Not merely a 'rubber stamp': A court's role in enforcing agreed penalties for continuous disclosure breach** (By Tim Washington, Blake Dawson Waldron)Australian Securities and Investments Commission v Chemeq Limited [2006], FCA 936, Federal Court of Australia, French J, 24 July 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/july/2006fca936.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2006/july/2006fca936.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This case concerned the issue of continuous disclosure, and the appropriate factors to be considered by a court in relation to penalties for non-compliance under section 1317G(1A) of the [Corporations Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act). Specifically, the court considered its role when there is a jointly submitted agreed penalty between the regulator and the defendant. French J held that:* A court will not merely 'rubber stamp' a jointly submitted agreed penalty in the context of a public law, which requires consideration of the public interest.
* A proper penalty to be applied will be one within an appropriate range in all the circumstances. Such an agreed range can provide certainty for like cases.
* The court will exercise judicial restraint that is informed by practical considerations, when departing from an agreed figure. Such restraint is different from the self-imposed restraint in judicial review and exercise of appellate jurisdiction.
* Factors influencing the court's decision on the appropriate penalty in this case included: effect on share price, non-discoverability of information, lack of recklessness or deliberateness, lack of compliance systems during the period of contravention, improvements of compliance systems since, seniority of those in breach, subsequent composition of Board and management, cooperation with the regulator and lack of evidence supporting this type of non-disclosure in the wider corporate community.
* The proposed penalties of $150,000 and $350,000 were appropriate.

**(b) Facts** Chemeq Limited (Chemeq) is a public 'listed disclosing entity' under sections 111AD and 111AE of the Act. Chemeq breached its obligations of continuous disclosure under section 674 of the Act on two occasions. Firstly, Chemeq failed to detail the true cost of its East Rockingham facility (first breach). Announcing to the market that the facility would cost $25M to build in 2002, the Board of Chemeq did not disclose to the market that the cost had increased to in excess of $50M by the end of 2003. Secondly, Chemeq overstated the importance of a patent approval in the United States (second breach), and did not immediately seek to remedy the misinformation. The patent related only to a process used to make one of Chemeq's products, rather than the product itself, and was thus hard to enforce. Nevertheless, heavy trading occurred after the announcement of the patent approval. The Australian Securities and Investments Commission (ASIC) brought an action under the Act against Chemeq, but the two parties jointly submitted a penalties proposal amounting to $500,000 in total. Chemeq admitted liability on both counts of breach.Because of the admission of liability, the only issue before French J was whether he should impose the jointly submitted proposed penalty.**(c) Decision** French J made three broad observations on the issue of continuous disclosure and penalties for non-compliance.Firstly, his Honour analysed the importance of continuous disclosure, pointing out that it was needed to align security prices with their underlying economic values. French J went further and stated that it was important to analyse whether a company has a 'culture of compliance' in assessing the penalties to be imposed for non-compliance. Secondly, his Honour considered the factors relevant to the imposition of penalty. Importantly, the penalties imposed in section 1137G(1A) were pecuniary in nature, with the objective of general and specific deterrence. Any factors therefore, need to reflect this approach. French J identified the following list of non-exhaustive factors to be taken into account when considering the imposition of the appropriate penalty:* Extent to which information would have been expected to/did impact on the company's shares (section 674(2)(c));
* Extent to which the information, if not generally available, would have been discoverable upon inquiry by a third party (section 676(2));
* Extent to which investors were materially prejudiced by the non-disclosure (section 1317G(1A));
* Extent to which the contravention was deliberate or reckless;
* Extent to which the contravention was negligent;
* The period of time over which the contravention occurred;
* The existence of compliance systems in relation to its disclosure obligations;
* Remedial and disciplinary steps taken after the contravention, and improvement on previous compliance systems;
* The seniority of officers responsible for contravention;
* Whether the directors were aware of the information in need of disclosure, and if not, whether subsequent systems have improved on this point;
* Any change in the composition of the board or senior managers since the contravention;
* The degree of the corporation's co-operation with the regulator; and
* The prevalence of the particular class of non-disclosure in the wider corporate community.

Thirdly, and perhaps most importantly, French J considered the court's role when there has been a jointly submitted proposed penalty. French J stressed that it is not the court's role to merely 'rubber stamp' any agreed figure between the regulator and the defendant.French J considered the authority of a Federal Court case (NW Frozen Foods Pty Ltd v ACCC (1996) 71 FCR 285,291), where Burchett and Kiefel JJ held that courts should not depart from an agreed figure merely because it was otherwise disposed to choose another figure. His Honour considered this decision as not binding a court to an agreed figure, but rather demonstrating a need to exercise judicial restraint informed by practical considerations. Such judicial restraint is different from the principles and criteria informing the courts' judicial review function or the exercise of its appellate jurisdiction. Thus, French J agreed with the comments of Weinberg J, who was not opposed to an agreed appropriate range of penalties to be imposed (ACCC v Colgate-Palmolive Pty Ltd [2002] FCA 619). Nevertheless, French J held that judicial restraint meant that the court will not lightly come to a different figure than the one proposed.Applying the relevant factors listed above, French J found:* the information would have been expected to impact on Chemeq's share price;
* the information was not readily discoverable by the small investors that made up the majority of Chemeq's investor base;
* there was a reasonable risk that investors would be materially prejudiced;
* the contravention was less than deliberate or reckless, but more than mere carelessness, amounting to a serious lack of awareness by Chemeq of its obligations;
* there were no effective compliance systems in place at the time of contravention, but Chemeq had significantly improved its systems since;
* responsibility for the contravention involved the most senior staff;
* composition of the Board and senior managers have since substantially changed;
* Chemeq has cooperated with the regulator and admitted the contravention; and
* there is no evidence as to the prevalence of the particular class of non-disclosure in the wider corporate community.

Having regard to all of the above applicable factors, French J held that the jointly submitted proposed amounts of $150,000 for the first breach, and $350,000 for the second breach were appropriate. It is important to note that section 1317G(1A) had been amended in the time period between the first and second breach, with the effect of increasing the maximum penalty. Thus, the penalty for the first breach was 75% of the old maximum, whereas the penalty for the second breach was only 35% of the new maximum.http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif**5.15 Don't ask? Unauthorised execution of documents and section 129 assumptions** (By Emily Barker, Blake Dawson Waldron)Errichetti Holdings Pty Ltd v Western Plaza Hotel Corporation Pty Ltd [2006] WASC 113, Supreme Court of Western Australia (in chambers) Master Newnes, 23 June 2006The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasc113.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2006/june/2006wasc113.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case considers the issue of whether a party is entitled to rely on the assumptions in section 129 of the [Corporation Act 2001 (Cth)](http://research.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act") where a document is executed on behalf of a company by a person who is not appointed as a director and is not authorised by the company to execute the document.This decision provides support for the proposition that the statutory assumptions about due appointment of directors afforded via sections 128 and 129 of the Corporations Act will not be displaced simply because the party seeking to rely on them has failed to make due enquiries, even where a reasonably prudent person would have made enquiries.In contrast, where there is knowledge or suspicion that a statutory assumption is incorrect, a party will not be entitled to rely on the assumptions, per section 128(4). The exact nature of what amounts to "suspicion" was not determined in this case because the nature of the application only required the court to consider whether there was a "genuine dispute" as to the binding nature of the document in relation to which the assumptions were claimed. However, Master Newnes considered that a person must have had at least an "actual apprehension or mistrust amounting to a slight opinion".**(b) Facts** The case involved an application by the plaintiffs to set aside two statutory demands served by the defendants on two companies, Errichetti Holdings Pty Ltd and Errichetti Nominees Pty Ltd ("the Errichetti companies"). The directors of both companies were Rosina and Dominic Errichetti. Peter Errichetti was appointed a director of both companies in September 2001 but in July 2002 was disqualified by ASIC from managing a corporation.During 2002 to 2004, the defendants negotiated a number of agreements with Peter Errichetti who apparently represented the Errichetti companies. Several agreements were apparently executed on the companies' behalves. Each time, the companies' seals were affixed and the documents appeared to be signed by the two directors, Rosina and Dominic Errichetti.The Errichetti companies failed to perform their obligations under the various agreements and as a consequence, the final settlement was reached via a Deed of Indemnity and Release ("Deed"). The Deed was negotiated between the defendants and Peter Errichetti, apparently acting on behalf of the Errichetti companies.On 30 March 2004, Peter Errichetti told the defendants that he had been reappointed as a director of both the Errichetti companies as from 14 July 2003. The Deed was executed on 12 April 2004. The defendants received a copy of the executed Deed the following day and it appeared to be executed under seal with the signatures of Peter Errichetti and Dominic Errichetti as directors. In fact, Dominic Errichetti's signature was a forgery. The Deed was accompanied by a completed ASIC 484 (change to company details) which stated that Peter Errichetti was appointed as director on 10 July 2003 (ie a backdating of nine months). The defendants' lawyer conducted searches of both Errichetti companies but Peter Errichetti did not appear as director in the records. Peter Errichetti was appointed as a director some time later (probably around June 2004) and the appointment was backdated to July 2003.Statutory demands were issued by the defendants against the two Errichetti companies to recover an amount in excess of $7.9 million, which the defendants claimed was payable under the Deed. The plaintiffs applied to have the statutory demand set aside on the grounds that there was a genuine dispute regarding their alleged indebtedness to the defendants. They argued that the Deed was not binding because Peter Errichetti had not been appointed a director of the companies at the time of execution, was not authorised to execute the Deed on behalf of the companies, and that Dominic Errichetti's signature was a forgery. The defendants did not dispute these facts but argued that the Deed was nonetheless binding on the plaintiffs by virtue of the statutory assumptions granted by sections 128 and 129 of the Corporations Act.The plaintiffs argued that the statutory assumptions in section 129 of the Corporations Act could not be relied upon by the defendants because, they claimed, the defendants "knew or suspected" per section 128(4) that an assumption in section 129 (namely, the due appointment of a director) was incorrect. According to the plaintiffs, the defendants must have known or suspected because of the facts surrounding the execution of the Deed. They pointed to the fact that the transaction was outside the ordinary business of the plaintiff companies, that the companies had consistently failed to meet their obligations (indeed, this was why the Deed was negotiated) and that Peter Errichetti had been disqualified as a director. The defendants denied that there was any basis for suspecting that the plaintiffs had not resolved to execute the Deed or that it had not been validly executed. The plaintiffs also submitted that the defendants had been dealing with someone "merely purporting" to be an agent of the Errichetti companies, rather than dealing "with the company" per section 128(1)), and therefore the assumptions could not apply.**(c) Decision** Master Newnes noted that in determining whether there is "a genuine dispute", the court "will confine itself to the question of whether a real dispute exists rather than attempt to determine the merits of the respective positions of the disputants", citing PDR Pty Ltd v Cottesloe Constructions Pty Ltd [2000] WASCA 62 at [6]-[7]. The question was therefore whether there was a genuine dispute as to the liability of the plaintiffs under the Deed.Citing earlier authority, Master Newnes concluded that section 129 can be relied on where a person purports to act as agent of a company. This was because the statutory assumptions would be unnecessary if they only extended to cases where the person representing the company had actual authority.On the issue of whether the defendants "knew or suspected" that a section 129 assumption was incorrect, Master Newnes considered that section 128(4) did not preclude a person from relying on section 129 simply because they had failed to enquire, "even where a reasonable person would have made enquiries." That section does not encompass a concept of being "put on enquiry", rather, the person must have had at least an "actual apprehension of mistrust, amounting to a slight opinion that the fact exists".Master Newnes drew a distinction between the earlier dealings and the execution of the Deed. At the time that the Deed was to be executed, the defendants sought confirmation that Peter Errichetti had been reappointed as a director as he claimed. The defendants were therefore aware that at the time Mr Errichetti signed the deed it was on the basis of his ostensible appointments as director on 10 July 2003. He did not appear as a director on the public records of ASIC so the assumption in section 129(2) was not available.Master Newnes accordingly determined there was a genuine dispute as to whether the affixing of the companies' seals "appeared" to have been witnessed by a person who "appeared" at that time to be a duly appointed director. There was therefore a genuine dispute as to whether the defendants are entitled to rely on the assumption in section 129(6) that the Deed had been duly executed in accordance with section 127 of the Corporations Act. Whether or not the defendants suspected that the Deed had not been validly executed (in that Peter Errichetti had not been validly appointed as a director) was in dispute according to the "relatively low threshold".http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up1.gifhttp://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20109%20September%202006_files/go_up.gif |
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