

THE BOARDROOM REPORT

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Fixing the price of cartel crimes No one condones price fixing and there are severe penalties in place for those that breach the rules. So why is the Government dramatically increasing the penalties and providing an amnesty period for corporate whistleblowers? ([more...](#))

A taxing issue The Government says it wants tax reform. The ALP wants tax reform. The Business Coalition on Tax Reform (of which AICD is a member) also wants reform. Even the OECD says Australia should have tax reform ([more...](#))

IFRS research needed Will the new financial reporting system prove any more useful than the previous manner in which financial information was reported, a survey of AICD members proved inconclusive ([more...](#))

Class action lawsuits The use of lawsuits by disgruntled US shareholders remained fairly constant last year but the hit to the bottom line was quite significant ([more...](#))

Blogging for directors There is now an internet blog for just about any subject. While some of it is merely vanity publishing, blogs can provide useful information and become an essential communication tool. No surprise then to see someone advocating a blog for company directors ([more...](#))

A just reprieve Australian companies with foreign parents have been given a reprieve from increased tax liabilities ([more...](#))

Public service governance The UK Government has published a corporate governance standard for its public service organisations ([more...](#))

Court rules on WorldCom directors US newspapers report the deal under which WorldCom directors would pay part of the \$US54 million settlement with shareholders is coming apart ([more...](#))

** Comment or feedback on these items may be addressed to
AICD@companydirectors.com.au*

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Fixing the price of cartel crimes

Last week Treasurer Peter Costello said the Government would amend the Trade Practices Act 1974 to introduce criminal penalties for serious cartel conduct as part of implementing the recommendations contained in Dawson Review of the Trade Practices Act.

The Dawson Review indicated that a number of problems with the introduction of criminal penalties needed to be resolved before such penalties could be introduced.

Principally, the problems identified in the Dawson Review centred on appropriately defining a criminal offence and implementing an effective leniency or immunity policy in the Australian context.

The proposed criminal cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel.

Dishonesty goes to the heart of serious cartel conduct, where customers are deceived when purchasing goods or services, unaware that the price and supply of those goods and services were determined by collusion, rather than competition.

To ensure the offence targets serious cartel conduct that causes large scale or significant economic harm, and that minor breaches are dealt with through civil rather than criminal proceedings, the DPP and the ACCC will enter into a formal, publicly available Memorandum of Understanding (MOU) establishing procedures for the investigation of the cartel offence and the circumstances in which the ACCC will refer a case to the DPP for prosecution.

The MOU will also specify that in making an independent determination as to whether to prosecute a particular matter, the DPP will consider factors such as the impact of the cartel and the scale of detriment caused to consumers and the public, and previous admissions to or convictions for cartel conduct.

The ACCC will issue guidelines, prepared in consultation with the DPP, to outline the factors that will inform any decision to pursue a criminal investigation.

Appropriate protection for whistleblowers that come forward to uncover cartel conduct will be provided through a clear and certain immunity policy. Guidelines will be published setting out the conditions for immunity to be granted by the DPP, upon the advice of the ACCC. The respective roles and responsibilities of the ACCC and the DPP will also be defined in the MOU.

Let's hope that the Government's new cartel regime will also have legal principles such as a company is innocent before it is proved otherwise in a court of law.

As AICD CEO Ralph Evans told newspapers last week: "It needs to be very clear when, and in what circumstances, the penalties apply and what action results in liability.

"Defendants need to have the same rights as any other defendant facing a criminal allegation. For example, guilt must be proven beyond reasonable doubt.

Continued on next page

From previous page

“Legal presumptions need to apply, such as access to rights of appeal and the onus of proof resting with the accusing party.”

Most importantly, the DPP and ACCC must ensure that cases of alleged cartel behaviour are not tried in the court of public opinion before they go to a court of law.

No one wants to see a repeat of the Caltex fiasco whereby the media was tipped off about a raid on Caltex’s offices, where ACCC officers were seen carrying out boxes of documents with the visual imputation that they contained evidence only for the investigation to eventually be dropped for lack of any evidence. Further information of the Government’s proposal is at

<http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp>

[\(Back to page 1\)](#)

A taxing issue

It seems tax reform will become one of the main political issues over the coming year with both political parties intent on demonstrating their reform enthusiasm.

Australia's peak business tax group, the Business Coalition for Tax Reform (BCTR) is urging the Government to take tax reform seriously as a vital step in ensuring Australia's economy continues to grow. BCTR's views on tax reform were mirrored in the latest OECD review of the Australian economy which gave us a generally favourable outlook but warned that tax reform was necessary for future growth.

The OECD's Australian report card is at <http://www.oecd.org/home/>

In releasing the BCTR budget submission BCTR chairman John Stanhope said the Government needed to undertake major reform across a number of key areas including seeking significant improvements in tax administration and the simplicity of the legislation, finding a method to rapidly remove the outstanding inefficient state taxes, undertaking significant personal tax reform and progressing international tax reforms which will benefit the economy by attracting labour and capital.

"Reform in all these areas of the tax system is fundamentally important for the health of the economy and the framework in which business operates," Stanhope said.

In its 2005 Budget submission the BCTR urges Government not to waste important opportunities for reform and encourages both federal and state governments to take a renewed interest in tax reform and to do so from a "whole of economy" perspective.

"The best taxation system for sustained long-term economic growth requires that all levels of taxation in Australia are working efficiently and facilitating Australia's international competitiveness" said Stanhope.

The BCTR encourages the Government to build on its Intergenerational Report 2002-03 and the recent interim report on Ageing by the Productivity Commission to develop a vision for Australia's tax system which will serve the country well as it confronts the twin challenges of an ageing population and increasing international competition.

The BCTR is a forum for bringing together the views of the business community on tax reform issues. Its budget submission is available at <http://www.bctr.org>

[\(Back to page 1\)](#)

IFRS research needed

Reporting financial performance to stakeholders in the annual report is an important aspect of corporate governance. AICD believes that the context for reporting financial performance to stakeholders in privately held businesses is quite different to companies that raise funds in capital markets. AICD is concerned that increasingly legislation and regulation based on corporate governance practices appropriate for large listed entities “flow down” to regulate proprietary companies.

This means that privately owned businesses may be constrained by regulation designed to address accountability relationships existing in the public domain.

In the last quarter of 2004 AICD joined with accounting firm Pitcher Partners to research the attitudes of proprietary company directors regarding financial reporting regulation. There is little or no information concerning the usefulness of general purpose financial reports to stakeholders in large proprietary companies and therefore this research was seen as a valuable opportunity to learn more about this segment of the market.

A research questionnaire was sent to 1304 AICD members across Australia.

To direct this research towards larger companies the selection criteria included companies with more than 21 employees and turnover of more than \$10 million a year.

155 responses were received in total representing 11.9 percent of the total population. However, it was disappointing that less than 23 percent of these responses were from directors who had a controlling interest in the company.

As a consequence, although a majority of responses were from large companies, the results did not provide further insight into the regulation of proprietary companies from the perspective of owner-managers.

The need to report to shareholders annually is the fundamental concept that underlies preparation of the statutory financial report in accordance with the Corporations Act 2001.

However the research results were inconclusive regarding the usefulness of the information provided. Only one in three respondents indicated that shareholders used the statutory financial report in their decision-making processes, which suggest limited usefulness. However 18 percent of respondents prepared an annual report voluntarily and a further 22 percent had their financial report audited by choice.

The fact that a reasonably significant percentage of respondents chose to prepare annual reports and chose to have an independent audit provides prima facie evidence that these functions both have value. Further, a majority of respondents (who generally had a high level of financial reporting experience and knowledge but not a controlling interest), considered that generally the component statements within the financial report were “very understandable”.

These seemingly opposing views from respondents, combined with the trend to provide shareholders in capital markets concise (or summarised) financial information rather than a full statutory financial report, indicate that debate concerning the usefulness of the financial report is yet to be resolved.

In accordance with the Corporations Act 2001 large proprietary companies are

Continued on next page

From previous page

required to lodge their financial report with ASIC unless they have applied for and obtained specific exemptions.

Financial information lodged with ASIC is available to the general public from the ASIC database. This database is intended to provide stakeholders with financial information to assist in their decision-making. The research results indicate that approximately half of the respondents access information from the ASIC database, but mainly in respect of competitor companies.

It is not possible to gauge the extent of competitive advantage or disadvantage that might arise, but in any event, the public availability of financial information was never intended to serve that purpose.

The results of this research raise more questions rather than providing answers. Very little is known about the behaviour of owner-managers and their needs for financial information. The lack of participation in research and in the development of legislation by this market segment also contributes to the general lack of understanding as to how the information needs of stakeholders in large proprietary companies might be satisfied.

As a consequence, it seems that public demands for competitive information is driving the nature and extent of financial information that proprietary companies provide to the market, rather than the need for proprietary companies to be accountable to their stakeholders.

In the absence of comment or complaint from proprietary company stakeholders, it is not possible to assess whether or not reporting requirements are appropriate, inappropriate, onerous or satisfactory. The research results suggest that the regulation of financial reporting by proprietary companies is operating satisfactorily.

If you have any comments that you would like to contribute to this debate please contact the AICD at AICD@companydirectors.com.au or Dianne Azoor Hughes, national technical director at Pitcher Partners tel:03 9289 9772 or e-mail dhughes@pitcher.com.au

Both AICD and Pitcher Partners would like to thank all respondents for their participation in this research.

[\(Back to page 1\)](#)

Class action lawsuits

While the number of federal securities fraud class actions filed in 2004 increased only moderately from 2003 levels, rising to 212 companies sued from 181, the decline in stock market capitalisation corresponding to these actions increased dramatically, according to a report by the Stanford Law School Securities Class Action Clearinghouse in cooperation with Cornerstone Research.

The total decline in the market capitalization of the defendant firms from the trading day just before the end of the class period to the trading day immediately after the end of the class period, or the “Disclosure Dollar Loss (DDL),” nearly tripled from \$58 billion in 2003 to \$169 billion for cases filed in 2004.

This 192 percent increase in the DDL index is attributable entirely to eight filings, in which each defendant firm experienced disclosure dollar losses in excess of \$5 billion. In sharp contrast, there was only one filing with losses that large in all of 2003.

The full report is at <http://securities.stanford.edu/>

[\(Back to page 1\)](#)

Blogging for directors

If you are not convinced that, as a board, your communication with shareholders is up to scratch perhaps the answer lies in starting your own internet blog – an idea starting to gain some traction in the US.

Board/shareholder communication is often a hit and miss affair and the idea behind a director blog is to create the means for better interaction and communication.

The AGM, the annual report and even a website are limited in their ability to communicate with shareholders on a regular basis.

A directors' blog would be an inexpensive, technically simple, but highly honest way for people to interact and dialogue on the web under a set of accepted rules. Blogging sites include features that can give corporate boards a direct link to the desktops of people who care about the company, regardless of how many shares they own.

Blogging is a more honest and inclusive way of communicating on the web because it is difficult for any one party to dominate the discourse.

Shareholders would be able to comment on web postings by directors and other commentators. They would also be able to post comments on their own blogs and have these linked from the board's blog. Anyone with a right to have their say as a shareholder would have an opportunity to do so.

A board blog is like an electronic Town Hall, something recommended by former SEC chair Richard Breeden in his report on WorldCom and now being implemented by the renamed MCI. Except that with a blog, the board has a perpetual online meeting. It can call together shareholders at any time to seek input or inform them of important developments at the board level.

It's a highly effective way for boards to keep shareholders informed of what they are doing at a negligible annual cost. The full director blog story is at <http://www.irwebreport.com/perspectives/2005/boardblogs1.htm>

[\(Back to page 1\)](#)

A just reprieve

Australian companies with offshore operations or foreign parents have been given a reprieve from potentially increased tax liabilities as the Government attempts to tackle the critical tax issues associated with the implementation of International Financial Reporting Standards (IFRS).

KPMG tax partner, Matt Hayes, notes “KPMG is extremely pleased that the Government has chosen to introduce a three year transitional period into the thin capitalisation tax rules. This relieves taxpayers from the prospect of having to make remedial IFRS capital management tax decisions at a time when IFRS has not been fully implemented.

“However, this is only a stopgap measure and two important points need to be remembered, bearing in mind that the potential conflicts between IFRS reporting methods and the thin capitalisation tax rules are ongoing,” said Hayes.

Firstly, in the transitional period, a taxpayer’s IFRS information systems will still need to identify key adjustments back to pre-IFRS accounting numbers to meet the interim concessions.

“Current IFRS conversion projects need to factor in this variable to mitigate the prospects of having to go back and produce another set of tax accounts at tax time,” said Hayes.

Secondly, Australia must come up with a revised thin capitalisation tax regime that is not an impediment to long-term business investment. Possible long-term consequences of IFRS include the non-recognition of various intangible assets and greater volatility of net asset values arising from fair value accounting.

“We need a long-term thin cap solution that, while cognisant of tax policy, is nevertheless practical, investment friendly and does not impede the long-term capital management decisions of business,” said Hayes.

Further information at <http://www.kpmg.com.au/Default.aspx?TabID=214&KPMGArticleItemID=1145>

[\(Back to page 1\)](#)

Public service governance

The UK has published a new Standard for the governance of public services that for the first time will give half a million people who serve on UK governing bodies a single, common standard (comparable to the private sector's Combined Code) that clarifies expectations of their roles and responsibilities.

According to HM Treasury, public expenditure in the UK will exceed £500 billion by 2005/06. The Standard of Good Governance (the Standard), developed by the Independent Commission on Good Governance in Public Services (the Commission), will provide both governors (for example, non-executive directors and board members) and the public who use services with guidance to review, challenge and question governance practice and seek improvements. It is based on a year's research and extensive consultation with the public and those involved in governance.

The idea is that governing bodies will review their own effectiveness and to make sure they receive the support they need to do a difficult job effectively. The public and regulators will be able to use the Standard to assess the accountability of public service organisations to the public they serve and to assess governance performance as a basis to demand change and improvements where necessary.

The Standard is intended to help all organisations in the public sector – including the police, schools, the National Health Service, non-departmental public bodies and local government – as well as independent organisations, such as some in the voluntary and community sector and registered social landlords, who receive public money to provide specific services.

Sir Alan Langlands, chair of the Independent Commission on Good Governance, which was established by the Chartered Institute of Public Finance and Accountancy (CIPFA) and the Office for Public Management (OPM) in partnership with the Joseph Rowntree Foundation, said: "There is no public service equivalent of the combined code which sets out the principles of good governance. As a result many governors are confused about their roles and responsibilities. The Standard puts some important stakes in the ground. It provides public bodies with a way of rapidly reviewing the effectiveness of their governance arrangements and the public with the means to challenge sub-standard governance."

The new Good Governance Standard establishes, for the first time, common principles for the roles and responsibilities of all public service governing bodies. Robert Black, Auditor-General for Scotland, commenting on the launch of the Standard said: "The good governance standard for public services should be read by everyone with a governance role in the public sector. As a short, clear, practice guide based on six core principles it provides an excellent framework for putting good governance into practice."

The Standard presents six core principles of good governance.

Continued on next page

From previous page

Each principle has supporting principles that explain what is involved in putting good governance into practice.

The six good governance principles are:

1. focusing on the organisation's purpose and outcomes for citizens and service users;
2. performing effectively in clearly defined functions and roles;
3. promoting values for the whole organisation and demonstrating the values of good governance through behaviour;
4. taking informed, transparent decisions and managing risk;
5. developing the capacity and capability of the governing body to be effective; and
6. engaging stakeholders and making accountability real

A statement of "application" clearly explains what an organisation must do in order to live up to the Standard. A set of probing questions allows governors and governing bodies to assess how well they are living up to it, and to develop action plans for making improvements. The Commission calls on public service organisations to review their governance arrangements regularly and to report publicly on findings as part of their accountability to the public.

A copy of the UK public service governance standard is at <http://www.opm.co.uk/ICGGPS/>

[\(Back to page 1\)](#)

Court rules on WorldCom directors

USA Today reported last Wednesday that a federal judge threw out a key part of the \$US54 million settlement by 10 former WorldCom directors, scuttling a deal to compensate investors who lost billions of dollars as a result of the company's accounting fraud.

US District Judge Denise Cotes indicated that the settlement, which had called for the directors to contribute \$US18 million of their own money, might hobble future efforts to collect payments from other defendants.

According to *USA Today*, the settlement – while not particularly large in the context of WorldCom's \$11 billion fraud – was considered ground-breaking because it sought to force WorldCom's outside directors to take personal responsibility for their roles in WorldCom's implosion.

As a result of the court's action, the lawsuit is expected to proceed to trial on February 28.

[\(Back to page 1\)](#)