|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
|

|  |  |  |  |
| --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif | http://my.lawlex.com.au/alert/pic/spacer.gif |
|   | AI Global |   |  |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |  |  |  |
| --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | 23 June 2010  | >  Regulatory Newsfeed | http://my.lawlex.com.au/alert/pic/spacer.gif |

 |
|   |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |
| --- | --- | --- |
|

|  |  |
| --- | --- |
| Corporate Law Bulletin No. 154> |  |

 |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |
| --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |  |  |
| --- | --- | --- |
|

|  |  |
| --- | --- |
| **Index** | mail lawlex helpdesk.asiapac@saiglobal.com |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

 |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
|

|  |
| --- |
| **Bulletin No. 154**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).[Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#h1) [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#h2) [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#h3) [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#h4) [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#h5) [Contributions](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#6) [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)  |

 | eview my Newsfeed selectionsiew past editions of Newsfeedsiew a list of related Standardsearch all Australian legislation from one websiteree trial our Lawlex Legislative Alertsree trial our other regulatory products and servicesovernance, risk and compliance solutions |
|

|  |
| --- |
| COPYRIGHT WARNINGUse of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. |

 |  |

 |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
|

|  |  |
| --- | --- |
| **Detailed Contents**  | own |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

 |
| [1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#1)[1.1 UK Independent Commission on Banking](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#011)[1.2 Major overhaul of UK financial regulation including abolition of the Financial Services Authority](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#012)[1.3 EU Commission consultation on short selling and derivatives](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#013)[1.4 BIS discussion of recent financial turbulence](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#014)[1.5 Report on national implementation of CEBS's high-level principles for remuneration policies](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#015)[1.6 APRA releases quarterly superannuation statistics](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#016) [1.7 Equity underwriting market study](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#017)[1.8 Global securities regulators adopt new principles and increase focus on systemic risk](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#018)[1.9 SEC approves new stock-by-stock circuit breaker rules](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#019)[1.10 Proposed corporate law amendments - reversing the High Court decision in Sons of Gwalia, corporate reporting and borrowing arrangements by superannuation fund trustees](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0110)[1.11 European Commission proposes improved supervision of credit rating agencies and launches debate on corporate governance in financial institutions](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0111)[1.12 Review of aspects of the UK regulation of takeover bids](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0112)[1.13 FRC issues new governance standards for listed companies](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0113) [1.14 Bank funding and liquidity management: report](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0114) [1.15 EU proposal for bank resolution funds](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0115)[1.16 SEC proposes consolidated audit trail system to better track market trades](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0116)[1.17 IOSCO publishes principles on cross border supervisory cooperation](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0117)[1.18 Report on reforming international financial regulation](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0118)[1.19 OECD paper on regulatory reform](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0119)[2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#2)[2.1 ASIC seeks comment on proposed relief from indirect self-acquisition provisions](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#021)[2.2 Updated ASIC guidance on credit licensing](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#022)[2.3 ASIC consults on Markets Disciplinary Panel](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#023)[3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#3)[3.1 New data centre for ASX](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#031)[3.2 ASX fees and activity rebates](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#032)[3.3 Reports](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#033)[3.4 Review of trading by directors in 'blackout' period - Q1 2010](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#034)[3.5 ASX Listing Rules omnibus amendments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#035)[3.6 Russell/ASX Long-Term Investing Report 2010](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#036)[3.7 Review of disclosure of directors' interest notices](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#037)[4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#4)[4.1 Transurban Group - Panel declines to conduct proceedings](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#041)[4.2 Mesa Minerals Limited - Declaration of unacceptable circumstances and orders](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#042)[5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#5) [5.1 Constitution does not allow preference shareholders to vote on new powers to take over the company](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#051)[5.2 Guarantee and Indemnity - Rights of a surety against a creditor](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#052)[5.3 Application to strike out further amended statement of claim in relation to alleged fraudulent conduct; whether plaintiff can bring claim under s 1324](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#053)[5.4 Relevant considerations when determining if an application for the winding-up of a company should be stayed or dismissed](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#054)[5.5 Informal effective service rule for statutory demand and the presumption of insolvency](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#055)[5.6 Full Federal Court provides guidance on ASIC's power of disqualification](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#056)[5.7 Effect of the invalid removal of a director on a company's subsequent decision to commence proceedings and engage legal firm](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#057)[5.8 ASIC permitted to produce overseas regulator's confidential documents to the court](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#058)[5.9 Voluntary winding up - the exercise of a court's discretion in granting an order that ASIC deregister a company prior to the expiration of the statutory three month period](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#059)[5.10 Grounds for reporting exemption: Is disclosing confidential financial information an unreasonable burden?](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0510)[5.11 The court's focus when convening the first meeting of shareholders for a scheme](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0511)[5.12 The effect of a DOCA on directors' guarantees](http://www.law.unimelb.edu.au/bulletins/154%20June%202010.htm#0512)  |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **1.1 UK Independent Commission on Banking** On 16 June 2010, the Chancellor of the Exchequer, The Rt Hon George Osborne MP, announced the establishment of an Independent Commission on Banking. The Commission will formulate policy recommendations with a view to: reducing systemic risk in the banking sector, exploring the risk posed by banks of different size, scale and function; mitigating moral hazard in the banking system; reducing both the likelihood and impact of firm failure; and promoting competition in both retail and investment banking with a view to ensuring that the needs of banks' customers and clients are efficiently served, and in particular considering the extent to which large banks gain competitive advantage from being perceived as too big to fail. The Commission will make recommendations covering: structural measures to reform the banking system and promote stability and competition, including the complex issue of separating retail and investment banking functions; and related non-structural measures to promote stability and competition in banking for the benefit of consumers and businesses. The Commission will also have regard to the Government's wider goals of financial stability and creating an efficient, open, robust and diverse banking sector, with specific attention paid to the potential impact of its recommendations on:financial stability; lending to UK consumers and businesses and the pace of economic recovery; consumer choice; the competitiveness of the UK financial and professional services sectors and the wider UK economy; and risks to the fiscal position of the Government. The Commission will produce a final report by the end of September 2011.etailed Contents**1.2 Major overhaul of UK financial regulation including abolition of the Financial Services Authority** On 16 June 2010, the Chancellor of the Exchequer, The Rt Hon George Osborne MP, announced that the UK Financial Services Authority would be abolished. A new prudential regulator is to be created which will operate as a subsidiary of the Bank of England. It will carry out the prudential regulation of financial firms, including banks, investment banks, building societies and insurance companies. An independent Financial Policy Committee will be created at the Bank of England, which will have the tools and the responsibility to look across the economy at the macro issues that may threaten economic and financial stability, and take effective action in response.    A new Consumer Protection and Markets Authority will also be created. It will regulate the conduct of every authorised financial firm providing services to consumers. It will also be responsible for ensuring the good conduct of business in the UK's retail and wholesale financial services. The Chancellor also announced that a new agency would be created to deal with serious economic crime as this is currently dispersed across a number of Government departments and agencies. Following is a brief extract from the Chancellor's speech that provides reasons for the changes:"As many of you know, I have my profound doubts about the tripartite system. This is not a commentary on the quality or dedication of the staff of the Financial Services Authority, the Bank of England or indeed the Treasury. It is instead a reflection on what has gone wrong and what may continue to go wrong unless there is change. At the heart of the crisis was a rapid and unsustainable increase in debt that our macroeconomic and regulatory system utterly failed to identify let alone prevent. Inflation targeting succeeded in anchoring inflation expectations, but the very design of the policy framework meant that responding to an explosion in balance sheets, asset prices and macro imbalances was impossible. The Bank of England was mandated to focus on consumer price inflation to the exclusion of other things. The Treasury saw its financial policy division drift into a backwater. The FSA became a narrow regulator, almost entirely focused on rules based regulation. No-one was controlling levels of debt, and when the crunch came no one knew who was in charge."etailed Contents**1.3 EU Commission consultation on short selling and derivatives** On 14 June 2010, the European Commission announced that it is conducting public consultations on (1) short selling and (2) derivatives and market infrastructures. In relation to the short selling consultation, the purpose is to consult market participants, governments, regulators and other stakeholders on possible provisions to be considered in a forthcoming Commission proposal for stand alone legislation dealing with potential risks arising from short selling. The policy options can be grouped into three types:rules to increase transparency related to short sales; rules to reduce risks of uncovered short selling; and emergency powers for authorities to impose temporary short selling restrictions.   The intention is that the new measures on short selling should:harmonise rules across the EU relating to short selling; harmonise tools that member states may use in an emergency situation; and facilitate co-ordination between member states in emergency situations.   The derivatives and market infrastructures consultation deals with:clearing and risk mitigation of OTC derivatives; requirements for central counterparties;interoperability; and reporting obligations and requirements for trade repositories. The short selling consultation paper is available on the [European Commission](http://ec.europa.eu/internal_market/securities/short_selling_en.htm%22%20%5Ct%20%22_new) website. The derivatives and market infrastructures consultation paper is available on the [European Commission](http://ec.europa.eu/internal_market/consultations/docs/2010/derivatives/100614_derivatives.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.4 BIS discussion of recent financial turbulence**On 14 June 2010, the Bank for International Settlements (BIS) published its quarterly review which attributes the recent surge in volatility in global financial markets to a loss of investor confidence due to fiscal concerns and the risk of weaker growth. The European rescue package brought a temporary reprieve from contagion in euro sovereign debt markets, but market concerns about the economic outlook remain.  The review also provides highlights from the latest BIS data on international banking and financial activity.  In addition it features four articles. These focus on: The factors behind the sharp drop in cross-border bank lending to emerging market economies during the financial crisis. A reduction in the supply of credit by international banks outweighed lower demand for credit. The output costs of currency collapses. These appear to be related to the factors leading to the collapse, not the drop in the exchange rate itself. The depreciation actually raises trend output. Policy responses to dislocations in Korea's FX swap market. Drawing on the swap line with the Federal Reserve was effective, but providing funds from Korea's foreign reserves was not. European banks' US dollar funding pressures: banks in several European countries continue to rely on the FX swap market to fund their dollar positions.   The review is available on the [BIS](http://www.bis.org/publ/qtrpdf/r_qt1006.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.5 Report on national implementation of CEBS's high-level principles for remuneration policies** On 11 June 2010, the Committee of European Banking Supervisors (CEBS) published its report on the national implementation of its 'High-level Principles for Remuneration Policies'. The principles were published in April 2009.Two studies were undertaken by CEBS: a first study, focusing on the national regulatory and supervisory actions and a second, assessing the implementation by the institutions and supervisors. Findings from both studies are presented in the report. Observations presented in the second study regarding implementation in institutions are mainly based on detailed information and examples concerning large credit institutions.Both supervisors and institutions have made considerable progress in the field of remuneration, with most countries adopting a regulatory approach for remuneration, supported by supervisory guidance. The most concrete changes observed in institutions are related to the governance mechanisms that must support the remuneration policies and practices. Deferral schemes for variable remuneration are also becoming more frequent. However, it is noted that the implementation is less satisfactory as regards the adjustment of compensation systems for all material risks. Discrepancies may still be observed between requirements set by supervisors to support adoption of CEBS's principles and remuneration policies and practices that can be observed within supervised institutions. When most pronounced, these discrepancies are caused either by underdeveloped practices in new fields such as risk-adjusted performance measurement, or by remaining uncertainty regarding dimensions such as scope, proportionality and home/host relationships and what implications these can have on the practices of institutions. The report is available on the [CEBS](http://www.c-ebs.org/documents/Publications/Other-Publications/Others/2010/ImplementationReportHLPR.aspx%22%20%5Ct%20%22_new) website.etailed Contents**1.6 APRA releases quarterly superannuation statistics**  On 10 June 2010, the Australian Prudential Regulation Authority (APRA) released its March 2010 quarterly superannuation performance publication. It shows that total estimated assets grew over the quarter by $31.8 billion, or 2.6 per cent, to a total of $1.26 trillion. Over the March quarter, the assets of industry funds grew by 3.6 per cent ($7.8 billion) to $226.6 billion, public sector funds by 2.7 per cent ($4.7 billion) to $177.4 billion, corporate funds by 1.7 per cent ($1.0 billion) to $60.9 billion and retail funds by 1.6 per cent ($5.5 billion) to $351.2 billion. Contributions to funds with at least $50 million in assets were $17.8 billion over the March quarter, with employers contributing $14.5 billion and members contributing $3.2 billion. Other contributions, including spouse contributions and government co-contributions, totalled $151 million.  Over the March quarter, retail funds received 32.7 per cent ($5.8 billion) of total contributions, industry funds 32.2 per cent ($5.8 billion), public sector funds 29.4 per cent ($5.2 billion), and corporate funds 5.7 per cent ($1.0 billion). The combined rate of return was 1.6 per cent for the March quarter. The rate of return for public sector funds was 1.9 per cent, corporate funds 1.8 per cent, industry funds 1.6 per cent and retail funds 1.3 per cent. The quarterly superannuation performance publication is available on the [APRA](http://www.apra.gov.au/Statistics/Quarterly-Superannuation-Performance.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.7 Equity underwriting market study** On 10 June 2010, the UK Office of Fair Trading (OFT) announced plans to undertake a market study into equity underwriting and associated services, and sought views on its scope. In 2009, companies raised an estimated £70 billion of equity capital in the UK, paying an estimated £2 billion in fees for equity underwriting and associated services. Initial discussions have confirmed that there is some dissatisfaction with these services among corporate users of the market. The OFT proposes that the market study should take a focused look at rights issues and other types of equity-raising by the 350 largest UK public companies, to consider whether users' concerns are justified. It intends to assess:How underwriting and related services are provided, including the level of competition for the work and how these different services such as advice, arranging the issue and the actual underwriting are sold.  How underwriting services are purchased, including the information available to buyers. How the regulatory environment affects the provision of these services.  The OFT is asking for views on the proposed scope of the study, such as whether to include aspects of capital-raising by companies whose securities are traded on the Alternative Investment Market (AIM) or initial public offerings (IPOs).Further information is available on the [OFT](http://www.oft.gov.uk/OFTwork/markets-work/current/equity-underwriting%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Global securities regulators adopt new principles and increase focus on systemic risk**  On 10 June 2010, the International Organization of Securities Commissions (IOSCO) published its revised 'Objectives and Principles of Securities Regulation' (Principles) to incorporate eight new principles, based on the lessons learned from the recent financial crisis and subsequent changes in the regulatory environment, which are designed to strengthen the global regulatory system against future crises.  The eight new principles cover specific policy areas such as hedge funds, credit rating agencies and auditor independence and oversight, in addition to broader areas including monitoring, mitigating and managing systemic risk; regularly reviewing the perimeter of regulation; and requiring that conflicts of interest and misalignment of incentives are avoided, eliminated, disclosed or otherwise managed.  According to IOSCO, the Principles, which are an agreed set of high-level global standards, outline the basis of an appropriate, effective and robust securities regulatory system. Therefore their proper implementation by securities regulators is critical to the creation and maintenance of a sound global regulatory system. The Principles also play an important role in promoting a sound global financial regulatory system through their use by the International Monetary Fund (IMF) and World Bank assessors in the performance of the securities sector element of country Financial Sector Assessment Programs.  **(a) Systemic risk principle**This new Principle recognises the need for regulators to be conscious of systemic risk and the role they play in relation to it. The financial crisis has highlighted that financial markets which IOSCO members regulate, or may be exempt from regulation, can be the mechanism by which risk is transferred within the financial system. Under the new principle, the regulator should have, or contribute to, regulatory processes to monitor, mitigate and appropriately manage such risks. Regulators should have particular regard to investor protection, market integrity, transparency and the proper conduct of business within markets as contributing factors to reducing systemic risk. The eight new principles added to the current 30 are: Principle 6: The regulator should have or contribute to a process to monitor, mitigate and manage systemic risk, appropriate to its mandate; Principle 7: The regulator should have or contribute to a process to review the perimeter of regulation regularly; Principle 8: The regulator should seek to ensure that conflicts of interest and misalignment of incentives are avoided, eliminated, disclosed or otherwise managed; Principle 19: Auditors should be subject to adequate levels of oversight; Principle 20: Auditors should be independent of the issuing entity that they audit; Principle 22: Credit rating agencies should be subject to adequate levels of oversight. The regulatory system should ensure that credit rating agencies whose ratings are used for regulatory purposes are subject to registration and ongoing supervision; Principle 23: Other entities that offer investors analytical or evaluative services should be subject to oversight and regulation appropriate to the impact their activities have on the market or the degree to which the regulatory system relies on them; and Principle 28: Regulation should ensure that hedge funds and/or hedge funds managers/advisers are subject to appropriate oversight.  **(b) IOSCO's goals and priorities**  IOSCO also reformulated its mission statement which will guide its goals and priorities over the next five years, which include:maintaining and improving the international regulatory framework for securities markets by setting international standards; identifying and addressing systemic risks; and strengthening IOSCO's role in the international financial community in order to advance implementation of the IOSCO Principles.  IOSCO has also published a briefing note outlining the decisions reached at this year's Annual Conference.  The revised Objectives and Principles of Securities Regulation are available on the [IOSCO](https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf%22%20%5Ct%20%22_new) website. The update on the IOSCO 2010 annual conference is available on the [IOSCO](http://www.iosco.org/library/briefing_notes/pdf/IOSCOMS03-10.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.9 SEC approves new stock-by-stock circuit breaker rules**On 10 June 2010, the US Securities and Exchange Commission (SEC) approved rules that will require the exchanges and FINRA to pause trading in certain individual stocks if the price moves 10 percent or more in a five-minute period. The rules, which were proposed by the national securities exchanges and FINRA and published for public comment, come in response to the market disruption of 6 May 2010.Under the rules, trading in a stock would pause across US equity markets for a five-minute period in the event that the stock experiences a 10 percent change in price over the preceding five minutes. The pause, which would apply to stocks in the S&P 500® Index, would give the markets the opportunity to attract new trading interest in an affected stock, establish a reasonable market price, and resume trading in a fair and orderly fashion. Initially, these new rules would be in effect on a pilot basis through 10 December 2010. The markets will use the pilot period to make appropriate adjustments to the parameters or operation of the circuit breakers as warranted based on their experience, and to expand the scope to securities beyond the S&P 500 (including ETFs) as soon as practicable. At Chairman Schapiro's request, the SEC staff also will:Consider ways to address the risks of market orders and their potential to contribute to sudden price moves. Consider steps to deter or prohibit the use by market makers of "stub" quotes, which are not intended to indicate actual trading interest. Study the impact of other trading protocols at the exchanges, including the use of trading pauses and self-help rules. Continue to work with the exchanges and FINRA to improve the process for breaking erroneous trades, by assuring speed and consistency across markets.  The SEC staff is working with the markets to consider recalibrating market-wide circuit breakers currently on the books - none of which were triggered on 6 May 2010. These circuit breakers apply across all equity trading venues and the futures markets. The order regarding FINRA is available on the [SEC](http://www.sec.gov/rules/sro/finra/2010/34-62251.pdf%22%20%5Ct%20%22_new) website. The order regarding exchanges is available on the [SEC](http://www.sec.gov/rules/sro/bats/2010/34-62252.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.10 Proposed corporate law amendments - reversing the High Court decision in Sons of Gwalia, corporate reporting and borrowing arrangements by superannuation fund trustees**  The Australian Government has introduced into Parliament proposed reforms to the [Corporations Act 2001 No 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and has also published for consultation proposed amendments to the [Corporations Regulations](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default). **(a) Corporations Amendment (Sons of Gwalia) Bill**The [Corporations Amendment (Sons of Gwalia) Bill 2010 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=114451" \t "Default) proposes to amend the Corporations Act. The Bill was introduced into the House of Representatives and received its second reading speech on 2 June 2010.  According to the explanatory memorandum, the Bill would amend the rights of persons bringing claims for damages in relation to shareholdings under the Corporations Act. The amendments would reverse the effect of the High Court's decision in *Sons of Gwalia Ltd v Margaretic* (2007) 232 ALR 232 (31 January 2007) and make other amendments to streamline external administrations. Specifically, the Bill would: provide that "all claims in relation to the buying, selling, holding or otherwise dealing with shares are to be ranked equally and after all other creditors' claims"; remove "the right of persons bringing claims regarding shareholdings to vote as creditors in a voluntary administration or a winding up unless they receive permission from the Court" and prevent those persons from being able to receive communications to creditors from an external administrator without making a written request under new s 600H; and remove any restriction on a shareholder's capacity to recover damages against a company based on how they acquired the shares or whether they still hold the shares, by inserting a Part 2F.4 (Proceedings against a company by members and others). **(b)  Corporations Amendment (Corporate Reporting Reform) Bill**The [Corporations Amendment (Corporate Reporting Reform) Bill 2010 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=114298" \t "Default) was introduced into the House of Representatives and received its second reading speech on 26 May 2010. The Bill proposes to amend the Corporations Act. According to the explanatory statement, the purpose of the Bill is to "improve Australia's corporate reporting framework by reducing unnecessary red-tape and regulatory burden on companies, improving disclosure requirements and implementing a number of other important refinements to the corporate regulatory framework". Specifically, the Bill would: introduce a three tiered differential reporting framework exempting small companies limited by guarantee from reporting and auditing requirements, and providing other companies limited by guarantee with streamlined assurance requirements and simplified disclosures in the directors' report; insert a new section 316A (Annual financial reporting to members of companies limited by guarantee) to streamline the distribution process of annual reports by allowing companies limited by guarantee to write to members informing them that an annual report has been prepared and how to obtain a copy; insert a new section 254SA to prohibit companies limited by guarantee from paying dividends; replace provisions relating to the preparation of financial statements under sections 295 (Contents of annual financial report) and 303 (Contents of half year financial report) so that, where the accounting standards require an entity to prepare financial statements in relation to a consolidated entity, separate financial statements do not have to be prepared in relation to the entity itself; insert new provisions to require that, where the notes to the financial statements include an explicit and unreserved statement of compliance with International Financial Reporting Standards, the directors' declaration included in the annual report must indicate that this statement has been included in the notes to the financial statements; amend section 254T (Circumstances in which a dividend may be paid) to replace the existing profits test with a more flexible requirement, which would allow a company to pay dividends if the company's assets exceed its liabilities immediately before the divided is declared and the excess is sufficient for the dividend payment, it is fair and reasonable to the company's shareholders as a whole, and it does not materially prejudice the company's ability to pay its creditors; amend section 323D (Financial years and half years) to allow an entity to vary the length of a financial year subsequent to its first financial year in certain circumstances; amend section 299A (Annual directors' report - additional general requirements for listed public companies) so that listed registered schemes, in addition to listed companies, are required to disclose the information that members would reasonably require to make an informed assessment of the operations, financial position and business strategies and prospects for future financial years of the entity reported on; amend section 258F (Reductions because of lost capital) to clarify that a company can only cancel share capital in circumstances where it is not inconsistent with the requirements in Australian accounting standards, so that companies may write off accumulated losses to share capital but cannot take expenses directly to share capital; and make various other amendments and transitional and savings provisions. The Bill also proposes to amend the [Australian Securities and Investments Commission Act 2001 No 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default). According to the explanatory statement, the Bill would: modify the membership requirements of the Companies Auditors and Liquidators Disciplinary Board (CALDB) by requiring the relevant Minister to appoint six members as accounting members of the CALDB; extend the immunity under section 221 (Protection of members etc.) to include pre-hearing conferences convened by the Chairperson of the CALDB; repeal provisions that are no longer necessary or appropriate as a result of the fact that the Australian Accounting Standards Board and the Auditing and Assurance Standards Board are now financial management and accountability agencies for the purpose of the [Financial Management and Accountability Act 1997 No 154 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12266" \t "Default); and make other miscellaneous amendments and provide for transitional and savings matters.  **(c) Exposure draft - Corporations Regulations** On 9 June 2010, the Australian Government published for consultation draft regulations that provide that certain borrowing arrangements by superannuation fund trustees permitted by the [Superannuation Industry (Supervision) Act 1993](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default) (the SIS Act) are financial products under the Corporations Act 2001. Generally, superannuation funds are not permitted to borrow funds except in limited circumstances.  Superannuation funds are regulated under the SIS Act. Limited recourse borrowing arrangements, such as instalment warrants, are one of the exceptions permitted under the SIS Act, under section 67(4A). The proposed Corporations Amendment Regulations 2010 would make limited recourse borrowing arrangements financial products under the Corporations Act when entered into by regulated superannuation funds. The proposed Regulations amend the [Corporations Regulations 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) to provide that: limited recourse borrowing arrangements are financial products under the Corporations Act when acquired by superannuation funds; limited recourse borrowing arrangements are not a credit facility under the Corporations Act when acquired by superannuation funds; and an Australian Financial Services Licence covering derivatives is taken to also cover limited recourse borrowing arrangements. The draft regulations are available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1829" \t "_new) website. etailed Contents**1.11 European Commission proposes improved supervision of credit rating agencies and launches debate on corporate governance in financial institutions** As part of its work on preventing a future financial crisis and strengthening the financial system, on 2 June 2010 the European Commission published amendments to the EU rules on Credit Rating Agencies (CRAs) and launched a public consultation on reforming corporate governance in financial institutions.  On corporate governance, the Commission has launched a public consultation on a number of issues including how to manage risk more effectively in financial institutions and how to empower shareholders. To complement this package of proposals, the Commission has also published two reports on how Member States have put into practice the Commission's two Recommendations of 2009 (see IP/09/673 and IP/09/674) on remuneration policies in the financial services sector and for directors of listed companies. In both cases, progress has been made but a significant number of Member States have yet to implement the Recommendations fully.  **(a) Improving EU supervision of Credit Rating Agencies** As rating services are not linked to a particular territory and the ratings issued by a CRA can be used by financial institutions all around Europe, the Commission is proposing a more centralised system for supervision of Credit Rating Agencies at EU level. Under the proposed changes, the new European supervisory authority - the European Securities and Markets Authority (ESMA, see IP/09/1347) - would be entrusted with exclusive supervision powers over CRAs registered in the EU. This would include also the European subsidiaries of well-known CRAs such as Fitch, Moody's and Standard & Poor's.  It would have powers to request information, to launch investigations, and to perform on-site inspections. Issuers of structured finance instruments such as credit institutions, banks and investment firms will also have to provide all other interested CRAs with access to the information they give to their own CRA, in order to enable them to issue unsolicited ratings. The Commission's proposal, which amends Regulation 1060/2009, will now pass to the EU Council of Ministers and the European Parliament for consideration. If adopted, the new rules would be expected to come into force during 2011. **Background:** CRAs issue opinions on the creditworthiness of companies, governments and sophisticated financial products. According to the Commission, they contributed to the financial crisis by underestimating the risk that the issuers of certain more complicated financial instruments might not repay their debts. In response to the need to restore market confidence and increase investor protection, the Commission put forward new EU-wide rules that put in place a common regulatory regime for the issuance of credit ratings. Under these rules, which will become fully applicable in December 2010 (see IP/09/629), all CRAs that would like their credit ratings to be used in the EU now need to apply for registration. The risks of conflicts of interest affecting ratings are also addressed (for example, a CRA cannot also offer consultancy services); CRAs will need to be more transparent as they will need to disclose the methodology and internal models and key rating assumptions they use to make their ratings. This should allow investors to perform better their due diligence. **(b) Reforming corporate governance in financial institutions** In response to the financial crisis, the Commission committed itself in its March 2009 Communication on "Driving European Recovery" to improving corporate governance in financial institutions.  As a first step, the Commission is now launching a public consultation on a Green Paper that details possible ways forward to deal with the following issues:How to improve the functioning and the composition of boards of financial institutions in order to enhance their supervision of senior management; How to establish a risk culture at all levels of a financial institution in order to ensure that long-term interests of the business are taken into account; How to enhance the involvement of shareholders, financial supervisors and external auditors in corporate governance matters; and How to change remuneration policies in companies in order to discourage excessive risk taking.  **Background:** According to the Commission, the financial crisis revealed significant weaknesses in corporate governance in financial institutions: board supervision and control of management was insufficient; risk management was weak; inadequate remuneration structures for both directors and traders led to excessive risk-taking and short-termism; and shareholders did not exercise control over risk-taking in the financial institutions they owned. These weaknesses played a role in the crisis and timely and effective checks and balances in governance systems would help preventing any future crisis. Further information on credit rating agencies is available on the [European Commission](http://ec.europa.eu/internal_market/securities/agencies/index_en.htm%22%20%5Ct%20%22_new) website. Further information on the corporate governance consultation is available on the [European Commission](http://ec.europa.eu/internal_market/company/modern/corporate_governance_in_financial_institutions_en.htm%22%20%5Ct%20%22_new) website. Further information on the consultation on remuneration recommendations is available on the [European Commission](http://ec.europa.eu/internal_market/company/directors-remun/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Review of aspects of the UK regulation of takeover bids** On 1 June 2010, The Code Committee of the UK Takeover Panel published a public consultation paper, PCP 2010/2, as part of its review of certain aspects of the regulation of takeover bids.  The Code Committee has initiated the current review in the light of recent widespread commentary on, and discussion of, takeover bids and following the receipt of suggestions for possible amendments to the Takeover Code and other aspects of takeover regulation. The issues covered in PCP 2010/2 include:whether the "50% plus one" minimum acceptance condition threshold for a takeover offer should be raised; whether voting rights should be withheld from shares in an offeree company acquired during the course of an offer period; whether the 1% trigger threshold for the disclosure of dealings and positions in relevant securities under the Takeover Code's disclosure regime should be reduced; whether offerors should be required to provide more information in relation to the financing of takeover bids and their implications and effects and, as a separate matter, whether the boards of offeree companies should be required to set out their views on an offeror's intentions for the offeree company in greater detail; whether shareholders in an offeree company should be given independent advice on an offer, whether "success fees" should be restricted, and whether details of the fees payable to advisers, and costs generally, in relation to a takeover bid should be disclosed publicly; whether some protections similar to those afforded to offeree company shareholders should be afforded to shareholders in an offeror company; whether the "put up or shut up" regime should be re-examined and whether the 28 day period between the announcement of a firm intention to make an offer and the publication of the offer document should be reduced; the extent to which inducement fee arrangements and other deal protection measures should be restricted; and  whether safeguards should be reintroduced in relation to substantial acquisitions of shares.  The consultation paper is available on the [Takeover Panel](http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201002.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.13 FRC issues new governance standards for UK listed companies**  On 28 May 2010, the UK Financial Reporting Council (FRC) introduced changes to the UK Corporate Governance Code - formerly known as the Combined Code. Changes include a clearer statement of the board's responsibilities relating to risk, a greater emphasis on the importance of getting the right mix of skills and experience on the board, and a recommendation that all directors of FTSE 350 companies be put up for re-election every year. The specific changes to the Code include:To improve risk management, the company's business model should be explained and the board should be responsible for determining the nature and extent of the significant risks it is willing to take. Performance-related pay should be aligned to the long-term interests of the company and its risk policy and systems. To increase accountability, all directors of FTSE 350 companies should be put forward for re-election every year. To promote proper debate in the boardroom, there are new principles on the leadership of the chairman, the responsibility of the non-executive directors to provide constructive challenge, and the time commitment expected of all directors. To encourage boards to be well balanced and avoid "group think" there are new principles on the composition and selection of the board, including the need to appoint members on merit, against objective criteria, and with due regard for the benefits of diversity, including gender diversity. To help enhance the board's performance and awareness of its strengths and weaknesses, the chairman should hold regular development reviews with each director and FTSE 350 companies should have externally facilitated board effectiveness reviews at least every three years.  The new edition of the Code will apply to financial years beginning on or after 29 June 2010. The revised UK Corporate Governance Code (June 2010) is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/UK%20Corp%20Gov%20Code%20June%2020102.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.14 Bank funding and liquidity management: report** On 27 May 2010, the Committee on the Global Financial System (CGFS) released a report titled 'Funding patterns and liquidity management of internationally active banks'. The report investigates changes in funding practices and liquidity management of international banks in response to the crisis. The report makes the following observations:The diversity in existing business models, with a mix of decentralised and centralised institutions, is the result of many factors and likely to be a source of systemic resilience. After the global financial crisis, liquidity management appears to be more centralised than was the case before. At the same time, international banks seem inclined to marginally and gradually increase local funding of local assets. Regulatory developments are likely to lead to further changes in funding and liquidity management, especially if host regulators implement local requirements that go beyond those laid down by international standards. A proliferation of host country regulation could imply that global banking groups would have to decentralise important aspects of their funding and liquidity management, hold more liquid assets in more locations, and reduce their reliance on intragroup funding. Further decentralisation would make banks and financial systems more resilient to certain kinds of shocks, but would also entail additional costs. The report is available on the [Bank for International Settlements](http://www.bis.org/publ/cgfs39.pdf?noframes=1" \t "_new) website.etailed Contents**1.15 EU proposal for bank resolution funds** On 26 May 2010, the European Commission proposed that the European Union establish an EU network of bank resolution funds to ensure that future bank failures are not at the cost of the taxpayer or destabilise the financial system. Following discussion at the forthcoming European Council, the European Commission will present these ideas at the G-20 Summit in Toronto on 26-27 June 2010. Such funds would form part of a broader framework aimed at preventing a future financial crisis and strengthening the financial system. The Commission believes that a way to achieve this is by introducing a requirement for Member States to establish funds according to common rules into which banks are required to pay a levy. The funds would not be used for bailing out or rescuing banks, but only to ensure that a bank's failure is managed in an orderly way and does not destabilise the financial system.  Further information is available on the [European Commission](http://ec.europa.eu/internal_market/bank/crisis_management/index_en.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.16 SEC proposes consolidated audit trail system to better track market trades** On 26 May 2010, the US Securities and Exchange Commission (SEC) proposed a new rule that would require the self-regulatory organizations (SROs) to establish a consolidated audit trail system that would enable regulators to track information related to trading orders received and executed across the securities markets. A consolidated audit trail system would help regulators keep pace with new technology and trading patterns in the markets. Currently, there is no single database of comprehensive and readily accessible data regarding orders and executions. Stock market regulators tracking suspicious market activity or reconstructing an unusual event must obtain and merge an immense volume of disparate data from a number of different markets and market participants. Regulators are seeking more efficient access to data through a far more robust and effective cross-market order and execution tracking system.The proposal is part of a larger effort by the SEC to help ensure that the markets are fair, transparent and efficient. Among other things, the Commission already has proposed rules that would:Effectively prohibit all markets from displaying marketable flash orders. Generally require that information about an investor's interest in buying or selling a stock be made publicly available, instead of just to a select group operating with a dark pool. Effectively prohibit broker-dealers from providing their customers with unfiltered access to exchanges and alternative trading systems - and that would help to assure that broker-dealers implement appropriate risk controls. Help identify and provide information on certain large traders. Promote fair and efficient access to listed options markets. The proposal is available on the [SEC](http://www.sec.gov/rules/proposed/2010/34-62174.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.17 IOSCO publishes principles on cross border supervisory cooperation**  On 25 May 2010, the International Organization of Securities Commissions (IOSCO) published a set of 'Principles Regarding Cross-Border Supervisory Cooperation' developed by its Technical Committee's Task Force on Supervisory Cooperation.  These Principles, accompanied by a report and sample Memorandum of Understanding (Sample MOU), set out how securities regulators can better build and maintain cross-border cooperative relationships that will allow them to more effectively oversee financial services providers such as investment advisers, asset managers, hedge funds, credit rating agencies, exchanges and clearing houses, that operate in multiple jurisdictions. The objective of the Principles is to assist regulators in determining the form of cooperation best suited to the regulatory task at hand, and outline the critical issues that experience has shown regulators should agree upon when building a supervisory cooperation arrangement. **(a) The principles for supervisory cooperation** The IOSCO principles for supervisory cooperation focus on three elements of successful supervisory cooperation:General principles - which describe the usefulness of cooperation and the types of information and consultation that regulators should share and engage in; Principles on the mechanisms for cooperation - which describe the functioning of MoU, supervisory colleges and regulatory networks; and Principles relating to the mechanics of cooperation, such as the basic principles of constructing a supervisory cooperation MOU. **(b) The report on fostering supervisory cooperation among securities regulators**  The report analyzes the different types of regulated entities and the globalization of their operations, and offers suggestions on enhancing cross-border cooperation among regulators in order to improve the supervision of globally-active entities. The report describes different types of mechanisms that securities regulators may use to foster greater supervisory cooperation, including ad hoc discussions, MOUs, supervisory colleges and networks of regulators. In addition, the report suggests that regulators expand the notion of supervisory cooperation to establish networks to consider and evaluate risks to domestic and global markets.  The principles and report are available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD322.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.18 Report on reforming international financial regulation** In May 2010, Access Economics and the Institute of Chartered Accountants in Australia published a report titled "Reforming international financial regulation". The matters dealt with in the report are: **Background** Context for reform and Australia's response The proposed reforms The reform timeline Australia's obligations and approach to reform  **International regulatory reforms most likely to affect Australia**Capital and liquidity enhancements Leverage ratio Procyclicality measures Systemic risk Products and markets Regulatory boundaries  **How might Australia respond?**Incorporate reforms within existing structures Re-assign regulatory responsibilities Selectively implement reforms Conclusion The report is available on the [Institute of Chartered Accountants](http://www.charteredaccountants.com.au/files/documents/Reforming_international_financial_regulation_WEB.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.19 OECD paper on regulatory reform** In May 2010, the OECD published a paper titled "Regulatory reform for recovery and growth". It is noted in the paper that the recent financial crisis has left many countries with large deficits and it is in this challenging fiscal environment that governments are considering regulatory reform as a strategy for recovery. The paper presents lessons learned and insights obtained from recent OECD research on the use of regulatory reform during crises and its impacts. The issues discussed in the paper are the role of regulatory reform in speeding up recovery from crises, implementation challenges, and the way forward for regulatory policy and reform.The paper is available on the [OECD](http://www.oecd.org/dataoecd/63/0/45339155.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **2. Recent ASIC Developments** |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **2.1 ASIC seeks comment on proposed relief from indirect self-acquisition provisions**On 18 June 2010, the Australian Securities and Investments Commission (ASIC) announced that it is seeking additional public comment on a number of relief proposals that will permit certain indirect self-acquisitions by investment funds through Consultation Paper 137 'Indirect self-acquisition by investment funds: Further consultation'.Under section 259C of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), the issue or transfer of shares or units of shares of a company to an entity it controls (indirect self-acquisition) is void unless certain exceptions apply.ASIC has previously released Consultation Paper 1 'Indirect self acquisition by investment funds' (CP 1) in October 1998, seeking feedback on the circumstances in which relief from section 259C should be given to investment funds and similar entities. Based on the policy proposed in CP 1, ASIC has provided interim relief on a case-by-case basis with a sunset clause so that ASIC could periodically review the policy.ASIC now intends to seek feedback on some discrete issues that have arisen since CP 1 was released and finalise this policy in the coming months. CP 137 seeks comment on the following proposals:granting future case-by-case relief without a sunset clause; an additional condition on relief for controlled trustees and responsible entities which will limit the amount of units in the scheme or trust that can be held by controlled entities to a maximum of 20 per cent; relief for investment-linked statutory funds and related managed investment schemes that allows participation in a placement of the company's shares; relief allowing self-acquisition of shares in a listed company for the purpose of index arbitrage; and regular periodic disclosure as a condition of relief. The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp137.pdf/%24file/cp137.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.2 Updated ASIC guidance on credit licensing**On 8 June 2010, the Australian Securities and Investments Commission (ASIC) issued updated policy guidance and details of the standard conditions that will be imposed by ASIC on credit licences, to assist those individuals and entities intending to engage in credit activities after 1 July 2010.The updated guidance is contained in: Regulatory Guide 203 Do I need an Australian credit licence (RG 203); and Regulatory Guide 204 Applying for and varying an Australian credit licence (RG 204). The changes to the regulatory guides generally reflect the final form of the [National Consumer Credit Protection Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111358" \t "Default) (National Credit Act), [National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=111363" \t "Default) (Transitional Act) and associated regulations, rather than substantive changes to ASIC's current policies and approach to administering the new regime. ASIC has also taken the opportunity to clarify some issues that have been raised by industry.ASIC has also released Pro Forma 224 Australian credit licence conditions (PF 224) which contains the standard licence conditions that will be imposed by ASIC on credit licences.Regulatory Guide 203 'Do I need an Australian credit licence' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG203.pdf/%24file/RG203.pdf%22%20%5Ct%20%22_new) website. Regulatory Guide 204 'Applying for and varying an Australian credit licence' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG204-1.pdf/%24file/RG204-1.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.3 ASIC consults on Markets Disciplinary Panel**On 26 May 2010, the Australian Securities and Investments Commission (ASIC) released Consultation Paper 136 'Markets Disciplinary Panel' seeking comment on the proposed operation of its Markets Disciplinary Panel.ASIC is setting up the panel as part of the regulatory infrastructure for the supervision of real-time trading on Australia's domestic licensed financial markets. ASIC is expected to assume responsibility for this in August 2010.In doing so, ASIC will be responsible for the supervision of its market integrity rules. It is proposed the Markets Disciplinary Panel will exercise ASIC's power to issue infringement notices and accept enforceable undertakings relating to breaches of those rules.The panel will consist of people with appropriate market or professional experience and function as a peer-review body.The Markets Disciplinary Panel is expected, as far as practicable, to take an approach similar to the existing ASX Disciplinary Tribunal. This will include imposing penalties and requiring remedial action generally consistent with those presently imposed or required by that tribunal.Further information on market supervision and surveillance by ASIC is available on the [ASIC](http://www.asic.gov.au/markets%22%20%5Ct%20%22_new) website.etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **3. Recent ASX Developments** |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **3.1 New data centre for ASX**On 10 June 2010, the Australian Securities Exchange (ASX) announced that it has entered into a commitment to build a new data centre to meet its expanded co-location services and upgraded business continuity requirements for the medium to long-term.  The new data centre will be located outside of, but a short distance from, the central business district of Sydney. It is scheduled to be completed in August 2011 and planned to be operational within a few months of that date. Migration to the new, larger data centre will allow the ASX to expand its co-location hosting services, including providing co-location benefits to both cash equities and futures markets participants. Co-location hosting enables high speed market data and trade execution with near zero network latency, by placing participant trading equipment in the same physical location as ASX's trading facility. The market announcement is available on the [ASX](http://www.asx.com.au/about/pdf/20100610_new_data_centre_for_asx.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.2 ASX fees and activity rebates**On 3 June 2010, the Australian Securities Exchange (ASX) announced its new fee and rebate schedule, to begin on 1 July 2010.  This is to coincide with the introduction of new trade execution services and functionality for the equity market in late June. ASX has previously announced a range of enhancements to the ASX trade execution service offering.  Some of those enhancements will come into operation over coming weeks. These include:New order functionality for the ITS central limit order book (CLOB) to be made available on 28 June 2010.  The functionality will also be available on ASX TradeMatch, which will replace ITS when it is implemented on the new low latency ASX Trade platform (anticipated to be in November 2010). ASX VolumeMatch, a new large order execution facility also to become operative on 28 June 2010. ASX PureMatch, a new trade execution service anticipated to be introduced in the second half of FY11.  This suite of new execution offerings will be complemented with additional services to customers, including a smart order routing product (ASX Best - scheduled for delivery alongside ASX PureMatch) and expanded co-location facilities to become available in the first half of FY12. In keeping with annual practice, ASX has reviewed its Large Participant Rebate (LPR - for the cash market) and Large Volume Rebate (LVR - for the futures market) schemes as well as a range of market connectivity fees. The market announcement is available on the [ASX](http://www.asx.com.au/about/pdf/20100603_asx_fees_and_rebates.pdf%22%20%5Ct%20%22_new) website. The schedule of fees is available on the [ASX](http://www.asx.com.au/about/pdf/asx_market_connectivity_fee_schedule.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.3 Reports** On 3 June 2010, the Australian Securities Exchange (ASX) released:the ASX Group Monthly Activity Report; and the SFE Monthly Volume and Open Interest Report for May 2010. The ASX group monthly activity report is available on the [ASX](http://www.asx.com.au/about/pdf/20100603_asx_group_monthly_activity_report_may_2010.pdf%22%20%5Ct%20%22_new) website. The SFE monthly volume and open interest report is available on the [ASX](http://www.sfe.com.au/content/notices/2010/notice2010_080.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.4 Review of trading by directors in 'blackout' period - Q1 2010** On 1 June 2010, the Australian Securities Exchange (ASX) released its latest review of securities trading by directors during the 'blackout' period.  For the purposes of the review, the blackout period is defined as between the close of a listed entity's financial period and the announcement of its half-year or full-year results.  The ASX Markets Supervision (ASXMS) review examined trading by directors during this period for possible contraventions of the publicly disclosed trading policy of the entity concerned. The review was conducted by ASXMS on all Directors' Interest Notices lodged between 1 January 2010 and 31 March 2010 (Q1 2010). The review is available on the [ASX](http://www.asx.com.au/about/pdf/20100601_review_of_trading_by_directors_in_blackout_period.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.5 ASX Listing Rules omnibus amendments** A number of amendments to the Listing Rules came into effect on 1 June 2010.  They are summarised in Companies Update 06/10. Further information is available on the [ASX](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20100601_0610_HTML.html%22%20%5Ct%20%22_new) website.etailed Contents**3.6 Russell/ASX Long-Term Investing Report 2010** On 26 May 2010, the Russell Investments/ASX Long-Term Investing Report was released.  Commissioned by the Australian Securities Exchange (ASX) and prepared by Russell's investment consulting team, the Report investigates the performance of various types of investments over the past ten- and twenty-year periods to 31 December 2009.  The Report considers the real-life impact of tax, costs and borrowing on ultimate investment returns. The aim is to provide investors with insight into how different investments have performed over the medium to long-term, in real terms. Further information is available on the [ASX](http://www.asx.com.au/about/pdf/20100526_russell_asx_report_media_release.pdf%22%20%5Ct%20%22_new) website. etailed Contents**3.7 Review of disclosure of directors' interest notices** On 20 May 2010, the Australian Securities Exchange (ASX) released its review of disclosure of Directors' Interest Notices lodged by listed entities.  The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 January 2010 and 31 March 2010 (Q1 2010).  The notices cover a director's appointment, changes to a director's interests and ceasing to be a director. This is the fifth such review that ASXMS has completed. The review is available on the [ASX](http://www.asx.com.au/about/pdf/20100520_review_of_disclosure_of_directors_interest_notices.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **4. Recent Takeovers Panel Developments** |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **4.1 Transurban Group - Panel declines to conduct proceedings** On 31 May 2010, the Takeovers Panel announced that it had declined to conduct proceedings on an application dated 24 May 2010 from CP2 Limited in relation to the affairs of Transurban (see TP10/22).On 8 May 2010, a consortium (CP2, the Canadian Pension Plan Investment Board and the Ontario Teachers Pension Plan) notified the Chairman of Transurban of its intention to submit a proposal to acquire control of Transurban. On 10 May 2010 Transurban announced that it would finance the acquisition of the Lane Cove Tunnel in Sydney partly through a fully underwritten accelerated renounceable 1 for 11 rights issue.  On 11 May 2010 the consortium presented its proposal to acquire Transurban. It presented a revised proposal on 12 May 2010. The revised proposal was not conditional on the rights issue being discontinued but was conditional, among other things, on board approval and funding. Transurban has made disclosure to the market. CP2 sought interim orders restraining Transurban from proceeding with the rights issue or allotting shares on exercise of the rights. On 25 May 2010, the President of the Panel declined to make interim orders (see TP10/23). The Panel declined to conduct proceedings. It considered that the proposals did not constitute genuine potential offers such as to make the rights issue a frustrating action and, even if they did, the actions of the Transurban board did not constitute a frustrating action. The Panel also did not consider that the rights issue would have a material effect on the control of Transurban. Accordingly it considered that there was no reasonable prospect that it would declare the circumstances unacceptable.  Further information is available on the [Panel](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**4.2 Mesa Minerals Limited - Declaration of unacceptable circumstances and orders**On 21 May 2010, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances and final orders in relation to an application dated 13 April 2010 by Mesa Minerals Limited in relation to its affairs (see TP10/017).Mighty River (which is owned and controlled by Mr Yuzheng Xie) has approximately 19.17% voting power in Mesa. Mighty River requisitioned an extraordinary general meeting of Mesa under section 249D to replace a majority of the board. Auvex Resources Limited has approximately 6.97% voting power in Mesa (acquired since 29 March 2010) and Mr James Smalley approximately 1.13%. Mineral Resources Limited has made a takeover bid for all the shares in Mesa. Mesa applied to the Panel for a declaration of unacceptable circumstances and made submissions, including that:Mighty River and Auvex are associates in relation to Mesa; and Mighty River and Auvex are also associates with other shareholders in relation to Mesa.  Mesa submitted that the combined voting power of associated parties as a result of acquisitions exceeds the 20% threshold in section 606 in breach of the Act. Mesa also submitted that failure to lodge a substantial holding notice in respect of the combined voting power constituted a further breach of the Act. The Panel considered that Mr Xie, Mighty River and Auvex have voting power of approximately 27.27% in Mesa at present, including because:Mr Xie is associated with Auvex and parties (including Mr Premjit Roy, a non-executive director of Auvex) who control Auvex or together hold relevant interests in more than 20% of the shares in Auvex; and Mr Xie and Mr Smalley are associates with respect to Mesa.  The Panel further considers that Mr Xie, Mighty River and Auvex's voting power in Mesa increased beyond the 20% threshold in section 606 as a result of share acquisitions by Mighty River and Auvex which occurred without using one of the exceptions in section 611. The Panel considers that the combined voting power of Mr Xie and his associates with respect to Mesa was not disclosed in accordance with Chapter 6C. The factors taken into account by the Panel included:structural and financial links; prior collaborative conduct; a common purpose in seeking to resolve a joint venture dispute between Mesa and Auvex or block the Mineral resources takeover bid for Mesa; and the existence of uncommercial dealings and investments involving various parties and other persons. The Panel considered that it was not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3). Mighty River and Mr Xie sought a review of the Panel's decision. On 16 June 2010, the Takeovers Panel announced that the review Panel had affirmed the decision of the initial Panel.Further information is available on the [Panel](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **5. Recent Corporate Law Decisions** |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| **5.1 Constitution does not allow preference shareholders to vote on new powers to take over the company** (By Alex Bowen, Mallesons Stephen Jaques) HNA Irish Nominee Limited v Kinghorn [2010] FCAFC 57, Federal Court of Australia, Full Court, Keane CJ, Jacobson and Rares JJ, 1 June 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/57.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/57.html%22%20%5Ct%20%22_new) **(a) Summary** HNA held preference shares in a number of companies. It wanted to use the limited voting rights attached to those shares under the companies' constitutions to vote on proposals which would create new rights attaching to the preference shares, effectively enabling it to take control of the companies. HNA was not able to vote on the resolutions as the voting rights in the constitution existed only to protect the existing rights of preference shareholders, not to create new rights. **(b) Facts** The case concerned 35 companies which were part of the RIL Aviation group ("the Companies"). Each company owned one aircraft. The case turned on the construction of their constitutions, which were similar in relevant respects. HNA owned preference shares in each of the Companies. While preference shareholders were not generally entitled to vote at general meetings, the relevant provisions of the Companies' constitutions gave them a right to vote 'on a proposal that affects rights attached to a Preference Share'. HNA wanted to use this voting right to pass two resolutions. The first resolution:removed the preference shareholders' right to vote on reductions of capital and buybacks, when they affected only ordinary shares and involved consideration not exceeding the value of those ordinary shares; and created a right for preference shareholders to vote on proposals (inter alia) to appoint directors, amend the constitution, wind up the company, and alter the voting rights of any shares on issue; and enabled preference shares to be converted into ordinary shares at the election of the shareholder. The second resolution was to create a special Voting Share which would 'confer control over the company upon the holders of preference shares'. The preference shareholders' ability to vote on this resolution was not discussed in the judgment. **(c) Decision** The issue was whether a resolution which creates additional rights could be a 'proposal that affects rights attached to a Preference Share'. **(i) Interpretation of the voting right** The court said that a constitution should be given a business-like interpretation based on the language used by the parties. The surrounding contextual circumstances may be of limited use because constitutions are amended from time to time and the identities of the members they bind change frequently. Although HNA argued that the clause referred to 'rights' and not 'existing rights', the court found that the ability to vote on rights attached to preference shares is 'concerned with the rights which have actually been conferred by the corporate compact on holders of preference shares and are currently exerciseable by them.' It is not possible sensibly to read the text as referring to rights which could be attached to a preference share. Contrary to HNA's submissions, the intention of the relevant paragraph was 'to establish a regime under which the general position is that a holder of preference shares has no right to vote at a general meeting of the company.' The exception was that preference shareholders should be protected from having their rights eroded without their having a say in the matter. It was argued that the construction adopted by the court would have the result that preference shareholders could have rights forced on them against their will. The court thought it was unlikely the drafters of the constitution contemplated this rather fanciful situation, and in any case the shareholders would be under no obligation to exercise any such right imposed upon them. It was also argued unsuccessfully that preference shareholders had some existing rights which were exerciseable in times when dividends were in arrears, and that by removing that temporal restriction the proposition was one which related to rights already attached to a preference share. **(ii) The first resolution** Even though the first proposed resolution did diminish the rights of the relevant preference shareholders, it also added to them. Therefore it did not come within the scope of the exceptional voting right in the constitution. **(iii) Conclusion** It was not necessary for the court to consider whether the resolutions would actually be effective, because without HNA's votes they would not be passed. HNA's appeal was dismissed.etailed Contents**5.2 Guarantee and Indemnity - Rights of a surety against a creditor**(By Laura Keily and Tim Lee, Corrs Chambers Westgarth) Permanent Custodians Ltd v AGB Developments Pty Ltd [2010] NSWSC 540, New South Wales Supreme Court, Davies J, 1 June 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/540.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/540.html%22%20%5Ct%20%22_new) **(a) Summary** Craig Kirrin Gore (the Second Defendant) and John Edward Atkinson (the Third Defendant) were guarantors of a debt owed by AGB Developments Pty Ltd (the First Defendant) to Permanent Custodians Ltd (the Plaintiff). The debt was secured by a mortgage over a property owned by the First Defendant. The Plaintiff agreed with the Second and Third Defendants (the Guarantors) that it would seek to recover first from the proceeds of the sale of the property in return for consent judgments executed by the Guarantors covering any shortfall. When the property was sold and proceeds were insufficient to discharge the debt the Plaintiff moved to enter the consent judgments. The Guarantors resisted, arguing that the property had been sold at undervalue in breach of an implied term in the agreement requiring the Plaintiff to secure the 'best price obtainable'. The Guarantors also sought leave for a cross-claim based on the alleged sale at undervalue. Justice Davies found that the agreement contained no implied term of the type alleged by the Plaintiff, ruling that the contract was effective without the implication of such a term. His Honour also declined to grant leave for a cross-claim, finding that the Guarantors had no claim against the Plaintiff under either section 420A of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) or a general negligence-based duty. Finally his Honour held that even if there were a relevant claim against the Plaintiff or the First Defendant a stay would not be granted because the terms of guarantee suspended the right to any such claims until the guarantee money had been paid. **(b) Facts** The Second and Third Defendants (the Guarantors) had guaranteed a loan given by the Plaintiff to the First Defendant. The loan was secured by a mortgage over a property owned by the First Defendant. The Plaintiff defaulted on 5 January 2009, and by 20 August 2009 the Plaintiff had secured judgment for possession of the mortgaged property and was in the process of making demands on the Guarantors. On 26 August 2009 the Plaintiff and the Guarantors agreed to an arrangement under which the sale of the mortgaged property would be used to expedite the resolution of the dispute (the Agreement). Under the Agreement the Plaintiff would execute a notice of discontinuance and the Guarantors would execute consent judgments. These documents would then be held in escrow pending the outcome of the sale. If the proceeds were sufficient to clear the mortgage debt the Plaintiff would file the notice of discontinuance, but if the proceeds were insufficient the Plaintiff would be entitled to enter the consent judgments without further notice. The Agreement included a term stating that the Plaintiff reserved its rights generally and including under guarantee. When the property was sold the proceeds were insufficient to clear the debt, and the Plaintiff moved to enter the consent judgments. The Guarantors resisted the entry of the consent judgment, alleging that the property had been sold at undervalue in breach of an implied term in the Agreement requiring the Plaintiff to have regard to the Guarantors' interests and do all things reasonably necessary to achieve the 'best price obtainable' (the Implied Term). The Guarantors also sought leave to file a cross-claim, arguing that the alleged sale at undervalue constituted a breach of the Plaintiff's duties under the general law and section 420A of the Corporations Act. **(c) Decision**  Justice Davies found that there were three matters to be considered. The first was whether there had been a sale at undervalue in breach of the Plaintiff's duties. The second issue was whether the Implied Term would give rise to a cross-claim that justified preventing the entry of the consent judgment. The final issue was whether, if no cross-claim was permitted in the present proceedings, execution of the consent judgment should be stayed pending the determination of any claims by the Guarantors in fresh proceedings. **(i) Mortgagee's duties** His Honour found no evidence that the property had been sold at undervalue, but considered whether a sale at undervalue would have breached any duties owed by the Plaintiff to the Guarantors. His Honour began by considering section 420A of the Corporations Act 2001 (Cth). Section 420A requires a party exercising a power of sale to take all reasonable care to sell the property for market value if applicable, or else the 'best price that is reasonably obtainable'. His Honour held that there was no evidence that section 420A was intended to confer any protection on guarantors, and that in any case it did not confer a remedy in damages for breach. In discussing section 420A his Honour relied heavily on the judgment of Bryson J in *GE Capital Australia v Davis* [2002] NSWSC 1146. His Honour then considered the Guarantor's claim that mortgagees owe a general law duty of care to guarantors to exercise their power of sale in good faith and with reasonable care to ensure that the property is sold for market price or the best price possible. His Honour dismissed this claim, noting that the notion of a negligence-based duty for mortgagees had been repeatedly rejected in New South Wales. **(ii) Implied terms** His Honour refused to imply the Implied Term for a number of reasons. Firstly, it did not meet the requirements set out in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266. Secondly, it was redundant given the mortgagee's duties under general law and section 420A of the Corporations Act as claimed by the Guarantors. Thirdly, the term was not capable of clear expression or understanding. Justice Davies concluded that if such a term were to be included in a contract it would have to be by express agreement. **(iii) Stay of execution based on fresh proceedings** The Guarantor's final submission was that the entry of the judgment and its enforcement should be stayed to allow the Guarantors to bring fresh proceedings alleging a breach of the general law duties of a mortgagee's exercise of the power of sale or a breach of section 420. In discussing this issue Justice Davies referred again to Bryson J's decision in Davis, which held that although guarantors have an equitable defence against creditors which stems from the guarantor's right to be subrogated to the creditor's rights, this defence is subject to the terms of the contract between the creditor and the guarantor. Justice Davies found that in this case the Guarantors' equitable rights had been displaced by the terms of the guarantee, specifically clauses 2.2, 2.5 and 6.6. Clause 2.5 provided that the Plaintiff's rights against the Guarantors were to continue unaffected unless expressly waived in writing, and clause 6.6 required the Guarantors to pay any amounts owing notwithstanding any deductions or offsets. Justice Davies held that the cumulative effect of these clauses was firstly to require payment regardless of any breach or relevant offset, and secondly to delay the Guarantor's right to make claims against the Plaintiff until the debt was fully paid. In an attempt to avoid these clauses the Guarantors submitted that the guarantee had been superseded by the Agreement, but Justice Davies rejected this argument. His Honour pointed to several clauses in the Agreement which referred to the guarantee as if it were still in effect. **(iv) Bankruptcy of the third defendant** The Third Defendant became bankrupt on 27 May 2010, and Justice Davies found that section 58(3) of the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default) prevented the Plaintiff from entering the consent judgment against the Third Defendant until leave of the court was obtained. His Honour therefore only made orders for judgment and costs against the Second Defendant. etailed Contents**5.3 Application to strike out further amended statement of claim in relation to alleged fraudulent conduct; whether plaintiff can bring claim under s 1324** (By Dean Bao, DLA Phillips Fox) Oates v Hawkins [2010] NSWSC 491, New South Wales Supreme Court, Bergin CJ in Equity, 25 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/491.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/491.html%22%20%5Ct%20%22_new) **(a) Summary** The defendants in the proceeding sought to strike out the plaintiff's Further Amended Statement of Claim (SOC) in relation to alleged fraudulent conduct. The defendants contended that various claims in the SOC did not disclose any reasonable cause of action, had a tendency to cause prejudice or embarrassment or were otherwise an abuse of process. Bergin CJ allowed the pleadings to remain in relation to the main issues, whilst for various minor issues orders were made to strike out certain pleadings, and in respect of some of those pleadings that were struck out leave was granted to amend those pleadings. **(b) Facts**    It was alleged that the plaintiff and two defendants, Hawkins and Tyne, were in a fiduciary relationship by reason of what was termed the 'Matrix Joint Venture' and the 'CCL Joint Venture.' **(i) Matrix Joint Venture**The Matrix Joint Venture was a business operated through Matrix Group Limited (Matrix). Numerous claims were made by the plaintiff in respect of this joint venture, including alleged breaches of fiduciary duties by Hawkins and Tyne. Amongst other things, the plaintiff contended that Hawkins and Tyne had fraudulently concealed receipts received by the Matrix Joint Venture. Amongst other orders, the plaintiff alleged that the joint venture was a 'quasi-partnership' and sought an order under section 1324 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to restore the receipts to Matrix and pay damages to the plaintiff.  The plaintiff had previously obtained judgment in the District Court in relation an entitlement to income received by Matrix. Hawkins and Tyne were not a party to those proceedings. **(ii) CCL Joint Venture** Consolidated Capital Limited UK (CCL UK) was originally a wholly-owned subsidiary of Matrix and now a wholly-owned subsidiary of Consolidated Capital Australia (CCL Aus). Amongst other things, it was alleged that Hawkins and Tyne set up companies for the purpose of deriving income from products and business opportunities that belonged to the CCL Joint Venture, and they had breached their duties to the plaintiff, CCL Aus and CCL UK (among others) in doing this. Again, it was alleged that the joint venture was a 'quasi-partnership.' **(iii) Previous proceedings** In previous proceedings, the plaintiff sought leave pursuant to section 237 of the Corporations Act to bring proceedings on behalf of CCL Aus against six defendants, including CCL Aus, CCL UK, Hawkins and Tyne. The plaintiff claimed that Hawkins and Tyne had appropriated to themselves products and business opportunities belonging to CCL Aus. It was held that CCL UK was acting solely for itself and in its own interests, a conclusion that could be displaced by proof that CCL UK was acting as agent for CCL Aus as its undisclosed principal. However, Mr Oates could not provide any proof.  Accordingly, there was no serious question to be tried and leave under section 237 of the Corporations Act was not granted. The appeal to the Court of Appeal was only in relation to the action under section 237 of the Corporations Act, so the plaintiff's personal cause of action was not considered further. Campbell JA agreed with the initial findings made by Barrett J, namely that there was no basis for finding that CCL Aus owned the relevant products and business opportunities. As such, leave was not granted under section 237 of the Corporations Act.**(iv) These proceedings**In these proceedings, the key issues were whether:the plaintiff was allowed to bring claims relating to the Matrix Joint Venture because the plaintiff sued Matrix in the District Court, without joining Hawkins or Tyne in those proceedings; the plaintiff had standing to pursue causes of action on behalf of Matrix and CCL Aus; and the plaintiff was issue estopped in relation to claims relating to products and business opportunities that were contended to be 'confidential property' of the CCL Joint Venture, and as such owned by CCL Aus.  **(c) Decision** **(i) Plaintiff not allowed to bring claims due to previous proceedings**The defendants moved to strike out various claims on the basis that the plaintiffs had already sued Matrix to judgment in the District Court, without joining Hawkins or Tyne in those proceedings. The plaintiff submitted that the cause of action pursued against Matrix in the District Court was different to the current proceeding, and that it was not unreasonable for the plaintiff to defer raising his personal claims against Hawkins and Tyne, as those claims could not have been raised in the District Court proceedings. This was due to the limitations of the equitable jurisdiction of the District Court, and the fact that actions under the Corporations Act could not be brought in the District Court.  Bergin CJ confirmed that it was not unreasonable for the plaintiff not to have brought separate claims against Hawkins and Tyne at the same time as his claim against Matrix in the District Court. As such, the plaintiff was not precluded from bringing his claim against Hawkins and Tyne. **(ii) Standing to make a claim**The defendants argued that the plaintiff had no standing to pursue causes of action on behalf of Matrix in relation to breaches of fiduciary duties. The defendants argued that since the liquidator of Matrix had chosen not to pursue a cause of action, section 1324 of the Corporations Act was unavailable to the plaintiff.  Bergin CJ concluded that the plaintiff was not actually seeking to bring an action on behalf of Matrix. Rather, the plaintiff was pursuing a personal claim, as he was a person whose interest was affected. Accordingly, the claim for relief under section 1324 would not be struck out. However, the plaintiff was ordered to review the matter and decide whether Matrix should be joined as a party, as an order was being sought that any profits made from the breach of fiduciary duties were to be restored to Matrix. Further, Bergin CJ also concluded that the plaintiff had standing under section 1324, despite the fact that CCL Aus had not chosen to pursue a cause of action and leave to bring an action on behalf of CCL Aus was previously refused. This was because the plaintiff was seeking to pursue personal claims, as they related to the way the assets of the corporations were moved to deprive the plaintiff of his alleged agreed share of profits in the CCL Joint Venture. However, Bergin CJ noted that the claim would be subject to review as to joinder of parties. **(iii) Ownership of products and business opportunities**The defendants claimed that there was an issue estoppel or an abuse of process in relation to claims of ownership of products and business opportunities, as this had been decided in the earlier proceedings. The plaintiff argued that for the doctrine of issue estoppel to apply, the same question must have been decided, the earlier decision must be final and the parties to both proceedings must be the same.  Bergin CJ concluded that the issues in this proceeding were different, and that there were different parties in this proceeding. Previously, it had been decided that CCL UK was not CCL Aus's agent, and thus the plaintiff could not claim that CCL Aus owned the products and business opportunities on the basis of such agency. However, in this proceeding the plaintiff was claiming a form of joint ownership. Therefore, Bergin CJ did not to strike out this aspect of the SOC, however, she noted that the plaintiff would have to reconsider the actual ownership claims that were made in the SOC.  In respect of other minor issues submitted by the defendants, Bergin CJ ordered the striking out of various pleadings and granted leave to replead. Other pleadings were struck out completely, and the plaintiff was ordered to serve amended pleadings on the defendants at a later date.etailed Contents**5.4 Relevant considerations when determining if an application for the winding-up of a company should be stayed or dismissed** (By Lauren Huberman, Blake Dawson) Lanepoint Enterprises Pty Ltd (Receivers and Managers Appointed) v Australian Securities and Investments Commission [2010] FCAFC 49, Federal Court of Australia, Full Court, North, Siopis and Buchanan JJ, 24 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/49.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/49.html%22%20%5Ct%20%22_new) **(a) Summary**The case considered the discretion of the court in staying or dismissing a winding-up application. It was held that the ruling at first instance was incorrect.  The majority found that the relevant considerations when exercising such discretion were not taken into account by the primary judge and he therefore erred in his judgment. The majority of the court held that the application brought by ASIC to wind-up Lanepoint Enterprises Pty Ltd (Lanepoint) should be stayed pending the resolution of the disputed debt.  **(b) Facts**Lanepoint carried on business as a property development company. Lanepoint borrowed money from Suncorp-Metway Limited (Suncorp) and Westpoint Management Ltd (Westpoint Management) to fund a development project it was engaged in. The loans were secured by a charge over Lanepoint's assets. Lanepoint and Westpoint Management were both within a group of companies called the Westpoint Group of companies. On 3 March 2006, Suncorp appointed receivers and managers to Lanepoint pursuant to Suncorp's powers under its charge. On 9 March 2006, Westpoint Management, which was in liquidation, appointed receivers and managers to Lanepoint pursuant to its charge over Lanepoint's assets. Suncorp recovered the monies owed to it by Lanepoint. ASIC applied to wind-up Lanepoint on the grounds of insolvency on 2 June 2006. ASIC relied upon section 459P of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) for its standing to apply to wind-up Lanepoint as the appointment of receivers and managers created a presumption of insolvency on the part of Lanepoint.  There were two series of transactions that were in dispute. The first was the Kingdream transfer. In this transaction, loans of Lanepoint which were recorded in the books of Westpoint Management were altered to record the loans as loans to Kingdream Pty Ltd. This reduced the debt owed by Lanepoint by $2 million. The second transaction was the $2 million run-around. This occurred through round robin exercises which had the effect of reflecting a payment by Lanepoint of $2 million of its debt (this occurred through a series of transfers and book entries of monetary transfers between related companies).  Lanepoint asserted that it was solvent because its assets exceeded its liabilities. It had two creditors; Westpoint Management (a related company) and Keyworld Investments Pty Ltd which was not demanding payment of the debt. It argued that its indebtedness did not exceed $2.3 million.  ASIC disagreed with Lanepoint's contention. ASIC contended that the debt to Westpoint Management had been reduced from $6.6 million by $4.2 million and that reduction of the debt was ineffective or liable to be set aside against Westpoint Management as the reduction was an improper transaction or voidable because the transactions were uncommercial.  Lanepoint argued that there was a substantial dispute as to the extent of the debt owed to Westpoint Management and therefore the ASIC application to wind up Lanepoint should be dismissed or stayed.  The primary judge rejected Lanepoint's contention that he should dismiss or stay the ASIC winding-up application. His honour noted that the court has discretion to determine the dispute rather than to stay the winding-up. The primary judge held that the Kingdream transfer and the $2 million run around transactions were improper transactions or liable to be set aside as voidable transactions under section 588FE of the Act. This increased the debt owed by Lanepoint to Westpoint Management to $6.6 million. As Lanepoint's assets amounted to approximately $5.73 million, Lanepoint was presumed insolvent. The primary judge made orders for the winding-up of Lanepoint and for the appointment of liquidators to Lanepoint.   Lanepoint appealed on the basis that the primary judge erred in the exercise of his discretion by not staying or dismissing ASIC's application. **(c) Decision** North and Siopis JJ found that it is in the discretion of the court to decide whether a disputed debt is determined within the framework of a winding-up application. Such discretion is subject to relevant considerations. Their Honours held that the discretion of the primary judge was exercised incorrectly.  The decision at first instance did not consider the question of whether all of the parties necessary for the final determination of the issues raised by ASIC's contentions were before the court. Lanepoint was the only party to the winding-up application, and none of the other companies or directors that were involved in the impugned transactions were parties to ASIC's winding-up application.  In addition, section 588F of the Act empowers a court to make orders where it is satisfied that a transaction is voidable under section 588FE of the Act. However such an order may only be made upon the application of a liquidator (section 588FF of the Act). Therefore, the liquidator of Westpoint would have to exercise their rights under section 588FF not ASIC.  Their Honours also found that when deciding if the application should be stayed or dismissed, the primary judge did not take into account that Lanepoint was not trading and was under the control of receivers and managers. This reduced the prejudice that could be suffered, by third parties, by staying or dismissing the application pending the determination of the dispute within a more appropriate framework. Their Honours held that for the reasons above, Lanepoint's appeal should be allowed. It was held that the application for winding-up should be stayed pending the determination of proceedings brought by the liquidator of Westpoint Management to determine the extent of the debt. Buchanan J dissented. His Honour agreed with the reasoning of the primary judge that Lanepoint was presumed insolvent and held that the appeal should be dismissed.etailed Contents**5.5 Informal effective service rule for statutory demand and the presumption of insolvency** (By Katrina Sleiman, Corrs Chambers Westgarth) Woodgate v Garard Pty Ltd [2010] NSWSC 508, New South Wales Supreme Court, Palmer J, 24 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/508.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/508.html%22%20%5Ct%20%22_new) **(a) Summary** The case involved an application by the plaintiff ("Mr Woodgate") to wind up the defendant Garard Pty Ltd ("Garard") in insolvency pursuant to sections 459A, 459C and 459P of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Corporations Act"). Mr Woodgate relied upon the presumption of insolvency arising under section 459C(2)(a) consequent upon the failure of Garard to comply with a statutory demand. The court was required to consider: (i) whether there was informal but effective service in circumstances where the statutory demand was not served in the manner prescribed by section 109X of the Corporations Act; and (ii) whether the presumption of insolvency arose if the time for compliance with the statutory demand expired after the winding up application was filed. **(b) Facts** On 31 July 2009, Mr Woodgate sent a statutory demand to Garard by registered post to an address which, only a month before, had ceased to be Garard's registered office. One of Garard's two directors, Mr Szkirpan, collected the registered letter containing the statutory demand from an Australia Post Office and, by letter to Mr Woodgate dated 14 August 2009, acknowledged that he had received the statutory demand on 13 August 2009. Mr Woodgate conceded that the statutory demand was not served at Garard's registered office or in any other manner authorised by section 109X for service of documents upon a company. Nevertheless, he submitted that the statutory demand was served upon Garard, within the meaning and for the purpose of sections 459E(1) and 459F(2)(b), because it was actually and effectively received by Garard. Garard did not file and serve an application under section 459G to set aside the statutory demand within 21 days from 13 August 2009.  At some time between 24 and 30 September 2009, Mr Szkirpan asked his co-director, Mr James, to take over dealing with the statutory demand. Mr Woodgate filed an originating process to wind up Garard on 13 October 2009 and sought a declaration pursuant to section 109X(6)(b) of the Corporations Act that Garard was deemed to be served with the statutory demand on 13 August 2009.  **(c) Decision**  Justice Palmer held that a declaration as to service of the statutory demand cannot be made pursuant to section 109X(6)(b) because that provision permits the court to authorise only the manner in which a document, not yet served, is to be served on a company, it does not enable the Court to validate irregular service already made. Justice Palmer accepted "the effective informal service rule", as explained by Young J in *Howship Holdings Pty Ltd v Leslie (No 2)* (1996) 41 NSWLR 542.  However, his Honour considered that as there is no authoritative decision of an appellate court confirming the "effective informal service rule" and also conflict in the first instance decisions which had applied the rule as to whether particular modes of informal service on a company are valid, it would be useful to summarise the principles which are supported by the preponderance of authority.   First, if a document required to be served on a company by the Corporations Act is served in accordance with any of the modes prescribed in section 109X of the Corporations Act and section 28A of the [Acts Interpretation Act 1901 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "Default) or, in the case of a section 459G application, at an address for service nominated in the statutory demand, the document is validly served and once service in a prescribed mode is proved, a proceeding cannot be challenged on the basis that the document did not actually come to the attention of the company.  Second, where service is effected by leaving the document at the company's registered office in accordance with section 109X(1)(a), it makes no difference whether the document is left within or outside normal business hours or within or outside the hours at which that office is kept open, and the date of service is the date of leaving the document, not when it comes to someone's attention. Third, where a creditor serves a statutory demand in a prescribed mode and: (i)  knows, at the time of service or before the section 459G(3) period expires, that the statutory demand has not actually come to the attention of the company; (ii) knows that the company would dispute the statutory demand if made aware of it;(iii) refrains from bringing the statutory demand to the actual notice of a responsible officer of the company within the section 459G(3) period; and (iv) relies on good service of the statutory demand and the presumption of insolvency arising under section 459C(2)(a)the Court may, in its discretion and in the interests of justice, set aside the statutory demand under section 459J(1)(b) for want of fair notice. Fourth, the prescribed modes are not exclusive of other modes of service. Whether another mode of service is good service depends upon whether the serving party can prove to the Court's satisfaction that the document actually came to the attention of an officer of the company who was either expressly or implicitly authorised by the company to deal directly and responsively with the document, or documents of that nature ("a responsible officer"). Fifth, there is no special exception to the "effective informal service rule" in the case of service by email or facsimile.  The question remains whether that mode of service actually brought the document to the attention of a responsible officer.Sixth, where a document, not served in a prescribed mode, comes to the actual attention of the sole director of a company it will be presumed, unless a strong case to the contrary is shown, that the director is the responsible officer and that service is good. Seventh, a party invoking the effective informal service rule bears the onus of proving the time at which the document came to the actual attention of a responsible officer of the company and the court will not lightly draw inferences or make assumptions as to the time of service. In the present case, Palmer J was satisfied that the statutory demand came to the attention of the company, through Mr Szkirpan, on 13 August 2009, which meant that the time for paying the debt or filing and serving a section 459G application expired on 4 September 2009. Accordingly, when Mr Woodgate filed his winding up application on 13 October 2009, he was entitled to rely upon the presumption of insolvency arising under section 459C(2)(a). However, Palmer J noted that if he was wrong to draw the inference that Mr Szkirpan was then the relevant responsible officer of Garard, it followed that good service of the statutory demand was not effected until Garard's other director also received actual notice of the Statutory demand, which was some time between 24 and 30 September 2009.  This would mean that the winding up application was made before the 21 day period for compliance with the statutory demand had expired.  It would then be necessary to consider whether the statutory presumption of insolvency could be invoked if time for compliance with the statutory demand had not expired before the winding up application was filed, but had expired by the time the application came on for final hearing.  Section 459C(2)(a) provides that the presumption of insolvency applies if, "during or after the 3 months ending on the day when the winding up application was made" the company had failed to comply with a statutory demand (or had suffered one of five other possible events).  Previous authorities had found that "during or after" meant that if the statutory demand expired after the day on which the application was made, the creditor could still rely on the presumption of insolvency when the application was heard. However, Palmer J considered the effect of section 459Q, which he noted had been neglected by those previous authorities.  Section 459Q requires that, where a winding up application relies on a failure to comply with a statutory demand, it must set out the particulars of that failure. It is therefore impossible for a creditor to file an application relying upon section 459C(2)(a) which complies with section 459Q(a) by setting out "particulars of the failure to comply with the statutory demand" if the creditor serves the statutory demand after the winding up application is filed or if the time for compliance with the statutory demand has not already expired.  As section 459Q only applies to applications which rely on statutory demands, Palmer J concluded that one can rely upon failure to comply with a statutory demand only if time for compliance has expired during the three months ending on the day when the application was made, but one can rely on any one of the other five insolvency events specified in section 459C(2)(b)-(f) if the event has occurred either during the three month period before the winding up application is filed or after filing and before the hearing.  In the present case, if Palmer J had found that the statutory demand was served on Garard between 24 and 30 September 2009, time for compliance would not have expired by the time of filing of the winding up application and his Honour would have dismissed the application.etailed Contents**5.6 Full Federal Court provides guidance on ASIC's power of disqualification**(By Michael Power, Mallesons Stephen Jaques) Culley v Australian Securities and Investments Commission [2010] FCAFC 43, Federal Court of Australia, Full Court, Ryan, Mansfield and McKerracher JJ, 19 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/43.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2010/43.html%22%20%5Ct%20%22_new) **(a) Summary** The Full Federal Court has held that the Australian Securities and Investments Commission's ("ASIC's") power to disqualify people from managing corporations under section 206F of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") is not limited by a requirement that the power be exercised within a reasonable time. The decision discloses a preference for adhering to the express terms of the Act, rather than implying or 'reading in' further terms and limitations. **(b) Facts** Brian Culley had been an officer of several companies which went into liquidation between 2001 and 2002. On 23 October 2002, the liquidator of one of those companies wrote to ASIC informing them that they were able to exercise their power of disqualification under section 206F of the Act. Despite this, ASIC took no action at all until 12 July 2006 when it wrote to Mr Culley asking for information.  It was not until 13 October 2006 that it sent Mr Culley a 'show cause' notice under section 206F(1)(b), and not until 14 February 2007 that it exercised its power under section 206F and disqualified Mr Culley from managing corporations for two years.   Mr Culley appealed that decision to the Administrative Appeals Tribunal ("AAT") who affirmed the decision on 8 July 2008 (see *Culley v ASIC* [2008] AATA 588). He then appealed to the Federal Court, arging that the AAT erred in law.  On 30 October 2009 Tracey J rejected that appeal. Mr Culley then appealed to the Full Federal Court. **(c) Decision** Section 206F(1)(a) of the Act provides that "ASIC may disqualify a person from managing corporations for up to 5 years if: (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i): (i) the person has been an officer of 2 or more corporations; and (ii) while the person was an officer ... of those corporations, each of the corporations was wound up".  Section 206F(1)(b) requires ASIC to send the person a 'show cause' notice, asking them to show why they should not be disqualified before making a decision. Mr Culley argued that the power of disqualification in section 206F was subject to an implied requirement that it be exercised within a reasonable time, which ASIC had breached.  He relied on the decision of Heerey J in *Kardas v Australian Securities Commission* (1998) 29 ACSR 304 ("Kardas"), which held (at [313]) that section 600 of the Corporations Law (the predecessor to section 206F) was subject to an implied requirement that it be exercised within a reasonable time. At first instance Tracey J dismissed the appeal.  His Honour found that the delay was unreasonable, but held that because this point was not argued before the AAT, the AAT's failure to consider it was not an 'error of law'.  The Full Court approved this reasoning.  However, since the point was argued by both parties on appeal, the Full Court went on to consider the merits of the alleged implied limitation.   The court dismissed the appellant's argument, finding that the language and structure of section 206F exclude any such implication.  The court gave great weight to the seven year time limit expressly fixed by section 206F(1)(a), suggesting that Parliament had thereby struck a balance between competing interests which should not be disturbed.  In this, the court appears to have heeded the respondent's submission based on *AMS v AIF* (1999) 1999 CLR 160 at 183 that clear words can only be subject to an implied limitation if they produce absurd or unintended consequences. The court nonetheless accepted ASIC's submission that it was bound to consider any delay in notification in deciding whether "the disqualification is justified" under section 206F(1)(c).  In their view, this was the true meaning of Heerey J's comments in Kardas: that a decision maker ought to discharge his or her functions with reasonable promptness, and a failure to do so will be a discretionary factor in the final decision.  In the alternative, the court held that the decision is wrong and should not be followed.etailed Contents**5.7 Effect of the invalid removal of a director on a company's subsequent decision to commence proceedings and engage legal firm**(By Jiayue Li, DLA Phillips Fox)BI Constructions Pty Ltd v Shad; Bayeh v BI Constructions Pty Ltd [2010] NSWSC 484, New South Wales Supreme Court, Slattery J, 18 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/484.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/484.html%22%20%5Ct%20%22_new) **(a) Summary** In the midst of proceedings brought by BI Constructions Pty Ltd ('BI Constructions'), one of its directors, Samir Bayeh, sought to challenge the authority of BI Constructions to bring such proceedings and retain Cambridge Law Group ('Cambridge') as lawyers. Samir Bayeh contended that his removal as director at a meeting held on 13 July 2009 ('13 July meeting') was invalid. Therefore, the company's subsequent resolutions to commence the current proceedings and to retain Cambridge were claimed to be invalid as the requisite notice was not provided to him as a director. Slattery J held that Samir Bayeh's removal was invalid and that Samir Bayeh continued to be a director of BI Constructions after 13 July 2009. Hence, the subsequent resolutions to commence proceedings and retain Cambridge were invalid. The court ordered that the relevant legal proceedings be stayed for 21 days to allow the parties to draft a management plan for the future course of conduct of the proceedings. **(b) Facts**  BI Constructions commenced operations with three directors, Samir Bayeh, Issam Issa and Youseff Bayeh ('Joe Bayeh'). The three directors each held two shares in BI Constructions. BI Constructions Pty Ltd was involved in a residential and retail development with Chikal Pty Ltd ('Chikal') as equal joint venturers which were completed in June 2009. Disputes arose between the three directors of BI Constructions. The principal point of contention which culminated in two of the directors, Joe Bayeh and Issam Issa, purporting to remove Samir Bayeh as director was Samir Bayeh's failure to provide an account of the expenses Samir Bayeh incurred in the development as requested by Joe Bayeh and Issam Issa on 26 June 2009. At the 13 July meeting, Issam Issa and Joe Bayeh resolved to remove Samir Bayeh as a director. Acting upon the basis that Samir Bayeh was no longer a director of BI Constructions, Joe Bayeh and Issam Issa excluded Samir Bayeh from any further involvement in directing the affairs of BI Constructions and gave no further notice to him of subsequent directors' meetings. The proceeds from the development were paid into the trust account of George Shad of Shad Partners solicitors. Mr Shad has refused to distribute the funds to either BI Constructions or Chikal due to the dispute between the three directors of BI Constructions. BI Constructions brought proceedings seeking a declaration that Mr Shad held one half of the funds from the development on trust for BI Constructions. Samir Bayeh brought a motion challenging the retainer of Cambridge as solicitors in the trust proceedings. The court ordered that the trust proceedings and Samir Bayeh's motion be heard together. **(c) Decision**  Slattery J held that:the removal of Samir Bayeh as a director by Issam Issa and Joe Bayeh was invalid; and the resolutions to commence the trust proceedings and retain Cambridge were invalid. **(i) Removal of Samir Bayeh as a director was invalid** As BI Constructions' constitution did not contain a power authorising the board to remove a director, the company was governed by the replaceable rules set out in the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Under section 203C of the Corporations Act, a director can only be removed pursuant to a meeting of members. Slattery J rejected Issam Issa's contention that the 13 July meeting was a meeting of members rather than a meeting of directors for the following reasons:Issam Issa's account of events that a decision had been made on 26 June 2009 that a meeting of members would be held to remove Samir Bayeh if he did not provide the requested accounts was inherently improbable.The pattern of advice from Issam Issa and Joe Bayeh's solicitor Benjamin Barrak suggested that they had not made up their minds about holding a general meeting of BI Constructions on 26 June 2009. There was no instruction to send out the requisite notice to members. After the 13 July meeting, Issam Issa and Joe Bayeh both considered that a directors' meeting had taken place, as evidenced by the minutes of the 13 July meeting entitled 'minutes of a meeting of directors of BI Constructions Proprietary Limited'. No one within BI Constructions sought to correct the minutes to indicate that a meeting of members had taken place. The explanation that both a meeting of directors and a meeting of members had occurred on 13 July was not credible and was inconsistent with Issam Issa's affidavit sworn in November 2009. Issam Issa's affidavit sworn in November 2009 accurately deposed that the 'board resolved to terminate Samir Bayeh's directorship' and reflected what he believed had happened. The Form 484 signed by Issam Issa and lodged with ASIC only referred to a directors' meeting.  Although it was not necessary for Slattery J to decide, his Honour held that even if the 13 July meeting was a meeting of members, it was not convened in accordance with the requirements of the Corporations Act. In particular, any notice of meeting provided to Samir Bayeh failed to comply with most of the notice requirements under the Corporations Act. **(ii) Invalidity could not be cured by application of section 1322** Slattery J also rejected the argument advanced on behalf of BI Constructions that the deficiencies were procedural irregularities which may be cured by applying section 1322 of the Corporations Act. Slattery J held that where the irregularity results in a decision adverse to the interests of those complaining of the irregularity and the irregularity also constitutes a denial of the opportunity to speak against the decision, the court is unlikely to excuse such an irregularity. Additionally, Issam Issa and Joe Bayeh had deliberately pursued a course of action to remove Samir Bayeh as a director when they knew he was overseas and unlikely to be able to come to the meeting. In these circumstances, Slattery J declined to excuse the irregularity. **(iii) Subsequent resolutions commencing proceedings and engaging Cambridge were invalid** Following the 13 July meeting, Issam Issa and Joe Bayeh did not notify Samir Bayeh of any subsequent directors' meetings. The exclusion was deliberate and openly motivated by Issam Issa and Joe Bayeh's discontent at Samir Bayeh's refusal to provide them with an account of his financial dealings in relation to the development. For these reasons, his Honour considered that the irregularity in the failure to give notice to Samir Bayeh of the subsequent directors' meetings could not be excused by the application of section 1322 of the Corporations Act. The directors' meetings where it was resolved to commence proceedings and engage Cambridge were not validly convened and the resolutions were invalid. As a result, the directors of BI Constructions did not have actual authority to commence proceedings or engage Cambridge. Where the question of the authorisation of a solicitor to commence proceedings is in question, once there is sufficient evidence to infer a lack of authority the party challenged must establish actual authority to commence proceedings. BI Constructions failed to establish that it gave actual authority to Cambridge to commence the proceedings. **(iv) Future course of proceedings**Slattery J stayed the trust proceedings for 21 days to allow the parties an opportunity to come to an agreement about continuation of the proceedings and formulate a management plan.etailed Contents**5.8 ASIC permitted to produce overseas regulator's confidential documents to the court**(By Steven Rice, Freehills) In the matter of Trio Capital Limited (administrators appointed) [2010] NSWSC 454, New South Wales Supreme Court, Ward J, 13 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/454.html](http://www.austlii.edu.au/au/cases/nsw/NSWSC/2010/454.html%22%20%5Ct%20%22_new) **(a) Summary** The court dismissed two applications which would have had the effect of restraining the Australian Securities and Investments Commission (ASIC) from producing documents to the court. Those documents had been given to ASIC by the Securities and Futures Commission of Hong Kong (SFC). **(b) Facts** An Order for Production (Order) was issued by the court on application of the administrators of Trio Capital Limited (administrators appointed) (Trio). The Order sought to compel ASIC to produce documents that had been provided to ASIC by the SFC.  By Amended Notice of Motion, the applicants (Applicants) sought an order restraining ASIC from producing documents under the Order. The only documents which would have been required to be produced by ASIC under the Order were compulsorily produced to the SFC by the Applicants. The Applicants advanced the following submissions in support of the Amended Notice of Motion:ASIC was prohibited from producing the material to the administrators because of section 127 of the [Australian Securities and Investments Commission Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) (ASIC Act); and Public interest immunity would require the court find that documents produced by the SFC and subject to secrecy provisions in Hong Kong law should not be disclosed to third parties.  **(c) Decision**  The court dismissed the Amended Notice of Motion. **(i) Section 127 of the ASIC Act does not prevent production of the documents** Section 127(1) of the ASIC Act states:"ASIC must take all reasonable measures to protect from unauthorised use or disclosure information:(a)  given to it in confidence in or in connection with the performance of its functions or the exercise of its powers under the corporations legislation (other than the excluded provisions); or ."Her Honour did not accept the Applicant's contentions that the only forms of authorised disclosure under section 127 of the ASIC Act are those which are contained in the various subsections of that provision. In making this finding, her Honour:noted that section 127(6) of the ASIC Act provides that nothing in the preceding subsections limits what might be authorised use or disclosure of information; accepted the submission of the administrators that complying with a subpoena or order for production is not "unauthorised"; and followed the decisions in *Maronis Holdings Ltd v Nippon Credit Australia Ltd* [2000] NSWSC 138 (Maronis) and *Shipley v Masu Financial Management* [2008] NSWSC 1187 (Shipley). Maronis and Shipley are both authority that production to the court in compliance with an order for production is not "disclosure" within the meaning of section 127 of the ASIC Act. Accordingly, Ward J rejected the contention that ASIC was prohibited from producing the material to the administrators because of section 127 of the ASIC Act. **(ii) Public interest immunity does not apply** The Applicants asked the court to maintain an objection to ASIC producing the documents under the Order, notwithstanding that neither ASIC nor the SFC had raised public interest immunity as a ground for objecting to the Order. The Applicants submitted that public interest immunity should apply to the documents because:they had been produced to ASIC under the rubric of legislation which contained provisions which required the documents to be kept confidential; and a "Multilateral Memorandum of Understanding" to which ASIC and the SFC were parties evidenced an intention to maintain the confidentiality of documents provided between regulators, and that it was in the public interest for overseas regulators to be assured that documents they produced would be kept confidential.  Her Honour rejected the contention that public interest immunity would require the court to find that documentation produced by the SFC and subject to secrecy provisions in Hong Kong law should not be disclosed to the parties. This was because her Honour found:the Multilateral Memorandum of Understanding expressly contemplates that documents produced between regulators may later be released; the court should be slow to reach a conclusion that public interest immunity applies where it has not been raised as an objection to production (citing *Sankey v Whitlam* [1978] HCA 43); and it was not shown that the documents required to be produced under the Order were documents in respect of which public interest immunity is likely to attach. etailed Contents**5.9 Voluntary winding up - the exercise of a court's discretion in granting an order that ASIC deregister a company prior to the expiration of the statutory three month period** (By Amruta Bapat, Blake Dawson) Emergen-X Pty Limited (in liquidation), in the matter of Emergen-X Pty Limited (in liquidation) [2010] FCA 487, Federal Court of Australia, Jacobson J, 13 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/487.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/487.html%22%20%5Ct%20%22_new) **(a) Summary** The plaintiff, Specialist Pathology Services Pty Limited ("SPS"), sought an order under section 509(6) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") requiring ASIC to deregister the defendant, Emergen-X Pty Limited (in liquidation) ("Emergen-X"), before the expiration of the statutory three month period specified in section 509(5) of the Act.  This was necessary in order for SPS to obtain certain tax concessions which were contingent on the deregistration of Emergen-X before 3 June 2010.  This case considered the factors relevant to the exercise of a court's discretion to grant such an order.  In relation to the voluntary winding up of a company, section 509(6) of the Act allows a liquidator or interested party to apply for an order requiring ASIC to deregister the company on a specified day.  In the absence of such an order, section 509(5) provides that ASIC must deregister the company three months after lodgement of a return of the holding of the company's final meeting, as described in section 509(3) of the Act.   Jacobson J approved the application and granted the order requested by SPS.  The following issues were most relevant to the exercise of Jacobson J's discretion to grant the order: whether Emergen-X had any creditors; whether Emergen-X's members supported the grant of the order; whether ASIC opposed the application; and whether there were any reasons to reject the application on the basis of "commercial morality".  **(b) Facts** Emergen-X was registered in June 2005 and was in the business of conducting pathology services.  In 2009, the business assets of Emergen-X were sold and the company ceased operations in October of that year.  On 3 March 2010, a meeting of Emergen-X members was held, at which it was resolved to wind up the company.  The final members' meeting was held on 19 April 2010, and notice of the final meeting was lodged with ASIC on 21 April 2010.  This triggered the operation of the three month period referred to in section 509(5) of the Act, such that ASIC would have had to deregister Emergen-X on 21 July 2010 in the absence of a court order to the contrary.  SPS was a member of Emergen-X.  In order for SPS to be eligible for certain tax concessions (to the value of approximately $85,000), Emergen-X had to be deregistered before 3 June 2010.  SPS therefore sought an order under section 509(6) of the Act that ASIC deregister Emergen-X on 24 May 2010 (almost two months before the expiration of the three month period specified in section 509(5) of the Act).    **(c) Decision** Jacobson J granted the order requested by SPS.  His Honour noted that SPS was an "interested party" for the purposes of section 509(6) of the Act due to its status as a member of Emergen-X, and also because of its "obvious interest" in obtaining the abovementioned tax concessions.   His Honour discussed the underpinning policy grounds for the statutory three-month "grace period" provided in section 509(5) of the Act.  This grace period was held to serve the purpose of allowing affected persons (such as creditors) to come forward and make a claim before a company is deregistered, rather than having to seek an order reinstating the company after deregistration. In granting the order requested by SPS, Jacobson J was influenced by the following factors: Emergen-X had no creditors; Emergen-X's members and liquidator were in favour of the grant of the order; Emergen-X's liquidator had obtained clearance from the Australian Taxation Office prior to the final members' meeting; ASIC had submitted in writing that it did not propose to attend the hearing, or to oppose or consent to the application; and the tax concessions sought by SPS were legitimate and pursued in good faith, and thus there were no considerations of "commercial morality" weighing against the exercise of the court's discretion to grant the order.  The fact that Emergen-X had no creditors was considered by Jacobson J to be very important.  His Honour noted that the existence of a creditor wishing to bring a claim against Emergen-X would be a factor against the exercise of the Court's discretion.  Jacobson J held that, should a creditor emerge in the future and wish to pursue a claim against Emergen-X, such a creditor would be able to apply to have Emergen-X reinstated.   Jacobson J did not express any view on the merits of SPS's claims in relation to the tax concessions sought.  It was held that this issue would depend entirely on the terms of the relevant tax legislation.etailed Contents**5.10 Grounds for reporting exemption: Is disclosing confidential financial information an unreasonable burden?**(By Steven Grant, Minter Ellison) Brightstar Logistics Pty Ltd v Australian Securities and Investments Commission (No 2) [2010] FCA 435, Federal Court of Australia, Emmett J, 7 May 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/FCA/2010/435.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/435.html%22%20%5Ct%20%22_new) **(a) Summary** This case concerns the considerations which the Australian Securities and Investments Commission (Commission) may take into account when assessing whether reporting relief should be provided under section 340 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act). **(b) Facts**The appellant, Brightstar Logistics Pty Ltd (Brightstar) was a large proprietary company and disclosing entity for the purposes of the Act and accordingly was required to lodge annual and half-yearly reports with the respondent Commission.  Brightstar applied to the Commission for an order under section 340 of the Act relieving it from those reporting requirements.  Under section 340(1), the Commission may make an order in writing relieving a company from all or specified requirements of Part 2M.3 of the Act, including those reporting requirements.  A delegate of the Commission refused to grant the relief sought by Brightstar.  Brightstar then commenced a proceeding in the Administrative Appeals Tribunal (Tribunal) seeking review of the delegate's decision.  Following the Tribunal's decision to affirm the delegate's decision, Brightstar filed a notice of appeal to the Federal Court under section 44 of the [Administrative Appeals Tribunal Act 1975 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7115" \t "Default) (Tribunal Act) which provides for an appeal as of right from a decision of the Tribunal on a question of law. The relevant facts are as follows:Brightstar was a wholly owned subsidiary of Brightstar Corporation.  Brightstar Corporation was incorporated in the United States of America and was one of the largest global distributors of mobile telecommunications devices, but also specialises in providing a range of advisory and other functions to telecommunication service providers. Brightstar was a party to two agreements with Telstra Corporation Limited (Telstra) which accounted for virtually all of Brightstar's revenue.  Brightstar was concerned that, if it was required to comply with the reporting requirements, thereby making the reports publicly available, it would be significantly disadvantaged because suppliers would have access to information that was confidential.  In particular, Brightstar feared that suppliers would be able to approach Telstra direct using that information, which could lead to the loss of its contractual relationship with Telstra and in turn be damaging to its financial prospects.  Brightstar contended that the Tribunal ought to have been satisfied that complying with the relevant requirements to lodge reports would provide no relevant benefit and would impose unreasonable burdens on Brightstar by exposing it to the burden of substantial detriment or at least the risk of substantial detriment.   The grounds of appeal fell into two broad groups.  The first group arose from the requirement that, before an order under section 340 can be made, the decision maker must be satisfied that compliance would impose unreasonable burdens, having assessed and compared the risk of detriment and the magnitude of detriment.  Brightstar contended that the Tribunal misconstrued sections 340 and 342 in resolving those questions.  The second group concerned the Tribunal's decision making process.  In particular, Brightstar claimed that fifteen findings made by the Tribunal:were made without any basis in the material before the Tribunal; failed to afford Brightstar's witnesses the opportunity of dealing with the findings; and failed to explain how the findings were based on the material before the Tribunal. **(c) Decision** **(i)  Imposing an unreasonable burden** Section 342(1) relevantly provides that, before making an order under section 340, the Commission must be satisfied that complying with the relevant requirements of Part 2M.3 would impose unreasonable burdens.  Emmett J observed that there is nothing in section 342 that gives explicit guidance to a decision maker, except in relation to relief from compliance with the audit requirements.  However, the reporting requirements could not fairly be characterised as audit requirements and accordingly, the prescription for determining whether an unreasonable burden would be imposed by requiring compliance with the audit requirements under section 342(2), does not apply directly to a decision as to whether compliance with the reporting requirements would impose an unreasonable burden. Emmett J considered that the decision maker must engage in a balancing exercise between the benefit to the community in having available to it the reports required by Part 2M.3, and the burden imposed on a company by lodging the relevant reports with the Commission, thereby making them publicly available.  A further consideration is the extent and likelihood of possible detriment whereby the likelihood of detriment must also be a consideration in determining the extent of the burden that would be imposed by compliance. In this respect, Brightstar contended that the Tribunal failed to apply the correct test, in so far as the Tribunal concluded that the decision to exempt Brightstar from compliance with the relevant requirements could only be made if the feared burden was likely.  Rather, Brightstar contended that it is sufficient for an applicant to identify the potential for something to occur that will, if it does occur, be to the financial disadvantage of the applicant. Emmett J observed that the language of section 342(1) makes it clear that, before the decision maker can exercise the power to make an order under section 340, the decision maker must be satisfied that compliance would impose unreasonable burdens.  It is not sufficient that an applicant for relief believes or feels that compliance would impose unreasonable burdens.  Accordingly, the likelihood of the feared detriment eventuating is a factor to be considered in assessing the unreasonableness of the burden.  The decision maker must, therefore, investigate and examine the relationship between compliance and the identified burden and unless a relationship with cause and effect is established, at least on the balance of probabilities, the decision maker could not be satisfied and the jurisdictional threshold requirement would be satisfied.  Accordingly, Emmett J rejected Brightstar's contention and found that the first group of grounds was not made out. **(ii)  The Tribunal's decision making process** Central to the second group of grounds was the reverse engineering argument.  The argument involved a hypothetical exercise that Brightstar claimed its suppliers could carry out if they had access to the reports that Brightstar would be required to lodge, whereby:its suppliers would be in a position to make profit share calculations from information gleaned from the reports, and armed with such knowledge would or could act so as to squeeze Brightstar's existing profit levels in negotiations between the suppliers and Brightstar for the purchase of products; or its suppliers would or could attempt to negotiate for the sale of products, direct with Telstra, thus substantially interfering with Brightstar's existing contractual arrangements with Telstra.  In support of its contentions, Brightstar called four Brightstar executives as witnesses. It was critical for the reverse engineering argument that Brightstar demonstrate how a motivated inquisitor could deconstruct the relevant reports in such a way as to extract costs, expenses and income attributable to the third party logistics and supply chain optimisation/advisory services provided to Telstra, being two out of the three parts of Brightstar's commercial relationship with Telstra.  However, Emmett J concluded that there was no evidence from any supplier or market expert that suppliers would act in the way that Brightstar's witnesses said they anticipated suppliers might act.  Accordingly, the Tribunal was entitled to be unpersuaded by the fear or apprehension on the part of Brightstar's witnesses, given that it involved an assumption that Brightstar's profit was earned uniformly across the whole of its product range.   Brightstar further contended that the Tribunal had erred in making findings contrary to evidence or in the absence of evidence.  Emmett J noted that the Tribunal was not bound to come to the same conclusion as Brightstar about the possible or probable or likely consequences that would flow from lodgement of the reports, even if it accepted the evidence of the Brightstar witnesses as to their subjective beliefs, opinions or fears.  In this respect, Brightstar bore at least a persuasive onus to satisfy the Tribunal that the adverse consequences that its witnesses predicted would in fact result.  The fact that the Tribunal did not reach the same conclusion as the witnesses did not involve a rejection of the evidence of those witnesses or a finding contrary to the evidence of those witnesses.  Accordingly, it was incorrect to say that some or all of the challenged findings were made contrary to the evidence or material before the Tribunal. Brightstar further claimed that even if there was evidence to support each of the challenged findings, the Tribunal denied Brightstar procedural fairness by failing to provide any adequate opportunity for its witnesses to address the proposed findings.  Emmett J observed that the Tribunal did not challenge the honesty of Brightstar's witnesses, but rather the conclusions that should be drawn from their evidence, which were speculative by necessity.  Furthermore, the Tribunal was not bound to put to Brightstar's witnesses the reasoning that might lead it to reach a different conclusion as to the matters about which the Brightstar witnesses speculated in their evidence.  On this basis, there was no denial of procedural fairness on the part of the Tribunal in reaching a conclusion as to what might happen, or what might be likely to happen, in the event of disclosure of the relevant reports, that was different from the speculation on the part of Brightstar's witnesses as to what they feared or apprehended would happen or might be likely to happen. Brightstar also contended that the Tribunal failed to provide adequate reasons for its decision in accordance with the Tribunal Act.  Emmett J observed that the adequacy or otherwise of reasons is to be judged in light of the factual and legal issues raised in the proceeding, the evidence that is put to the Tribunal and the relationship between the evidence, the issues and the Tribunal's decision.  Given that Brightstar's contentions in relation to the reverse engineering argument involved conjecture and speculation by necessity, the ultimate question in the proceeding was one of judgment about whether the consequences feared by Brightstar were a real likelihood or no more than a bare possibility.  That question involved weighing different considerations and drawing appropriate inferences, which required a subjective assessment.  This did not require the Tribunal to form a view about the credibility of evidence given by witnesses called by Brightstar.   Provided the Tribunal identified any material finding of fact and referred to the evidence on which the finding was based, its obligation under the Tribunal Act to provide adequate reasons for its decision was satisfied. Emmett J then considered each of the findings challenged by Brightstar in turn.  In particular the following findings can be noted:The Tribunal found that the complexity of the detailed remuneration arrangements between Brightstar and Telstra would preclude a person from inferring any useful differentiation, for the purpose of analysing the significance of Brightstar's trading profitability, between the impact of Brightstar's activities related to initial product acquisition and the effect of its ongoing advisory functions.  Whilst Brightstar argued there was no evidence to support this finding, Emmett J found that Brightstar's evidence demonstrated how difficult it would be for an insider, let alone an outside inquisitor, to glean any useful information from the financial statements in the way contemplated by the reverse engineering argument. Brightstar argued that it was contrary to the evidence of the change in Telstra's purchasing price of handsets pre and post Brightstar, to conclude that financial statement disclosure would not materially, or meaningfully, increase either the commercial incentives for disruption of arrangements or materially influence others to act on those incentives.  However, Emmett J found that the Tribunal's conclusion as to the likely impact of disclosure of the financial statements was justified by the evidence that there was already substantial commercial motive to launch an attack on Brightstar and its exclusive arrangements with Telstra, yet none of the suppliers had done so or attempted to do so. Brightstar also contended that there was no evidence to support the Tribunal's conclusion that disclosure was unlikely to afford any meaningful opportunity to suppliers because disclosure was unlikely to affect Telstra.  Emmett J considered that given the substantial evidence that Telstra was extremely satisfied with the benefits that it derived from its dealings with Brightstar, the Tribunal was entitled to find that Telstra's satisfaction with Brightstar acted as a substantial impediment against any attempt by suppliers to seek to appropriate any part of Brightstar's business by approaching Telstra directly.  Furthermore, it was open to the Tribunal to find that unless a supplier or suppliers could offer to replace the whole of Brightstar's services to Telstra, there was no risk that Telstra would be persuaded to alter its existing arrangements with Brightstar.   **(iii) Orders** Accordingly, Emmett J found Brightstar had not made out any of the grounds it relied upon and dismissed the appeal with costs.etailed Contents**5.11 The court's focus when convening the first meeting of shareholders for a scheme** (By Maé Comber, Graduate, Freehills) Rusina Mining NL, in the matter of Rusina Mining [2010] FCA 517, Federal Court of Australia, Barker J, 30 April 2010 The full text of this judgment is available at: [http://www.austlii.edu.au/au/cases/cth/FCA/2010/517.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/517.html%22%20%5Ct%20%22_new)  **(a) Summary** The first requirement for a scheme of arrangement is for the court to order a meeting of company shareholders to vote on the approval of the scheme. This is the subject of Barker J's decision in the matter of *Rusina Mining* [2010] FCA 517 in which his Honour outlines the current authority on the role and processes of the court in making such an order. The scheme must thereafter be approved by the statutory majority of shareholders at the convened meeting and accepted by the court pursuant to Part 5.1 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). These latter processes are not currently in issue.  **(b) Facts**  The proposed transaction is a merger between Rusina Mining NL (Rusina), a listed company, and European Nickel plc (European Nickel) which is incorporated in the United Kingdom.  Pursuant to the scheme, the registered holder of five fully paid ordinary shares in Rusina will receive one ordinary fully paid share in European Nickel. As a condition precedent, all option holders must exercise their options to participate in the scheme or transfer or cancel their options in accordance with a separate agreement.  **(c) Decision** Justice Barker granted the application. His Honour was satisfied that the scheme met the preliminary statutory requirements as set out in section 411 of the Act and that adequate information had been disclosed to the members. **(i) The role of the court** Justice Barker outlined the role of the court in this application by reference to several important cases. In *Re CSR Ltd* [2010] FCAFC 34 (Re CSR Ltd), the Full Court of Australia favoured the principles laid out by Emmett J in *Re Central Pacific Minerals ML* [2002] FCA 239 which included that:the scheme must be of such a nature and in such terms that the court would likely approve it at the final stage; the court may have regard to the acceptability of the documentation, the commercial viability and morality of the arrangement; questions of public policy are taken into consideration, having regard to the best interests of the security holders and safeguards against technical and mechanical defects in the scheme; and by convening the meeting, the court is not agreeing to approve the arrangement at the final stage (at [6] of this decision and [8]-[11] in *Re Central Pacific Minerals NL*).  The members of the Full Court in Re CSR Ltd gave further consideration to the appropriateness of the court taking into account "public policy" and "commercial morality" at the first stage of convening a meeting. Justice Finkelstein took the view that these matters should not be primary at the convening hearing. There are many instances where it is not appropriate to consider the merits of the scheme at this stage (paraphrased at [8]). The joint judgment of Keane CJ and Jacobson J supported this reasoning and argued that it is not open to the court to refuse to convene a meeting simply on the ground that it would be likely rejected at the final hearing (at [66] of *Re CSR Ltd*).  Justice Barker concluded that these comments are consistent with those of Jacobson J in *Re Seven Network Ltd* [2010] FCA 220 (at [9]). In particular, Jacobson J argued that it was not for the court to substitute its commercial judgment for that of "informed shareholders". The result is that there is a heavy responsibility on the applicant seeking the order to ensure that all relevant matters are brought to the attention of the court.  **(ii) Technical requirements to convene a meeting** Justice Barker was satisfied that the technical requirements set out in sections 411(1) and (2) of the Act for the purposes of convening the first meeting were made out.  To outline a few points, the proposed merger falls within the scope of the sections, including that the scheme does not appear to be prohibited by the Rusina Constitution or have an improper purpose.  Ordinary fully paid shareholders in Rusina will be treated as a single class of members (excluding those who also hold shares in European Nickel). Option holders will fall either within or outside this classification on the basis that they will exercise, transfer or cancel their options as a condition precedent. ASIC had been given at least 14 days notice of the hearing which is a reasonable timeframe to examine the terms of the scheme. ASIC indicated that it did not intend to make submissions on the proposed scheme.**(iii) Adequate disclosure** Justice Barker accepted that the Scheme Booklet appeared to contain the material information relevant to shareholders in making their decision and that Rusina had considered that the Booklet should be prepared to a similar level of disclosure as that in Ch 6 of the Act for a scrip-for-scrip takeover offer (at [31]). This includes that an independent expert's report be commissioned. The report concluded that even though the scheme was not fair on the basis of the consideration, it was reasonable because of the potential benefits which may flow from the merger in the long term. **(iv) Bringing matters to the attention of the court** Rusina was required to direct the court to certain matters relevant to the application. One such matter is that courts have been concerned with convening a meeting where the consideration was subject to performance or creditor risk (in other words, where there is no security). His Honour considered these risks were minimal (citing the case of *Re Brambles Industries Ltd* (2006) 59 ACSR 501) because the consideration is shares in European Nickel which requires the approval of that company's shareholders as a condition precedent. The second matter which Barker J considered in this context was the appropriateness of the exclusively provisions as set out in the Merger Implementation Agreement (MIA). His Honour ultimately raised no objections. The negotiations appeared to be at arms length and the period of six months has been permissible in other cases (for example in *Re APN News & Media Ltd* (2007) 62 ACSR 400). Moreover, the MIA carves out adequate exceptions for the directors to uphold their fiduciary obligations.  His Honour was then directed to the reasonableness of the naked break fees which result in Rusina being liable to pay European Nickel US$250,000 when triggered by certain circumstances. These include where the shareholders vote against the scheme (a "naked" break fee) or the directors fail to recommend it. Even though European Nickel is also liable to pay US$250,000 as a break fee in certain circumstances, it is not triggered by European Nickel's shareholders failing to approve the scheme. In this sense, it is not a reciprocal arrangement and is only partially "naked".  Justice Barker was not deterred by this fact. In his view, a naked break fee which may be enforceable against Rusina is "essentially the price of buying the opportunity for the applicant's shareholders, which is akin to an option" (at [51]). A naked break fee is not per se unfair. Justice Barker confirmed that the issue is whether the break fee operates as a penalty or is likely to coerce shareholders into voting in favour of the scheme.  On these facts, the break fee is below the 1% equity value of Rusina which is less than the benchmark proposed by the Takeovers Panel as not likely to coerce (see Takeovers Panel Guidance Note 7 at [8]). The risk of paying the break fee is reasonable in light of the benefits which are expected to flow from the scheme.Similarly, the factors which trigger the break fee do not oblige a Rusina director (either in that capacity or in a personal capacity) to breach any legal duties. Any concerns in that regard may be raised by any member at the convened meeting and dealt with in accordance with the "commerciality" of the scheme proposal. Accordingly, Barker J did not see any future impediments to the court approving the scheme at the final stage. **(v) Appropriateness of the scheme of arrangement** The final discussion point for this initial application was whether the court was satisfied the objectives of the parties could have been achieved by the procedures set out in Ch 6 of the Act (in other words, not attempting to avoid the takeover provisions). Rusina submitted that if the proposed merger is effected via the takeover provisions, it would be a two step process which can be more easily satisfied in a one step process by way of a scheme. Rusina argued that it was unlikely the takeover would be accepted to the full 100% in the first instance, and therefore, it would have to undertake to compulsorily acquire any remainder interests once it achieved a 90% majority. On this basis, Rusina submitted that:"where there is a feature of the scheme that cannot, or cannot necessarily, be achieved in a takeover under Ch 6, a specific intention to avoid the operation of a provision of Ch 6 should not be inferred, from a party's desire to take advantage of a perceived or actual procedural advantage of effecting a merger under Part 5.1, rather than a takeover under Ch 6" (at [58] citing numerous case examples in support).Justice Barker referred this issue for a latter stage in the approval process and concluded that there was insufficient evidence to justify putting a stop to the scheme approval process on this basis alone.etailed Contents**5.12 The effect of a DOCA on directors' guarantees**(By Zac Chami and Sarah Foley, Clayton Utz) Boral Bricks Pty Ltd v Davey [2010] QSC 131, Supreme Court of Queensland, Douglas J, 30 April 2010 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/qld/QSC/2010/131.html](http://www.austlii.edu.au/au/cases/qld/QSC/2010/131.html%22%20%5Ct%20%22_new) **(a) Summary** In *Boral Bricks Pty Ltd v Davey* [2010] QSC 131, the defendants argued in defence to a claim for payment of a debt owed by Norlis Pty Ltd (Company), of which they were guarantors, that the Deed of Company Arrangement (DOCA) released the guarantors from any liability to pay any debt owed by the company to a creditor. This was said by the defendants to be the effect of clause 9.2 of the DOCA which deemed that all of the Applicant's liabilities had been paid. Applying the reasoning of the High Court's decision in *Lehman Bros Holdings Inc v City of Swan* [2010] HCA 11 (Lehman Decision), Douglas J held that the DOCA could not bind creditors in respect of a claim against a third party, in this case the guarantors.  **(b) Facts**  Boral Bricks Pty Ltd, a creditor of the Company, brought an application for summary judgment against the Company's directors for the payment of a debt of $14,145.24 and for a declaration that the Applicant was an equitable chargee of land owned by the guarantors. The Applicant also sought orders for the sale of the land. The Respondent Directors were guarantors of the Company's debts.  Two defences were raised by the Respondents, namely that:the DOCA released the claims against the Directors as guarantors; and the charging clause did not apply to the land over which the charge was claimed because the Defendants had a legal and not an equitable interest in that land.**(c) Decision**  **(i) The DOCA defence**  Clause 8.2 of the DOCA purported to release all of the indemnities, guarantees and other claims against the Company's directors to the same extent that claims against the Company were released or satisfied by the DOCA.  As noted by Douglas J, such a clause had been found in the Lehman Decision not to affect a creditors' rights under a guarantee or indemnity.    However, the Respondents relied on clause 9.2 of the DOCA which provided that all of the Company's "liabilities shall have been deemed to have been paid and fully satisfied in full regardless of when any amount is actually received by each Creditor from the Deed Administrator".  They argued that this clause was different to a release clause, because it deemed all of the debts owed by the Company to the Applicant to have been paid, with the result there was no remaining claim for which the guarantors could be liable. The issue was whether clause 9.2 of the DOCA, being a deeming provision, could be treated differently to clause 8.2 of the DOCA, the release provision.  The question turned on the language of section 444D(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Act) which provides: (1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i).One simple answer identified by his Honour was that the Applicant in this case was suing on its indemnity, not as creditor of the Company but pursuant to the guarantor's independent liability to it. In response, the Respondents claimed that the DOCA bound all creditors (not only those who voted in favour of it) such that the Applicant, as a creditor, was required to acknowledge that its debts had been deemed to have been paid in full.  In construing section 444D(1) of the Act, Douglas J referred to the Lehman decision where the majority of the High Court stated: "the critical observation to make is an observation about the text of section 444D(1). That sub-section identifies who is to be bound by a deed of company arrangement ('all creditors of the company') but at once proceeds (by the 'so far as concerns' clause) to limit the extent to which those creditors are to be bound ('so far as concerns identified claims'). Contrary to submissions of Lehman Holdings and Lehman Asia, there is no textual footing for reading the word 'claims', in the 'so far as concerns' clause in section 444D(1), as including claims against persons other than the subject company."His Honour also referred to the judgment of Heydon J in that case: "in relation to a contention that the statute permits the extinguishment of the proprietary rights of minority creditors against persons other than the company without fair compensation, the rule of construction poses the inquiry whether there are clear and unambiguous words supporting that quite different outcome."Having regard to that reasoning, with which his Honour agreed, he concluded that if a moratorium or release (of the kind dealt with in the Lehman decision), construed in light of section 444D(1), does not bind the creditors of guarantors, there is no logical reason why a deemed payment should.   **(ii) The charging clause defence** The charge created by clause 9 of the guarantee extended to all the guarantors' "equitable interest in freehold or leasehold property". However, the Respondents argued that their interest in the subject land was a legal, not an equitable, interest.  His Honour held that the charge was effective, accepting an argument raised by the Applicant that the property was intended to be used as security.  His Honour relied on the decision of Philippides J in *Boral Resources (Qld) Pty Ltd v Andrews* (No 13789 of 2009; 3 March 2010, unreported) and referred to her Honour's statement that: "It is sufficient if the court can fairly gather from the language of the instrument that the intention of the parties is to constitute the property referred to as a security".  Douglas J also considered that there was a respectable argument for the word "equitable" being used mistakenly.  The surrounding circumstances in this case suggested that an equitable charge was intended to be created over the land, not a charge over an equitable interest in the land. **(iii) Implications for guarantors** Deeds of Company Arrangement cannot be used to subvert a guarantor's obligations in respect of a company's debts. Section 444D(1) of the Act has been construed narrowly by the courts such that creditors are bound by that section only to the limited extent identified in that provision - the assent of some creditors to the giving up of claims against another does not bind other creditors and, more particularly, the Act does not bind creditors to give up a claim against another person other than the subject company such as a third party guarantor or indemnifier.etailed Contents |

 |

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |  |
| --- | --- | --- |
| **6. Contributions** |  | ext Section |

 |
| http://my.lawlex.com.au/alert/pic/spacer.gif |
|

|  |
| --- |
| If you would like to contribute an article or news item to the Bulletin, please email it to: "cclsr@law.unimelb.edu.au".etailed Contents |

 |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |  |  |  |
| --- | --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif |

|  |
| --- |
| **DISCLAIMER**This email alert is not intended to be and is not a complete or definitive statement of the law on the relevant subject matter. No person should take any action or refrain from taking any action in reliance upon the contents of this alert without first obtaining advice from a qualified practitioner. SAI Global expressly disclaims liability for any loss or damage suffered howsoever caused whether due to negligence or otherwise arising from the use of this information. For further information or if you have received this notice in error or believe that the email has been forwarded to you in breach of our licence terms, please notify SAI Global immediately by telephone on 03 9278 1555 or email helpdesk.asiapac@saiglobal.com. |

 | http://my.lawlex.com.au/alert/pic/spacer.gif |
|   |
|

|  |  |  |
| --- | --- | --- |
| http://my.lawlex.com.au/alert/pic/spacer.gif | Copyright © 2010, Anstat Pty Ltd an SAI Global Company ABN 115 133 152. All rights reserved.  | http://my.lawlex.com.au/alert/pic/spacer.gif |

 |

Sent to : i.ramsay@unimelb.edu.au