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[View previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | [odify My Newsfeed](http://my.lawlex.com.au/default.asp?goto=news_sub) [earch Newsfeed Archive](http://my.lawlex.com.au/default.asp?goto=news) [iew user guide](http://my.lawlex.com.au/content/static/LawlexGeneralUserGuide.pdf) [earch the law](http://my.lawlex.com.au/default.asp?goto=search_leg) [bout legislative alert](http://www.lawlex.com.au/content/view/69/0) [bout SH&E Monitor](http://www.lawlex.com.au/content/view/94/146/)[bout SAI Global](http://www.saiglobal.com/) | | |  | | --- | | COPYRIGHT WARNING Use 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](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%231) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer%281%29.gif | | | [1. 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The buyer could also have the option to buy the shares at the later date although the CfD does not confer a right to buy them. The holder of a CfD on a company's shares has an economic interest in the company, without direct ownership of shares in the company.   The consultation paper sets out analysis of evidence, which shows how potential market failures could occur from using CfDs on an undisclosed basis to influence corporate governance and build up stakes in companies. These failures, although not widespread, need to be addressed to ensure market confidence and efficiency are maintained.   The paper proposes two alternative approaches to securing greater disclosure.  The first approach would strengthen the current disclosure regime by requiring a disclosure of any CfDs written in reference to 3% or more of total voting rights attached to a company's shares unless it was clear that:   * the CfD holder could not exercise or seek to exercise voting rights and had made a clear statement to that effect; and * there were no arrangements or understandings in relation to the potential sale of the underlying shares by the CfD holder.   The majority of CfDs are expected to fall within this "safe harbour", removing the need for disclosure.    In addition, this proposal would enable companies to request a notification if they believed a CfD holder had an economic interest of 5% or more of the company's shares regardless of 'safe harbours'. It would also make clear the responsibilities of a CfD holder to ensure that any statements made about voting rights in a company are clear and not misleading. The proposals would also make it harder for CfD holders to build up significant stakes in companies without disclosure. The cost of implementing such targeted disclosure is expected to be minimal.    The alternative approach is a general disclosure regime which would achieve the same objectives by requiring CfD holders to reveal all economic interest of stakes of 5% or more in a company's shares. This would be broadly equivalent to extending the UK Takeover Panel's current regime in an offer period. The total direct cost of implementation could be about £20-50 million with potential wider costs to the CfD and equity market as a whole. While this regime would cost more it would entail simpler rules.   Any rule changes would only apply to CfDs relating to UK shares admitted to trading on a regulated or prescribed market. This includes shares admitted to the regulated markets of UK Recognised Investment Exchanges and the Alternative Investment Market (AIM). The paper also details how the proposed changes would work with existing Takeover Panel rules on disclosure.  The consultation period will last for 3 months and end on 12 February 2008.  Further information is available on the [FSA](http://www.fsa.gov.uk/Pages/Library/Policy/CP/2007/07_20.shtml" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.2 IOSCO launches task force on recent market events**   On 8 November 2007, the International Organization of Securities Commissions (IOSCO) announced the creation of a Task Force on the subprime crisis to review the issues facing securities regulators following the recent events in the global credit markets.    The Task Force will conduct a preliminary review of the issues raised by these events in order to identify any implications for securities regulators which could be addressed through current and future IOSCO work. The review will complement the work being undertaken by other regulatory and governmental bodies in assessing how markets have reacted to the recent events in the credit markets. One of the objectives of the Task Force is to ensure that the implications for securities regulation are reviewed in a systematic manner.    The Task Force will concentrate its work in the following areas:    **Risk management/prudential supervision**: arising from broker dealer firms involvement in the trading of structured products it will examine their risk assessment processes and assess whether their current models of risk management are sufficiently robust.   **Transparency/due diligence**: the Task Force will analyse:   * What types of data investors, and in particular mutual funds, rely on for investing in structured products; * Whether information provided by issuers and arrangers of structured financial products to their clients is sufficient to assess the quality of the product and whether additional information at the time of, or subsequent to, issuance of the product may benefit market efficiency and stability; and * Whether regulators receive sufficient information regarding the structured product markets to protect investors in, and ensure the efficiency and stability of, public securities markets.   **Valuation of assets/accounting issues**: given that investors may have relied on the ratings provided by credit rating agencies as not only an assessment of the probability of default by an entity, but also as an assessment of the product's liquidity, the Task Force will assess whether alternative models of valuation are needed and whether IOSCO should develop valuation principles or best practices in this area.    The Task Force, in order to evaluate potential problems raised by the accounting treatment of structured products, will also consider revisiting last year's the report on special purpose vehicles (SPVs) in order to better analyse the mechanisms whereby SPVs are kept on the balance sheet and the possible implications in terms of risk measurement and information to investors where listed companies are involved.    **Credit rating agencies (CRAs)**: co-ordinate with the CRA Task Force to analyse the questions raised by the recent events concerning the role of CRAs and how they relate to the subprime crisis and whether the IOSCO CRA Code of Conduct adequately addresses any conflicts of interest that may be relevant.    It is anticipated that the Task Force will present its final report to the Technical Committee in May 2008 during IOSCO's Annual Conference in Paris.    Further information is available on the [IOSCO](http://www.iosco.org/" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.3 Financial services roundtable unveils blueprint for US financial competitiveness**   On 7 November 2007, the US Financial Services Roundtable unveiled its "Blueprint for US Financial Competitiveness", a plan of action which seeks to ensure that the US maintains a competitive position in the global financial marketplace through principles-based regulation; eight "must do" reforms; and modernized charters and new national charter options.    This Blueprint is the work of a 62-member Blue Ribbon Commission on Enhancing Competitiveness created by The Financial Services Roundtable and chaired by Richard M. Kovacevich, Chairman, Wells Fargo & Company; and James Dimon, Chairman and CEO, JPMorgan Chase and Co.    Within the past year, three reports on US financial competitiveness including the Bloomberg-Schumer Report have called for a system of principles-based regulation.    The Commission developed The Blueprint which offers 68 specific recommendations and identifies the six Guiding Principles that form the foundation of a stronger regulatory system. They are:   1. Fair treatment for consumers; 2. Competitive and innovative financial markets; 3. Proportionate, risk-based regulation; 4. Prudential supervision and enforcement; 5. Options for serving consumers; and 6. Management responsibilities.   The Blueprint targets eight specific policy areas where principles-based financial regulation could be implemented to achieve better policy and regulatory outcomes for financial services firms and the consumers they serve. They are prudential supervision, litigation reform, consumer credit and opportunities for long-term financial security, anti-money laundering, risk-based capital regulation, insurance regulation, Sarbanes-Oxley Act (section 404), and U.S. and international accounting standards.    The Blueprint also endorses charter choice for financial firms, a key component of which is the modernization of existing depository institution charters. This would involve removing outdated restrictions and impediments to competition.  In addition, The Blueprint calls for the creation of three new national charter options for financial services firms: an optional national insurance charter, an optional national securities charter, and an optional universal financial services charter.   The report is available on the Financial Services Roundtable's website at: [http://www.fsround.org/](http://www.fsround.org/" \t "default)  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.4 Australian CEO turnover remains close to record high**   Australian CEOs were replaced with close to record frequency in 2006 yet the average time they spent in the job increased, according to a study by Booz Allen Hamilton published on 7 November 2007.   Fifteen per cent of Australian ASX 200 CEOs departed their post in 2006, down slightly from the record high of 15.5% recorded in 2005 and close to the average global CEO turnover rate of 14.3%. The percentage of departures linked to poor CEO performance - rather than a merger or regular transition - increased to 4.0% in 2006, up from 2.5% in 2004.  However, while the revolving door for CEOs in Australia continues to move at a rapid rate, CEOs appear to be staying in their jobs longer. The average tenure of departing Australian CEOs in 2006 increased to 7.4 years, compared to average CEO tenure globally of 7.8 years. On a long-term average, however, Australian CEOs still enjoy far less time in the job than their counterparts overseas, with average CEO tenure in Australia since 2000 at 5.9 years compared to 7.2 years globally.  The 2006 study reveals the balance in CEO recruitment is swinging back to internal candidates, with new CEO appointments from within, at 57%, outnumbering external appointments for the first time in seven years. It also showed departing CEOs in 2006 who had been internally sourced generated greater shareholder returns than those recruited externally.  Booz Allen's periodic Australian CEO Turnover Study analyses CEO departures at ASX 200 companies and compares findings with the firm's annual Global CEO Turnover Study, examining CEO departures among the world's largest 2,500 listed companies. CEO departures are classified as being for performance reasons, merger-related or regular transitions.  Booz Allen's 2006 study showed a steady and consistent improvement over the previous four years in shareholder returns generated by internally sourced CEOs. In 2006, internal hires had generated an average return of 21%, compared to 17% for CEOs appointed from outside.    In other findings from Booz Allen's 2006 CEO Turnover study:   * Australian Boards have become less tolerant of under-performing CEOs, with the average tenure of CEOs undergoing forced departures in 2006 only three years, compared to average tenure of 4.4 years for under-performing CEOs since 2000. At the same time, Australian CEOs appear to be benefiting from a less turbulent corporate environment than in the US or Europe; in 2006, 57% of departing Australian CEOs underwent regular transitions, whereas globally this was the case for only 46% of departing CEOs. This reflects relatively lower levels of M&A activity in Australia. * Globally the annual rate of CEO Turnover increased by 59% between 1995 and 2006, with the proportion of performance-related (or forced) turnovers increasing by 418% in this period. The CEO turnover rate of 15.0% in Australia in 2006 was slightly below that of 15.4% in North America and Europe, and above the 14.5% recorded in Japan and 9.9% in the rest of Asia. * M&A activity has become an increasingly important driver of CEO departures globally (but not in Australia). While frequency of both regular (e.g. retirement) and forced successions declined in 2006, the proportion of CEOs who left because of a merger rose. Merger-related departures as a percentage of all departures globally in 2006 rose to 22% compared to 11% in 2003. * Globally, boardroom infighting is taking a higher toll on CEOs, with 11.0% of CEO departures linked to boardroom conflicts in 2006 compared to only 2.0% in 1995.   Further information is available on the [Booz Allen](http://www.boozallen.com.au/" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.5 Entry into force of MiFID**    On 1 November 2007, the European Markets in Financial Services Directive came into force. MiFID will increase competition among exchanges, multilateral trading facilities (MTFs) and investment firms, giving them a "single passport" to operate throughout the EU on the basis of authorisation in their home Member State. Investors will not only have access to a greater number of trading venues, but also a more robust and comprehensive framework ensuring high levels of investor protection. Significant market developments are already underway in anticipation of this new, more competitive environment.    The "passport" will enable authorised investment firms, banks and exchanges to provide their services freely across borders by harmonising national rules for investment services and the operation of exchanges. It will benefit investors, issuers and market participants by promoting efficient and competitive markets, notably by allowing banks and other investment institutions to compete fairly with stock exchanges as trading venues in their own right, something which has until now not been possible in some Member States.    The body vested with the monitoring of firms covered by MiFID, the Committee of European Securities Regulators (CESR), has issued detailed guidance on transitional arrangements.   Further information is available on the [Europa](http://ec.europa.eu/internal_market/securities/isd/mifid_en.htm" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.6 World Economic Forum's global competitiveness index**    The United States tops the overall ranking in the Global Competitiveness Report 2007-2008, released on 31 October 2007 by the World Economic Forum. Switzerland is in second position followed by Denmark, Sweden, Germany, Finland and Singapore, respectively. Australia is ranked 19. Chile is the highest ranked country in Latin America, followed by Mexico and Costa Rica. China and India continue to lead the way among large developing economies. Several countries in the Middle East and North Africa region are in the upper half of the rankings, led by Israel, Kuwait, Qatar, Tunisia, Saudi Arabia and the United Arab Emirates. In sub-Saharan Africa, only South Africa and Mauritius feature in the top half of the rankings, with several countries from the region positioned at the very bottom.   The rankings are calculated from both publicly available data and the Executive Opinion Survey, a comprehensive annual survey conducted by the World Economic Forum together with its network of Partner Institutes (leading research institutes and business organizations) in the countries covered by the Report. This year, over 11,000 business leaders were polled in a record 131 countries. The survey is designed to capture a broad range of factors affecting an economy's business climate. The Report also includes comprehensive listings of the main strengths and weaknesses of countries, making it possible to identify key priorities for policy reform.   **The global competitiveness index 2007 - Top 10**   |  |  |  | | --- | --- | --- | | 1 | United States | 5.67 | | 2 | Switzerland | 5.62 | | 3 | Denmark | 5.55 | | 4 | Sweden | 5.54 | | 5 | Germany | 5.51 | | 6 | Finland | 5.49 | | 7 | Singapore | 5.45 | | 8 | Japan | 5.43 | | 9 | United Kingdom | 5.41 | | 10 | Netherlands | 5.40 |   The Global Competitiveness Report's overall competitiveness ranking is the Global Competitiveness Index (GCI). The GCI is based on 12 pillars of competitiveness, providing a comprehensive picture of the competitiveness. The pillars include: Institutions, Infrastructure, Macroeconomic Stability, Health and Primary Education, Higher Education and Training, Goods Market Efficiency, Labor Market Efficiency, Financial Market Sophistication, Technological Readiness, Market Size, Business Sophistication and Innovation.   A second part of the Report provides a more detailed examination of the microeconomic aspects of competitiveness, presented in the Business Competitiveness Index (BCI). Countries that do well on the GCI also tend to do well on the BCI but there are some important differences.    The BCI finds many European countries, especially Switzerland, Norway and Spain, to have wages much above the level supported by their competitiveness. The BCI rankings and subindexes on company operations and strategy, and business environment quality are found in Chapter 1.2 of the report entitled "The Microeconomic Foundations of Prosperity: Findings from the Business Competitiveness Index".   The report contains a detailed country/economy profile for each of the 131 economies featured in the study, providing a comprehensive summary of the overall position in the rankings as well as the most prominent competitive advantages and competitive disadvantages of each country/economy based on the analysis used in computing the rankings. Also included is an extensive section of data tables with global rankings covering over 110 indicators.   The report is available on the [World Economic Forum](http://www.weforum.org/en/initiatives/gcp/Global%20Competitiveness%20Report/index.htm" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.7 FTC releases consumer fraud survey**   On 29 October 2007, the US Federal Trade Commission (FTC) released a statistical survey of fraud in the United States which shows that 30.2 million adults or 13.5 percent of the adult population were victims of fraud during the year studied. More people (an estimated 4.8 million US consumers) were victims of fraudulent weight-loss products than any of the other frauds covered by the survey.   Fraudulent foreign lottery offers and buyers club memberships tied for second place in the survey. Lottery scams occur when consumers are told they have won a foreign lottery that they had not entered. Victims supplied either personal information such as their bank account numbers or paid money to receive their "winnings." In the case of buyers clubs, victims are billed for a "membership" they had not agreed to buy. An estimated 3.2 million people were victims of these frauds during the period studied.   Fraudulent prize promotion schemes ranked fourth in the fraud survey, with an estimated 2.7 million victims reporting making a purchase, a payment, or attending a sales presentation to receive a prize that either was never delivered or was not what the consumer expected. Work-at-home programs, in which the purchaser earned less than half of the income the seller had promised, ranked fifth among the fraudulent schemes covered by the survey. An estimated 2.4 million individuals fell victim to these schemes, and many purchased more than one fraudulent work-at-home program. Consumers also reported falling victim to other specific scams, including pyramid schemes.   Print advertising, direct mail, including catalogues, newspaper and magazine advertising, and posters and flyers was used to pitch fraudulent offers in 27 percent of reported incidents. The Internet, including Web sites, auction sites, and email, was used to make 22 percent of the fraudulent pitches. Television or radio accounted for 21 percent of the pitches, and telemarketing accounted for nine percent.  Further information is available on the [FTC](http://www.ftc.gov/index.shtml" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.8 Europe's highest court strikes down takeover protections in German company**   (By Ilene Knable Gotts and David A Katz, Wachtell, Lipton, Rosen and Katz)   On 26 October 2007, the European Union's highest court, the European Court of Justice, concluded that Germany's 47 year old "Volkswagen law" restricts the free movement of capital in the European Community and is, therefore, not permissible: Commission v Germany, Case No C-112/05 (23 October 2007).    Germany had argued that the law is not a national measure that limits the acquisition of shares in undertakings or deters investors of other Member States from investing their capital. The European Commission disagreed and, following repeated unsuccessful initiatives seeking to have Germany revoke the law, the EC initiated suit against Germany in March 2005.   Specifically, the court struck down each of the following "golden share" type provisions that had the cumulative effect of insulating Volkswagen AG from purchase by an acquirer not acceptable to the Federal Republic of Germany and the northern German state of Lower Saxony (where Volkswagen is headquartered):   * The court found impermissible a provision that prevented any single shareholder in Volkswagen from casting more than 20% of the votes (even if the shareholder held more than 20%). This provision had the practical effect of limiting Porsche, with a 31% stake in Volkswagen, from exercising its voting rights in full or pursuing a takeover. * The court struck down a law that required a supermajority vote of over 80% of the shares to approve any resolution presented to shareholders, which effectively provided Germany and Saxony with blocking rights over any such resolution since each held 20% of Volkswagen's capital at the time the supermajority vote requirement was adopted. * The court found that the right granted to each of Germany and Saxony to appoint two representatives to the Volkswagen supervisory board improperly deterred investors from other Member States from investing in Volkswagen's capital. The court specifically rejected Germany's assertions that such a law was needed to protect workers' interests.   The immediate impact of the court decision is that it could allow Porsche to attempt to acquire Volkswagen. However, the decision has greater implications since it sends a strong message to Member States that the free movement of capital within the European Community will take precedence over a Member State's individual industrial policy. The court has ruled consistently in favor of the EC against attempts by Member States to protect companies or industries, including the fostering of "National Champions" and the provision of state aid.   The decision follows other recent EU rulings prohibiting golden share structures and comparable arrangements. While the Volkswagen law technically did not involve a golden share, many of the same principles were inherent in its construct.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.9 Ownership rules for audit firms: study on the impact on the audit market**   On 23 October 2007, the European Commission published an independent study on the ownership rules that apply to audit firms and their consequences on audit market concentration. The study analyses whether changes to the ownership rules of audit firms might help increase the number of international players in the audit market. At present, the European Statutory Audit Directive requires that auditors hold a majority of the voting rights in an audit firm and control the management board. The study will contribute to the Commission's work on how to improve competition in the audit market.    **Key conclusions of the study**   * The audit market for major listed companies is dominated by the Big Four audit firms. For the smaller audit firms, important investments might be necessary over years in order to expand and to enter the international audit market. * Analysis of an investment model developed to assess such potential expansion plans indicates that an audit firm owned by external investors, instead of auditors, might take more easily the decision to expand into the market of large audits. One of the reasons is that existing ownership structures may be estimated to increase audit firms' cost of raising capital by perhaps as much as 10%. * Nevertheless, restrictions on access to capital appear to represent only one of several potential barriers to entry. There are other barriers which also play an important role: reputation, the need for international coverage, international management structures, and liability risk. The impact of liability risk on the cost of capital can be significant and may lead to capital rationing. * There may also be good reasons for audit firms to stick to their current structures: for example, to retain their human capital. From the regulatory point of view, existing ownership structures have been justified by the necessity to protect independence of audit firms. However, the analysis of the decision-making processes in large audit firms indicates that alternative ownership structures are unlikely to impair auditor independence in practice. Specific conflicts of interest could be dealt with through the establishment of appropriate safeguards.   The study is available on the [Europa](http://ec.europa.eu/internal_market/auditing/market/index_en.htm" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.10 Guidance papers on insurance solvency assessment**   On 22 October 2007, the International Association of Insurance Supervisors (IAIS) issued three guidance papers on solvency assessment. The papers identify key features which the IAIS encourages supervisors to consider in their particular solvency regimes to assist them in establishing and maintaining well-regulated insurance industries. They encompass quantitative and qualitative aspects of solvency assessment and provide guidance to supervisors in the following areas:   * the structure of regulatory capital requirements; * enterprise risk management for capital adequacy and solvency purposes; and * the use of internal models for risk and capital management by insurers.   These papers pave the way towards enhanced transparency and comparability of supervisory practice in support of the IAIS's longer term objective to facilitate improved convergence towards a globally accepted risk-based solvency assessment regime for insurers. They will form the foundation on which high-level principles-based solvency assessment standards will be developed.   The IAIS is also planning further work in the specific areas of valuation of assets and liabilities and determination of capital resources for solvency purposes as it continues its efforts to expand the suite of documentation on solvency assessment. These initiatives will contribute towards promoting efficient and well-regulated insurance markets worldwide and ultimately, supports the preservation of global financial stability.  The IAIS solvency guidance papers are available on the [IAIS](http://www.iaisweb.org/" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.11 Whose company is it? New insights into the debate over shareholders vs stakeholders**   Does the corporation exist for the benefit of shareholders, or does it have other, equally important stakeholders, such as employees, customers and suppliers?   A new study titled, "Stakeholder Capitalism, Corporate Governance and Firm Value," by Wharton finance Professor Franklin Allen, Elena Carletti of the Center for Financial Studies at the University of Frankfurt and Robert Marquez of Arizona State University does not provide a definitive answer. But in showing the various benefits of the stakeholder approach, it demonstrates that the issue is not as settled as some researchers and business people in the United States, United Kingdom and other shareholder-oriented nations might think.   Several conclusions emerge from the study, which uses a mathematical model to explore the advantages and disadvantages of stakeholder-oriented firms. First, stakeholder-oriented companies have lower output and higher prices, and can have greater firm value than shareholder-oriented firms. Second, firms may voluntarily choose to be stakeholder-oriented because it will increase their value, according to the study.   Third, the researchers find that consumers who prefer to buy goods and services from stakeholder firms can increase the number of stakeholder-oriented companies in a society. Finally, the study shows that, with the rise of globalization, domestic companies (both the stakeholder and shareholder types) earn more profits when stakeholder-oriented firms from foreign countries, rather than foreign shareholder-oriented firms, enter those domestic companies' markets.    Although the study finds much to like about stakeholder-oriented companies, it does unearth one downside: Consumers can be harmed by the higher prices charged by stakeholder firms. Higher prices enable these firms to put into practice the often-costly governance structures that benefit people other than shareholders.   The study comes at a time when some countries with a stakeholder-oriented business climate, such as Germany and France, have felt pressure to revive their economies by adopting policies that are closer to the shareholder-oriented view.  The study adds to the discussion of corporate governance and the role of corporations vis-a-vis their stakeholders. In the United States, directors have a fiduciary responsibility to act in the interests of shareholders. According to the authors, most academic literature on governance begins with this perspective and, indeed, this is the dominant orientation of the business and investment communities of countries such as the US and UK.  But in many societies, the maximization of shareholder value is far from the accepted corporate paradigm. In their study, Allen and his co-authors discuss other countries where the interests of parties other than shareholders have bearing on the corporate policies.  The study is available at [here](http://finance.wharton.upenn.edu/%7Eallenf/download/Vita/corporate-governance-RFS-08-04-07.pdf" \t "default).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.12 Steps to improve choice in the UK audit market**    On 16 October 2007, the UK Financial Reporting Council (FRC) announced details of the implementation phase of its Choice in the UK Audit Market project following publication of the final report of its Market Participants Group.    **(a) Background**   The Market Participants Group (MPG) was established in October 2006 to provide advice to the Financial Reporting Council on market-led actions to mitigate the risk that could arise in the event of one or more of the Big Four audit firms leaving the market. The Group's final report contained 15 recommendations to enhance the efficiency of the UK audit market.   **(b) Implementation arrangements**   The FRC announcement summarises how the MPG's 15 recommendations will be implemented. The recommendations are ultimately targeted to audit firms, companies and investors, although in some cases enabling actions by professional bodies, regulators or legislators may first be needed and these are shown in the tables.   Some of the steps planned for the implementation phase include:   * Preparation of guidance to audit firms on reporting their capabilities, governance arrangements and profitability. * Preparation of guidance to companies on providing shareholders with information on their auditor selection policy and on the use of audit firms from more than one network. * Further consideration of changes to audit firm ownership rules.   Any material changes to regulatory arrangements will be assessed for proportionality and effectiveness, with stakeholders being consulted before decisions are taken.   The FRC will make a public report every six months on progress in implementing the recommendations.   **(c) Final report of Audit Choice Market Participants Group**    On 16 October 2007, the FRC published the final report of the MPG that is advising the FRC on its Choice in the UK Audit Market project. The Group's 15 recommendations are set out below.   **(i) Background**   An outcome of the first stage of the Choice in the UK Audit Market project was a strong preference amongst stakeholders for market-led solutions. The MPG was established in October 2006 to provide advice to the Financial Reporting Council on possible actions that market participants (i.e. companies, investors and audit firms) could take to mitigate the risks arising from the characteristics of the market for audit services to public interest entities in the United Kingdom.   The MPG published its interim report and provisional recommendations for consultation in April 2007. Responses received from major investor and corporate representative bodies as well as individual audit firms and other market participants were considered by the MPG in finalising its recommendations.   **(ii) Findings**   The MPG noted that there is concern amongst market participants over the uncertainty and costs that could arise in the event of one or more of the Big Four firms leaving the market. This risk could be mitigated through increased choice of auditors. However a number of current market characteristics, when taken together, reduce the propensity of existing or new non-Big Four firms to make 'step change' investments in their capability to audit public interest entities and the propensity for public interest entities to select non-Big Four firms as auditors.   The MPG evaluated a wide range of possible actions to increase choice of auditors. In its evaluation the MPG sought to identify possible actions which would, when combined with others, contribute to increased choice whilst at least maintaining audit quality, at a cost which is proportionate to the likely benefits and at a cost which is lower than any alternatives offering equivalent benefits.   The responses to the MPG's Interim Report demonstrated broad support for the interim recommendations. The MPG has taken account of the responses in finalising its recommendations which are substantially unchanged from the provisional recommendations. The MPG found no 'silver bullets' that could rapidly increase choice at a proportionate cost whilst maintaining audit quality.   **(iii) Recommendations**   The MPG's 15 final recommendations are intended to:   * Increase the feasibility of investment in the supply of audit services to public interest entities by existing non-Big Four firms or new firms; * reduce the perceived risks to directors of selecting a non-Big Four firm; * improve the accountability of boards for their auditor selection decisions; * improve choice from within the Big Four; * reduce the risk of firms leaving the market without good reason; and * reduce uncertainty and disruption costs in the event of a firm leaving the market.   **(iv) List of recommendations**   1. The FRC should promote wider understanding of the possible effects on audit choice of changes to audit firm ownership rules, subject to there being sufficient safeguards to protect auditor independence and audit quality. 2. Audit firms should disclose the financial results of their work on statutory audits and directly related services on a comparable basis. 3. In developing and implementing policy on auditor liability arrangements, regulators and legislators should seek to promote audit choice, subject to the overriding need to protect audit quality. 4. Regulatory organisations should encourage participation on standard setting bodies and committees by appropriate individuals from different sizes of audit firms. 5. The FRC should continue its efforts to promote understanding of audit quality and the firms and the FRC should promote greater transparency of the capabilities of individual firms. 6. The accounting profession should establish mechanisms to improve access by the incoming auditor to information relevant to the audit held by the outgoing auditor. 7. The FRC should provide independent guidance for audit committees and other market participants on considerations relevant to the use of firms from more than one audit network. 8. The FRC should amend the section of the Smith Guidance dealing with communications with shareholders to include a requirement for the provision of information relevant to the auditor selection decision. 9. When explaining auditor selection decisions, Boards should disclose any contractual obligations to appoint certain types of audit firms. 10. Investor groups, corporate representatives, auditors and the FRC should promote good practices for shareholder engagement on auditor appointments and re-appointments. 11. Authorities with responsibility for ethical standards for auditors should consider whether any rules could have a disproportionately adverse impact on auditor choice when compared to the benefits to auditor objectivity and independence. 12. The FRC should review the Independence section of the Smith Guidance to ensure that it is consistent with the relevant ethical standards for auditors. 13. Regulators should develop protocols for a more consistent response to audit firm issues based on their seriousness. 14. Every firm that audits public interest entities should comply with the provisions of a Combined Code-style best practice corporate governance guide or give a considered explanation. 15. Major public interest entities should consider the need to include the risk of the withdrawal of their auditor from the market in their risk evaluation and planning.   The report is available on the [FRC](http://www.frc.org.uk/documents/pagemanager/frc/FRCMPG%20Final%20Report%20for%20web.pdf" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.13 Top concerns for company directors**    US directors named strategic planning as their top concern followed by corporate performance and CEO succession, according to the 2007 National Association of Corporate Directors (NACD) Public Company Governance Survey released on 15 October 2007.    Of the top three issues, respondents felt that they were least effective in the area of CEO succession. Nearly half indicated that they did not have a formal plan for succession.    Directors also expressed discomfort about their relationship with shareholders. Only a third (36.4 percent) of directors thought their boards communicated very effectively with shareholders, and likewise did not believe that shareholders communicated well with boards.    The NACD survey had been published for ten years biannually until it became annual in 2005. The 2007 report consists of primary research with 791 respondents conducted from July to August, and is supplemented with data from the 2007 proxy statements of over 5,000 public companies. The report breaks down key data from 24 major industries and serves as a benchmarking guide for directors and boards on nearly 100 board practices.    Additional highlights from the 2007 NACD survey:   * CEO compensation: Director discomfort with CEO pay continues this year. Consistent with the 2006 survey, 77 percent of respondents rated CEO compensation as either "too high" or "somewhat high" relative to CEO performance. Top reasons included: absence of genuine performance objectives; granting of equity awards that have little connection to future corporate performance; and lack of strong negotiation by the compensation committee. * Information management and decision making: In general, directors gave management high marks for providing the appropriate level of information, with the highest level of satisfaction with information relating to financial oversight. But information around executive talent management received the lowest scores, with less than half of the respondents finding the information they receive very adequate. * Peer evaluations: For the first time, peer evaluations were as prevalent as self-evaluations, a shift in the methods for evaluating directors. Individual director evaluations performed by boards increased only slightly to 46 percent compared to 45 percent in 2006. * Director candidates: In addition to wanting a current or former CEO on the board (91.7 per cent of respondents), additional pools of senior executives, professional advisors and technical experts are also increasingly seen as highly valuable additions to the board. Areas of functional experience most desired in board members are finance (74.8 percent), operations (66.7 percent), external audit (45.5 per cent), and marketing (45.4 per cent). * Diversity on boards: 65.0 percent of respondents report having a woman on the board, but the average number of women is 1.6; while 41.7 percent of respondents reported a minority on the board, the number of minority directors on those boards averaged 1.7.   The complete 2007 NACD Public Company Governance Report can be ordered online at: [http://www.nacdonline.org/](http://www.nacdonline.org/" \t "default)  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.14 Study of US financial regulation**   On 12 October 2007, the US Government Accountability Office (GAO) identified the need to modernize the financial regulatory system as a major challenge. The report, mandated by the Financial Services Regulatory Relief Act of 2006, discusses:   1. measurements of regulatory costs and benefits and efforts to avoid excessive regulatory burden; 2. the challenges posed to financial regulators by trends in the industry; and 3. options to enhance the efficiency and effectiveness of the federal financial regulatory structure.   According to the GAO, the inherent problems of measuring the costs and benefits of regulation make it difficult to assess the extent to which regulations may be unduly burdensome to US financial services firms, particularly in comparison to firms in other countries.    Additionally, it is difficult to separate the costs of complying with regulation from other costs and thus determine regulatory burden. Regulatory agencies, however, have undertaken several initiatives to reduce regulatory burden; these efforts contributed to the Financial Services Regulatory Relief Act of 2006. While noting that regulation contributes to confidence in financial institutions and markets, the GAO observes that regulators have opportunities to further reduce regulatory burden. The GAO also recently recommended regulatory agencies consider whether and how to measure the performance of regulation during the process of promulgating the regulation and improving the communication of regulatory reviews to the public.    The current regulatory structure, with multiple agencies that oversee segments of the financial services industry, is challenged by a number of industry trends. The development of large, complex, internationally active firms whose product offerings span the jurisdiction of several agencies creates the potential for inconsistent regulatory treatment of similar products, gaps in consumer and investor protection, or duplication among regulators. Regulatory agencies have made efforts to collaborate in responding to these trends and avoid inconsistencies, gaps, and duplication. However, challenges remain; until recently, the Office of Thrift Supervision and the Securities and Exchange Commission, for instance, had not sought to resolve potentially duplicative and inconsistent regulation of several financial services conglomerates for which both agencies have jurisdiction. Finally, despite the challenges posed by the industry's dynamic environment, accountability for addressing issues that span agencies' jurisdiction is not clearly assigned. These issues have led the GAO to suggest in prior work that the federal regulatory structure should be modernized.    The GAO and others have recommended several options to accomplish modernization of the federal financial regulatory structure; these include consolidating certain regulatory functions as well as having a single regulator for large, complex firms.    There also are potential lessons that can be learned from the experience of other nations that have restructured their financial regulators. One important lesson the United States could learn from the United Kingdom's Financial Services Authority is the value of setting principles or goals for regulators. The Department of the Treasury's recently announced plan to propose a restructured regulatory system provides an opportunity to take the first step toward modernization by providing clear and consistent goals for the regulatory agencies.   The full report is available on the [GAO](http://www.gao.gov/new.items/d0832.pdf" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.15 Guidance on ethics education and IT knowledge requirements for accountants**   On 4 October 2007, the International Accounting Education Standards Board (IAESB), an independent standard-setting board within the International Federation of Accountants (IFAC), released two new International Education Practice Statements (IEPSs). The new practice statements assist IFAC members, associates and other educators in developing ethics education programs and in implementing the information technology (IT) knowledge component of a professional accounting education program.  **(a) Ethics education**   The first practice statement, IEPS 1, 'Approaches to Developing and Maintaining Professional Values, Ethics, and Attitudes', provides guidance to IFAC members and associates on how to achieve good practice in developing and maintaining professional values, ethics and attitudes in accordance with the requirements in International Education Standard 4, Professional Values, Ethics and Attitudes. The practice statement identifies a number of methods for the delivery of ethics education, stressing the importance of workplace learning and assessment. It also identifies continuing professional development as the means for member bodies to ensure that professional accountants continue to develop professional values, ethics, and attitudes throughout their careers.   **(b) IT Knowledge requirements**   IEPS 2, 'Information Technology for Professional Accountants' outlines the knowledge and skills necessary to prepare professional accountants to perform competently in the IT environment. All professional accounting candidates are expected to have a knowledge and understanding of at least one of three roles - manager, evaluator or designer of information systems, or a combination of these roles. The practice statement identifies the competency elements that IFAC member bodies can include in the IT knowledge component of prequalification professional accounting education programs. It also provides guidance on teaching and assessing IT at the prequalification stage, as well as implementing post-qualification development of IT knowledge and competences.   Further information is available on the [IFAC](http://www.ifac.org/education/index.php" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1)  **1.16 Australian financial markets annual turnover exceeds US$100 trillion**   The Australian Financial Markets Association has published the 2007 Australian Financial Markets Report which shows that Australia's annual turnover of over-the-counter and exchange-traded markets in 2006-2007 totalled A$118 trillion (US$100 trillion). The figures measure Australia's debt, equities, foreign exchange and derivatives markets.   Annual turnover across Australia's financial markets (over-the-counter (OTC) and exchange-traded) increased by 17 per cent to A$118 trillion (US$100 trillion) in 2006-2007. This follows growth of 21.3 per cent in 2005-06 and 19.3 per cent in 2004-2005. The total market turnover in 2006-07 was almost four times that of ten years ago.    The annual market turnover in 2006-2007 represents 113 times the total value of the nation's nominal GDP (A$1,046 billion). Ten years ago it represented 57 times nominal GDP (A$546 billion), illustrating the increased importance and strength of Australia's financial sector. Since 1997 annual turnover rose at a compound rate of 14.4 per cent per annum, which is more than double that of the nominal GDP growth rate of 6.6 per cent.   Strong annual turnover in OTC markets (68 per cent of all financial markets) continued. Overall, the OTC markets expanded by 11 per cent to around A$80 trillion in 2006-2007. In the high volume categories, foreign exchange (FX) rose further by 12 per cent to A$49 trillion in 2006-2007, after growth of 38 per cent in 2005-06. The FX market annual turnover has now tripled that of ten years ago.    Annual turnover in exchange-traded markets (32 per cent of total markets) has continued its strong uninterrupted increase of 11 years, with growth of 32 per cent in 2006-2007. Turnover in the futures market was up by 33 per cent to A$36 trillion, and sees it as the second largest financial market in Australia behind foreign exchange. The equities market grew by 22 per cent to around $A1.8 trillion in 2006-2007, an increase of almost six-fold since 1996-1997.  Further information is available on the [Invest Australia](http://www.investaustralia.gov.au/" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%233) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer%281%29.gif | | |  | | --- | | **2.1 ASIC to pursue compensation for Westpoint investors**  On 8 November 2007, the Australian and Securities Investments Commission (ASIC) announced it would take legal action for the benefit of investors in the Westpoint Group seeking compensation for their failed investments.  This announcement follows ASIC's statement to the Federal Court that the Commission had resolved to take over the running of liquidators' proceedings commenced by the liquidator of Ann Street Mezzanine Pty Ltd and York Street Mezzanine Pty Ltd and to bring claims on behalf of other mezzanine companies.   The regulator believes the legal action, over a number of phases, if successful could provide benefits to as many as 3,600 out of some 4,300 investors in the failed property development group.   As there were several different investment products offered by the Westpoint Group, the extent of the potential benefits for investors will vary. ASIC believes that up to 85 per cent of investors who invested in Westpoint products where there were losses should benefit.   ASIC will use its power under section 50 the ASIC Act, which enables it to begin and carry on civil proceedings for damages for investors where it appears to ASIC that such proceedings are in the public interest.   The first phase of the regulator's legal action will seek to recover damages from various directors and officers of certain companies in the Westpoint Group and entities associated with one of the directors and from a number of licensees of financial planning firms that sold Westpoint investments.  It will be alleged that directors and officers are responsible for the misapplication of funds raised by the mezzanine companies, and that commission payments received by entities associated with one director should be returned. While ASIC is yet to fully formulate and quantify these claims, at this stage ASIC has identified potential claims of up to $245 million.   The availability of assets to satisfy any claims is enhanced as a result of the range of orders that ASIC sought after the Westpoint Group failed, freezing up to approximately $54 million in assets.   As part of its action against directors and officers, ASIC has resolved to carry on the current actions by PricewaterhouseCoopers (PwC). As liquidator of the Ann and York Street mezzanine companies, PwC is currently suing various directors and officers of those companies (as well as entities associated with one of the directors) for $39.4 million.   The first phase of ASIC's legal action also covers five Australian financial services licensees. Action against additional licensees is also being considered.  ASIC will allege that, in selling products with the risk and financial characteristics of Westpoint, the licensees did not comply with their obligations under the conditions of their Australian financial services licences and under the law.   ASIC will be seeking a total of approximately $63.2 million in damages from these licensees, based on the amounts which their clients invested in Westpoint products and subsequently lost when Westpoint collapsed.   The regulator expects the legal proceedings announced against these licensees to be formally filed with the court by the end of the year.  ASIC is continuing to investigate matters arising from the Westpoint collapse, including possible further claims for compensation against other financial service licensees and the auditors.  ASIC expects to finalise its consideration of these additional claims by the end of the year.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h2)  **2.2 ASIC's next steps towards better disclosure for unlisted and unrated debentures**  On 31 October 2007, the Australian Securities and Investments Commission (ASIC) announced that as part of its progress in implementing its 'Three Point Plan' for unlisted and unrated debentures, ASIC has:   * released a new regulatory guide, "Regulatory Guide 69 Debentures - Improving Disclosure for Retail Investors" outlining its benchmarks (and reporting on an 'if not, why not' basis) to improve disclosure to retail investors in the $8billion unlisted and unrated debenture market; * released a consultation paper, "Consultation Paper 94 Debenture Advertising", which includes a draft regulatory guide on debenture advertising for issuers and publishers in that market; and * provided an update on investor research and education on unlisted and unrated debentures.   **(a) Regulatory Guide 69 "Debentures - Improving disclosure for retail investors"**  Debenture issuers, industry and consumer groups together made over 60 submissions in response to ASIC's consultation paper released on 23 August 2007. In its regulatory guide, ASIC has decided to proceed with a new disclosure regime built on an 'if not, why not' basis of reporting, but has modified some of the benchmarks in response to the submissions it has received.   Accompanying the regulatory guide are:   * an outline of submissions received, together with reasons why ASIC may not have followed certain suggestions, and * a regulation impact statement, justifying that the benefits outweigh the costs of compliance in this exercise.   A dedicated ASIC team will now work with all existing unlisted and unrated debenture issuers to discuss the benchmarks with them and their preparation for the enhanced reporting they will be required to provide to investors by 1 March 2008.  Any new issuers entering the market from 1 December 2007 will be required to disclose against the benchmarks from that date.   **(b) Consultation Paper 94 "Debenture advertising" and draft regulatory guide on debenture advertising**  After considering submissions in response to the consultation paper, ASIC has decided to consult for a further period of one month on the issue of debenture advertising and has released a draft regulatory guide as part of the consultation paper to facilitate this further consultation.   In particular, ASIC is interested in assessing, with industry, the practical issues faced by publishers in screening and detection of advertisements. Comments on the draft regulatory guide are due by 30 November 2007.   ASIC will release a final regulatory guide in December and will expect debenture issuers and publishers to comply with the guide from early January 2008.  **(c) Investor research and education**  In addition to the research work conducted to date, ASIC has appointed a market research organisation to conduct further and more detailed investor research to obtain better information about the characteristics, preferences and decision-drivers of investors in these products. This will also involve testing a draft investor guide among a sample of retail investors to evaluate its usefulness in helping investors assess investments using the enhanced disclosure.   ASIC expects to finalise its investor research by the end of the year and will then use the results to help develop education programs for retail investors, which will commence in March 2008 to coincide with enhanced reporting against the benchmarks by debenture issuers.  **(d) Background**  ASIC's new approach is built around the following benchmarks, which are designed to help retail investors and their advisers assess risk and the risk-reward prospects of unlisted and unrated debentures:   * Issuers should have a minimum of 20 per cent equity where more than a minor part of their debenture funds are invested in property development. In other cases, equity should be a minimum of 8 per cent. * Issuers should estimate their cash needs for the next three months and have cash or cash equivalents on-hand to meet this need. * Issuers should clearly disclose their approach to rollovers, including whether the 'default' is that debenture investments with them are automatically rolled-over. * Issuers should have their debentures rated for credit risk by a recognised credit rating agency. The other benchmarks apply even if the debentures are rated. * Issuers who on-lend funds should provide detailed disclosure of their loan portfolio. * Issuers who on-lend funds should disclose how many loans they have made to related parties and what assessment and approval process it follows for these loans. * Issuers who are involved in or lend money to property related activities should value those properties. Development property assets should be valued on an 'as is' and 'as if complete' basis. ASIC also expects issuers to disclose the cost of the property. All relevant valuations should be disclosed if a loan makes up more than 5 per cent of the issuer's portfolio. * Issuers lending money to property development are required to maintain a 70 per cent loan to valuation ratio on 'as if complete' valuation. Issuers lending money to other property are required to maintain an 80 per cent loan to valuation ratio.   Requiring disclosure against these benchmarks (and reporting on 'if not, why not' basis), requiring those involved with issuers (e.g. trustees, advisers, valuers and auditors) to use those benchmarks in carrying out their responsibilities and educating investors and potential investors to understand those benchmarks and use them in their decision making process make up the main principles of ASIC's new approach to debentures.  Regulatory Guide 69: "Debentures - improving disclosure for retail investors" is available [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg69.pdf/$file/rg69.pdf" \t "default).   Consultation Paper 94: "Debenture advertising" (includes draft regulatory guide on debenture advertising) is available [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_94_Debenture_advertising_final.pdf/$file/CP_94_Debenture_advertising_final.pdf" \t "default).  Report 108: "Report on submissions for CP89 unlisted, unrated debentures" is available [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Report_108_Report_on_submission_for_CP89.pdf/$file/Report_108_Report_on_submission_for_CP89.pdf" \t "default).  Regulation Impact Statement - "Debentures: improving disclosure for retail investors" is available at [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RIS_RG69.pdf/$file/RIS_RG69.pdf" \t "default).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h2)  **2.3 Independent expert reports**  On 30 October 2007, the Australian Securities and Investments Commission (ASIC) released two regulatory guides updating ASIC's policy on independent expert reports.  These are Regulatory Guide 111 "Content of expert reports" [RG 111] and "Regulatory Guide 112" Independence of experts" [RG 112].  While ASIC has seen an improvement in the overall quality of expert reports in recent years, concerns remain that they are too long. The updated regulatory guides address this issue as well as perceptions that some expert reports are not sufficiently independent.   Consultation Paper 62: "Better experts reports" is available at [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/PPP_experts_reports.pdf/$file/PPP_experts_reports.pdf" \t "default).   Regulatory Guide 111: "Content of expert reports" is available [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg111.pdf/$file/rg111.pdf" \t "default).    Regulatory Guide 112: "Independence of experts" is available [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg112.pdf/$file/rg112.pdf" \t "default).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h2)  **2.4 Simpler auditor registration**  On 29 October 2007, the Australian Securities and Investments Commission (ASIC) provided revised guidance for individuals and companies seeking registration as a company auditor or an authorised audit company.  To simplify the registration process for prospective auditors ASIC has located all its guidance about registration in the one document - Regulatory Guide 180 "Auditor registration".  ASIC has included guidance about how it processes applications for registration and what supporting documents need to be lodged with it.   ASIC has also amended the online registration system to better support the registration process. Individuals and companies can now apply for registration as a company auditor or an authorised audit company, submit changes to their registered details, and submit their annual statements, online.  While the changes come into effect immediately, ASIC accepts that some applicants may have lodged an application that has not yet been decided, or may have completed an application but have not lodged it, on the basis of the previous guidelines. ASIC will process the application under the previous guidelines for applicants who have:  (a) Lodged an application but the application has not yet been decided; or (b) Completed and signed their application prior to the changes but have not yet lodged the application.   HHowever, ASIC expects applicants who are only beginning to prepare their application to take into account the guidance in RG 180 when preparing their application and supporting 'proof' documents.   Regulatory Guide 180 is available [from ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg180.pdf/$file/rg180.pdf" \t "default).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%234) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer%281%29.gif | | |  | | --- | | **3.1 Australia's stock market now ranked seventh in the world**   Australia's stock market advanced one place to overtake Switzerland as the world's seventh largest, according to Standard & Poor's (S&P) latest survey published on 12 October 2007.    Australia's market capitalisation of floating stocks surged more than 130 per cent to reach US$1.14 trillion in September 2007 from US$494 billion in September 2004 (the earliest September data publicly available from S&P). This represented a compound annual growth rate of 32.1 per cent, well above the average rate of 19.6 per cent for all markets. Australia's total market value measured by floating stocks had also exceeded many major European economies, such as Switzerland (US$1,089billion), Spain (US$757 billion) and Italy (US$714 billion).   The USA dominated the world market, with a global market share of 41.8 per cent. The UK and Japan were the second and third largest markets in the world, accounting for 9.2 per cent and 8.9 per cent market capitalisation of all floating stocks respectively. France (4.2 per cent) followed then Canada (3.8 per cent) and Germany (3.6 per cent).   In the Asia-Pacific region ex Japan, Australia had the largest stock market in terms of floating stocks, with a global market share of 2.9 per cent, up from 2.1 per cent three years ago. Australia's share was well above that of Korea (1.8 per cent), China (1.7 per cent) and Hong Kong (1.1 per cent).   The latest data from the Australian Securities Exchange (ASX) also showed that Australia's equity market had grown substantially in recent years, due to a combination of significant Initial Public Offerings (IPOs), other equity market capital raisings, rising equity values, increasing corporate profits and robust economic growth. Total market capitalisation of all listed equities at the end of September 2007 exceeded A$2 trillion (US$1.8 trillion) with 2,131 listed entities.  Included in these numbers are 79 foreign-domiciled companies with a combined market capitalisation of around A$450 billion (US$400bn).   Further information is available from [Invest Australia](http://www.investaustralia.gov.au/" \t "default).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developmentstrong>** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%235) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer%281%29.gif | | |  | | --- | | **4.1 Takeovers Panel publishes revised Guidance Note on lock-up devices**   On 13 November 2007, the Takeovers Panel announced that it had published a revised version of its Guidance Note on Lock-up devices.   Guidance Note 7 sets out the Panel's approach to arrangements entered into by a target entity, including devices such as break fees, asset lock-ups, no-talk agreements and no-shop agreements.  It explains the two guiding criteria, concerning competition and coercion that the Panel applies when considering whether such arrangements give rise to unacceptable circumstances.   The Panel advised that it has not published the Guidance Note in a draft form for comment as it considers that the changes that it has made are not substantive and involve no change of policy. Rather the changes are part of the Panel's continued monitoring of the evolution of, and the Panel's own experiences with, lock-up arrangements. The types of changes which the Panel has made include:   * Adjusting the focus of the guidance note from singular devices to lock-up arrangements generally.  The Panel considers that this is reflective of current market practice towards the use of multiple devices, and the Panel's concern with the overall effect of lock-up arrangements. * Guidance on agreements affecting dealings with rival bidders, including 'no due diligence' agreements and agreements to pass on information. In summary, the Panel considers that, similar to no talk provisions, such agreements require appropriate safeguards and fiduciary exceptions. * Adding recent matters as examples of the policy issues discussed. In particular, the policy incorporates references to the recent panel decisions in Magna Pacific Holdings Limited 02 [2007] ATP 03 and Queensland Cotton Holdings Limited 02 [2007] ATP 05.  Accordingly, the policy reflects that the Panel would be likely to find a no-talk agreement to be anti-competitive if the form of any fiduciary exception meant that it was likely to be unavailable to target directors in practical terms. * Clarification of policy application.  The revised policy clearly states that the principles will be applied to any arrangement which has the effect of fettering the actions of a target, a bidder or a substantial shareholder.   While it has not published the document as a draft, the Panel advised that it would, as always, be interested to receive comments on the revised version of Guidance Note 7.   A copy of the revised Guidance Note is available on the [Takeovers Panel](http://www.takeovers.gov.au/display.asp?contentid=122" \t "default) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%236) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer%281%29.gif | | |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | **5.1 ASIC claim for public interest immunity privilege over documents and witness statements rejected**   (By Pablo Fernandez, DLA Phillips Fox)   P Dawson Nominees Pty Ltd v Multiplex Ltd [2007] FCA 1659, Federal Court of Australia, Goldberg J, 2 November 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/november/2007fca1659.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/november/2007fca1659.htm" \t "default) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)    **(a) Summary**   The applicant ("Dawson") brought proceedings against the respondent ("Multiplex") in relation to an alleged contravention of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) and the ASX Listing Rules whereby Multiplex allegedly failed to disclose material information that a reasonable person would expect to have a material effect on the price or value of Multiplex's shares.    This decision relates specifically to ASIC's claim for public interest immunity privilege over certain documents the subject of a subpoena duces tecum served on ASIC by Dawson. Goldberg J rejected ASIC's claim for privilege over the documents.    **(b) Facts**      Dawson brought proceedings on its own behalf and on behalf of other persons who had acquired shares in Multiplex between 2 August 2004 and 30 May 2005. Multiplex (UK) had entered into a contract in September 2002 for the design and construction of the Wembley National Stadium ("the stadium") in the United Kingdom. Completion of the project was delayed due to substantial cost increases and other issues.    Dawson alleged that during the period between 2 August 2004 and 30 May 2005, as a consequence of the issues surrounding the stadium project, profit earnings of Multiplex were substantially reduced. Dawson further alleged that by 2 August 2004 Multiplex was aware or should have been aware of the substantial reduction in profit earnings.    Dawson alleged that such information was material information that a reasonable person would expect to have a material effect on the price or value of Multiplex's shares, and that Multiplex, being a listed company, was therefore obliged to disclose such information to the Australian Stock Exchange ("ASX") pursuant to the ASX Listing Rules and had contravened its obligation of continuous disclosure under section 674 of the Corporations Act by failing to do so.   From February 2005 until September 2006, the Australian Securities and Investments Commission ("ASIC") investigated the events and issues relating to the stadium project. During its investigation it obtained and generated a significant number of documents, including 23 witness statements.   On 21 December 2006, Dawson applied to ASIC under section 25(1) of the [Australian Securities and Investments Commission Act 2000 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) for investigation documents and transcripts of examinations pursuant to an ASIC investigation of Multiplex. At the time of judgment ASIC had not yet made a determination on this application.   On 12 July 2007, Heerey J gave Dawson leave to issue a subpoena duces tecum against ASIC for the production of the above documents. Objection was made to the production of a number of the documents:   * by ASIC, on the ground of public interest immunity privilege; * by Multiplex, on the ground of legal professional privilege; and * by Multiplex, on the ground that the documents which are otherwise available for inspection should only be inspected by persons who enter into confidentiality undertakings.   The documents the subject of the subpoena were produced to the Court by ASIC on 20 August 2007.    **(c) Decision**     **(i) Multiplex objection to the production of documents for inspection**   Multiplex objected to the production of documents for inspection by ASIC on various grounds.  First, Multiplex argued that legal professional privilege applied in respect of a number of documents which Multiplex had supplied to ASIC. This issue was to be determined at a later date and is not considered further.    Multiplex further submitted that the documents should only be inspected by Dawson's legal representatives who had signed confidentiality undertakings. Dawson argued that confidentiality undertakings were unnecessary and that the documents should be available for inspection. Goldberg J set an interim arrangement on 11 September 2007, whereby access would be given to Dawson's legal representatives who had signed confidentiality undertakings. The final determination in relation to this point is the basis of this judgment.   **(ii) ASIC's objection to the production of documents for inspection**   ASIC applied to restrict inspection of thirty-six documents it produced pursuant to the subpoena as well as copies of all the transcripts of examination of all witnesses examined by ASIC during its investigation of Multiplex on the ground of public interest immunity privilege.    **(iii) ASIC's ex parte application**   ASIC sought orders pursuant to section 50 and section 17(4) of the [Federal Court of Australia Act 1976 No. 156 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "deafult) ("FCA"). Under section 50, ASIC sought to forbid the publication of the confidential affidavits it had filed, including publication to the legal representatives of Dawson and Multiplex. Under section 17(4), ASIC sought orders excluding the public from the hearing of its public interest immunity privilege claim on the basis that the presence of the public would be contrary to the interests of justice.    Goldberg J granted the orders sought by ASIC.  In relation to section 50 FCA, his Honour noted that it is a fundamental principle of the administration of justice in Australia that the administration of justice be open justice and that, in considering ASIC's application to restrict access to the documents, justice must be done between all the parties involved.    In relation to exercising the power under section 17(4) of the FCA, Goldberg J noted that an approach similar to that of section 50 of the FCA should be taken and furthermore that the power should only be exercised in circumstances where not to exercise it would be "contrary to the interests of justice".   Dawson argued that ASIC should disclose its reasons to support its claim for the protection of information in an open hearing. However, Goldberg J agreed with ASIC's argument that in disclosing its reasons, it would inevitably expose the information it sought to be protected, and therefore granted the orders sought under sections 17(4) and 50 of the FCA.  ASIC's application for public interest immunity privilege was therefore heard in the absence of both parties to the proceeding.    **(iv) Reasons for rejecting ASIC's public interest immunity privilege claim**   Goldberg J rejected ASIC's claim for public interest immunity privilege over the specified documents and witness transcripts. First, ASIC submitted that Dawson's objective of serving the subpoena on ASIC was to confine the quantum of any security for costs which might be ordered. ASIC argued that this purpose was different from the usual purpose to obtain documents for use as evidence. Goldberg J rejected ASIC's argument and considered that in these circumstances, such use of a subpoena was for a legitimate purpose and proper forensic objective.   Secondly, ASIC submitted that as it was only claiming the privilege over certain documents, the subpoenaed documents that were available for inspection (i.e., not subject to the privilege claim) were more than adequate for the administration of justice. Goldberg J rejected this submission, stating that it was not for ASIC to determine whether Dawson had sufficient evidence to prove its case against Multiplex or whether or not Dawson would require the documents subject to ASIC's claim for privilege.    Goldberg J therefore rejected ASIC's claim for public interest immunity privilege over the specified documents and witness transcripts.   As it was decided that the documents were not protected from production for inspection on the ground of public interest immunity privilege, Goldberg J permitted persons examined by ASIC during the investigation and whose transcripts are subject to the subpoena, to make submissions.    The court ordered that this proceeding be adjourned until 14 November 2007.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.2 Stringent approach to asset preservation orders directed at non relevant persons**   (By Cherie Canning, Mallesons Stephen Jaques)   ASIC v Burnard [2007] NSWSC 1217, Supreme Court of New South Wales, Barrett J, 31 October 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1217.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1217.htm" \t "default)  or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)   **(a) Summary**   ASIC v Burnard examines the scope of orders the court may make to prohibit payment or transfer of money and other property under section 1323(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default).    The decision confirms that, if the case for the appointment of a receiver of property of a relevant person is established under section 1323(1)(h), the court may instead impose an "alternative or lesser" order, producing in practical terms a substantially similar result.   For the purpose of section 1323(1)(a), where the order is directed at restraining a person who is not the "relevant person", the court will only grant such an order if that person has no interest in the property the subject of the order.  That person must amount to no more than a bare trustee of the property, having no beneficial interest whatsoever in the property.   **(b) Facts**   This proceeding stems from the financial collapse of the Westpoint Group and investigations and other actions undertaken by ASIC in consequence of that collapse.  ASIC sought continuation of orders that were in force in respect of Neil Austin Burnard (Mr Burnard), Palentia Pty Ltd (formerly known, and referred to herein, as "Kebbel NSW") and Tenala Pty Ltd.  In addition ASIC sought orders against an additional two defendants Jennifer Lee Robins ("Ms Robins") and BDI Pty Ltd ("BDI").  Ms Robins was the wife of Mr Burnard.  BDI was a company owned and controlled by Mr Burnard and Ms Robins.  BDI's principal activity was to act as the trustee of three trusts, known as the Asset Trust No 2, the Tessa Trust and the Executive Superannuation Plan One.    ASIC applied for the following orders under section 1323(1) of the Corporations Act:   |  |  | | --- | --- | | Order 1 - That Mr Burnard and Kebbel NSW be restrained from dealing with any of their respective assets; | | | Order 2 - That Ms Robins be restrained from dealing with the following properties: | | |  | (a) the family home of Mr Burnard, Ms Robins and their children (the "Mosman Property"); and | |  | (b) a holiday house located in Mona Vale (the "Mona Vale Property"); | | Order 3 - That BDI be restrained from dealing with all of their respective assets including assets owned on behalf of Asset Trust No 2, the Tessa Trust and the Executive Superannuation Plan One | |   **(c) Decision**   This decision examined the scope of the orders available under section 1323(1).  Section 1323(1)(a) provides:      "Where an investigation is being carried out under the ASIC Act or this act in relation to an act or omission by a person, being an act or omission that constitutes or may constitute a contravention of this Act and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of a person (in this section it is called an aggrieved person) to whom the person referred to in paragraph (a) (in this section called the relevant person), is liable, or may be or become liable, to pay money, whether in respect of a debt, by way of damages or compensation or otherwise, or to account for financial products or other property, the Court may, on application by ASIC or by an aggrieved person, make one or more of the following orders."   Section 1323(1)(d) - (k) lists a range of orders that the court may make if the elements of section 1323(1)(a) are made out.  ASIC sought to rely, inter alia, on section 1323(1)(h), which provides that the court may make an order appointing:      if the relevant person is a natural person - a receiver or trustee, having such powers as the court orders, of the property or of part of the property of that person; or       if the relevant person is a body corporate - a receiver or receiver or manager, having such powers as the court orders, of the property or of part of the property of that person.   Each if Mr Burnard and Kebbel NSW were the "relevant persons" in respect of whom orders were sought under section 1323(1).   **(i) Order 1**   The court accepted that section 1323(1)(h) provided a jurisdictional basis for the making of Order 1 which was directed at restraining Mr Burnard and the whole of the property of Kebbel NSW.   The court found support for its view in three recent decisions:  Re Richstar Enterprises Pty Ltd; Australian Securities and Investments Commission v Carey (No 3) (2006) 57 ACSR 307; Australian Securities and Investments Commission v Kreichwost [2007] NSWSC 948 and Australian Securities and Investments Commission v Banovec (No 2) [2007] NSWSC 961.  These cases all provided that, if grounds are established for the making of an order under section 1323(1)(h), it is open to the court to instead make an "alternative or lesser order" which does not appoint a receiver but otherwise safeguards or preserves the property in respect of which a receiver could have been appointed.    The court granted the asset preservation order against Mr Burnard and Kebbel NSW, subject to a time limit at which point the orders would be reviewed.   **(ii) Order 2**    Order 2 was directed at Ms Robins and sought to restrain her dealings with the Mosman Property and Mona Vale Property.  The court refused to grant Order 2 on the basis that it fell outside the scope of section 1323(1).  The registered proprietors of the Mosman Property were Ms Robins and Mr Burnard, who hold their interests as tenants in common in unequal shares, being Ms Robins as to a 99 percent undivided interest and Mr Burnard as to a 1 percent undivided interest.  Ms Robins was the sole registered proprietor of the Mona Vale Property.  The funds for the acquisition of the Mosman property and the Mona Vale property came from BDI and Kebbel NSW.  The funds that came from BDI were, in part, assets of trusts that at all material times were the property of Mr Burnard.  Due to the source of the funds, the Mosman property and the Mona Vale property were held on a resulting or constructive trust for Mr Burnard.  The court considered whether section 1323(1) empowered the court to make Order 2 which would restrain Ms Robins from dealing with the Mosman Property and the Mona Vale Property.  Sections 1323(1)(e), (f) and (g) were rejected as providing a jurisdictional basis for the  order.  The court then considered whether section 1323(1)(h) provided such a basis.  The court again held that it would only provide a basis if the order represented an "alternative or lesser" measure compared to an order appointing a receiver of Mr Burnard's interest or that of Kebbel NSW.  The court observed that if Order 2 were made, it would bind Ms Robins in such a way to immobilise the interests of Mr Burnard and Kebbel NSW, but also the interests of Ms Robins.  If Ms Robins were a bare trustee having no beneficial interest whatsoever in the properties, an order restraining her from disposing of them might well be seen as a lesser alternative to the appointment of a receiver of Mr Burnard's equitable interest or that of Kebbel NSW.  This would not be the case if Ms Robins herself had an interest in the property. Accordingly, the court considered whether Ms Robins was a bare trustee or had a beneficial interest in the property.  ASIC provided evidence of the cash flows relating to the purchase of the properties, inviting the court to draw from this that Ms Robins had no beneficial interest in the property.  The court held that no reliable conclusion regarding the existence of a resulting or constructive trust could be reached by having regard to cash flows alone, in particular the intention of the parties was also an important consideration.  On the high level analysis of the cash flows that was available, the court was unable to find to this effect. Therefore, ASIC had failed to establish Ms Robins had no beneficial interest in the property and Order 2 was not granted.     **(iii) Order 3**   Order 3 was directed at restraining BDI. As with Order 2, the court refused to grant order 3 on the basis that it fell outside the scope of section 1323(1).   Again the court rejected ASIC's submissions that sections 1323(1)(e), (f) and (g) provided a basis for the making of this order and attention was directed at section 1323(1)(h). Order 3 could only be made under section 1323(1)(h) if BDI, despite being the legal owner, had no beneficial interest of its own.   The court held that this was not the case as each of the trusts were active and ongoing.  The trustee incurred expenditure and, in relation to the real estate assets, become liable to rates and other outgoings.  The general law principle is that a trustee has a right to resort to and apply trust funds for the discharge of liabilities incurred in the authorised conduct of the trust.  That right is given by means of an equitable interest in the whole of the assets of the trust: see Chief Commissioner of Stamp Duties v Buckle (1995) 38 NSWLR 574, approved by the High Court in Chief Commissioner of Stamp Duties v Buckle (1998) 192 CLR 226). Consequently BDI was found to have an equitable interest in the property and it was held that section 1323(h) did not authorise the making of Order 3.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.3 No waiver of privilege caused by ASX announcements disclosing legal advice**    (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)   GMCG, LLC v Agenix Ltd [2007] QSC 309, Supreme Court of Queensland, Douglas J, 29 October 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/may/2007qsc309.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2007/may/2007qsc309.htm" \t "default) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)  **(a) Summary**   The case concerned an application for disclosure of documents said to be protected by legal professional privilege.  Agenix Ltd (Agenix) lodged a note to a company report with ASX Limited (ASX) which disclosed that Agenix received legal advice that it had no liability whatsoever in respect of proceedings brought against it.  Shortly after, Agenix lodged an amended note with the ASX stating that Agenix had received legal advice and based on that advice, the company believed that it had no liability whatsoever.   GMCG, LLC (GMCG) asserted that the note waived privilege that might otherwise have attached to the advice and sought disclosure of the advice and all documents which were relied on in the preparation of the advice or which influenced the content of the advice.   The court was asked to consider whether the disclosure of the advice was inconsistent with the confidentiality which the privilege was intended to protect.  After considering the purpose of the disclosure to the ASX, the court held that Agenix did not waive privilege in the advice or in the other related documents.   **(b) Facts**    GMCG had commenced proceedings against Agenix for fees claimed to be owed pursuant to an agreement by which GMCG acted as financial adviser to Agenix.  In a note to a preliminary final report lodged by Agenix with ASX on 13 September 2006, Agenix said of this litigation: "The company has received legal advice that it has no liability whatsoever."   On 21 September 2006 GMCG's solicitors asserted that the note waived privilege that might otherwise have attached to the advice and sought disclosure of it.  On 28 September 2006 Agenix lodged its financial statements for the financial year ended 30 June 2006 with the ASX and repeated the statement already made in the preliminary final report set out above.  On 22 December 2006 Agenix advised the ASX of a correction to its financial statements to amend that note to read: "The company has received legal advice.  Based on that advice, the company believes that it has no liability whatsoever."   GMCG asserted that the note waived privilege that might otherwise have attached to the advice and sought disclosure of the advice and all documents which were relied on in the preparation of the advice or which influenced the content of the advice, including instructions, witness statements, file notes and other documents provided to or generated by the author of the advice for the purpose of obtaining or preparing it.   There was uncontradicted evidence from Mr Anthony Finn, the finance manager and joint company secretary of Agenix, that the note was prepared in its original form to explain why Agenix's potential exposure to a claim should be classified as a "contingent liability" instead of a "provision" under the relevant accounting standard.  Mr Finn stated that, on about 22 December 2006, he caused an amendment to be made to the note on contingent liability to reflect the fact that it recorded Agenix's belief and not its lawyer's belief which he regarded as desirable to ensure that the note was completely accurate.   **(c) Decision**    The court accepted Mr Finn's evidence that he referred to the legal advice to make it clear that the classification of the claim as a contingent liability was based on the Agenix's belief, following legal advice, that it had no liability.  The court also accepted that the advice was mentioned in order to explain the reason why Agenix believed that its possible further exposure in the proceedings was properly classified as a contingent liability.   The court then considered whether the disclosure of the advice was inconsistent with the confidentiality which the privilege was intended to protect.  Referring to the decision in Secretary to the Department of Justice v Osland [2007] VSCA 96, the court identified a number of relevant principles.  First, because privilege is a rule of substantive law, not of evidence, and an important common law right or immunity, the task for the court is to determine whether this specific disclosure is so clear and inconsistent with the maintenance of the privilege as to be unfair.  Second, the test of inconsistency is capable of accommodating the notion that, in appropriate circumstances, the privilege-holder should be able to disclose publicly that he is acting on advice and what the substance of the advice is, without being at risk of having to disclose the confidential content of that advice.  Third, in assessing whether there is an inconsistency leading to waiver, the purpose for which the privilege-holder made the disclosure is highly relevant.  Fourth, the question is whether the use made by the privilege-holder of the information - particularly the purpose of disclosing the conclusion of the advice - is inconsistent with maintenance of confidentiality in respect of the content of the advice.   In considering the purpose of the disclosure to the ASX, the court stated that it was important that Agenix be able to disclose why it had adopted a particular accounting treatment of its potential exposure to GMCG, as it promoted the integrity of the accounts and market transparency by the provision of appropriate information to shareholders, potential shareholders and creditors in circumstances where the disclosure has given it no advantage in the litigation.     Accordingly, the court held that the references to the advice Agenix received in the notes to its accounts did not waive the privilege in the advice or in the other documents relied on in the preparation of the legal advice or which influenced the content of the legal advice for the purposes of the proceedings.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.4 Filing a limited defence to preserve the privilege against self-incrimination**   (By Laura Deschamps, Freehills)   MacDonald v ASIC [2007] NSWCA 304, New South Wales Court of Appeal, Spigelman CJ, Mason P, Giles JA, 26 October 2007   The full text of this judgement is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswca304.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswca304.htm" \t "default)  or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)   **(a) Summary**   Following the initiation of civil penalty proceedings by ASIC, MacDonald claimed that the privilege against self-incrimination meant that he was not required to file a defence.   The court held that the privilege against self-incrimination does not exclude the requirement to address the issues addressed in the initiating process. The filing of a defence is still required even where the privilege is claimed.    The defence required to be filed, however, was limited to identifying the matters which were admitted, not admitted and denied in order to preserve the privilege. MacDonald was also granted the liberty to file an amended defence after the close of ASIC's defence.   **(b) Facts**   ASIC commenced civil penalty proceedings against MacDonald and other defendants, alleging various contraventions of the Corporations Act. ASIC also sought disqualification orders against the individual directors.   At first instance MacDonald had claimed that the privilege against self-incrimination did not require him to lodge a defence. On appeal, MacDonald resiled from this position, but nevertheless claimed that any requirement for him to lodge a defence was limited to an indication of the extent to which ASIC's allegations were admitted, not admitted or denied.   MacDonald also indicated during the course of proceedings that he intended to rely on statutory defences which would require him to adduce additional evidence.   **(c) Decision**   The court indicated that a departure from compliance with the civil proceedure rules was, in these circumstances, necessary to preserve the privilege against self-incrimination.   The requirement to file a defence was not waived. A failure to file a defence in civil proceedings is an admission of the facts contained in the statement of claim. As Mason P (with whom Giles JA agreed) noted, a failure to file a defence would have enabled ASIC to apply for judgment against MacDonald.   Although MacDonald was required to file a defence, he could "not be compelled to include in his Defence any information that may have the tendency to expose him directly or indirectly to the penalties being sought by ASIC" in order to preserve the privilege. Similarly, a defendant is not required to disclose information which directly or indirectly leads to a train of enquiry which may be self-incriminating.   Mason P found that any departure from the rules of procedure, to preserve the privilege against self-incrimination, should be no more than that which was strictly necessary to preserve the privilege. The form of pleading which Mason P required was:  "If, which is so denied, the matters alleged in para X constitute a contravention of sY of the Corporations Law, the defendant says that the matters alleged by ASIC also establish that the claimant relied upon information or professional or expert advice / acted honestly (etc). The defendant reserves the right to advance in his case additional material in support of his defence, the details whereof will be disclosed by amending this paragraph after the close of ASIC's case".  Mason P held that this form of pleading still required compliance with the rules of procedure as MacDonald was still required to invoke any defences and identify any of ASIC's allegations on which he would rely.   In a separate judgment Spigelman CJ questioned whether the form of pleading proposed by Mason P retained a role for [Uniform Civil Procedure Rules 2005 No. 418 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "default) rule 14.14(2)(c) which requires any matters not arising out of the preceding pleading be specifically pleaded. The form of pleading which Spigelman CJ would have required would have only have dispensed with the Civil Procedure rules for matters arising in relation to the statutory defences and granted MacDonald the ability to file an amended defence.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.5 The privilege against self-incrimination: avoiding further and better particulars in civil penalty cases**   (By Chad Catterwell, Freehills)   Australian Securities and Investments Commission v Mining Projects Group Limited [2007] FCA 1620, Federal Court of Australia, Finkelstein J, 25 October 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1620.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1620.htm" \t "default) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)   **(a) Summary**   The defendant directors claimed that either the privilege against self-incrimination or the closely related "penalty privilege" protected them against an application by ASIC for further and better particulars. ASIC claimed that even if the privileges could ordinarily be relied upon, they had been waived when the defendants filed detailed defences.   ASIC's application was dismissed. A defendant cannot be required to provide information (including by way of particulars) that may be the basis of an investigation leading to the discovery of evidence against him. The waiver was confined to the facts asserted or admitted in the defences.   The defendants sought discovery of draft witness statements obtained by ASIC from third parties. The application was dismissed. The statements were protected by legal professional privilege under the [Evidence Act 1995 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "default).    **(b) Facts**   ASIC alleges Mining Projects Group Limited made misleading public announcements. In addition, ASIC alleges two directors breached their duties under sections 180 and 181 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default), breached the insider trading rules and improperly used company information. As a result, ASIC seeks pecuniary penalties against the directors and orders disqualifying them from managing a corporation.   Each defendant has filed a defence which admits certain facts, denies others and includes facts amounting to a positive case.   In the present application, ASIC claimed these defences were deficient and sought orders for further and better particulars.   **(c) Decision**   As Finkelstein J noted, the conflict between the privilege against self-incrimination and the rules of pleadings most starkly arises where a defendant wishes to run a positive case in defence. The pleading rules, in Finkelstein J's preferred view, must give way to the privilege and there should be no obligation on a defendant to plead a positive case. Alternatively, if the defendant is required to plead a positive case, it should be entitled to rely upon the privilege.    In adopting this approach, Finkelstein J preferred a narrow reading of Bridal Fashions Pty Ltd v Comptroller-General of Customs (1996) 17 WAR 499 (Bridal Fashions). ASIC contended that Bridal Fashions was authority for the proposition that a positive case was by definition exculpatory and thus could never be incriminating. Justice Finkelstein disagreed with that view saying at [16]:  disclosing a positive case at the pleadings stage will often provide the plaintiff with an opportunity to follow up leads and open up fresh fields of inquiry. A defendant cannot be required to provide information that may be the basis of an investigation that may lead to the discovery of real evidence. If a defendant is required to plead a positive case there is a risk of that happening. (references omitted)  This view, he said, was not inconsistent with Bridal Fashions. That case was a civil penalty proceeding under the [Customs Act 1901 No. 6 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6233" \t "default). By virtue of by section 255 of the Customs Act, pleading facts in a statement of claim is prima facie evidence of those facts. In those circumstances, it was not open to the defendant to simply put the plaintiff to proof on the allegations as such a defence would not enable the defendant to lead any evidence to negate the presumption created by section 255. Section 255 had the practical effect of requiring that a positive case be pleaded. Accordingly, Finkelstein J suggested at [15] that:  the point made by the Full Court is a narrow one. In a Customs Act case neither penalty privilege nor self-incrimination privilege is of any use to a defendant because, if either privilege is claimed and no positive case is run, the defendant will suffer an adverse judgment.  In relation to waiver, Finkelstein J accepted that the penalty privilege and the self-incrimination privilege could be waived by conduct (such as by filing a positive pleading) but took the view that any such waiver, in the circumstances, was limited to the "facts" admitted or asserted in the defences.    On the discovery point, Finkelstein J noted his preference for the view that regulatory bodies that bring civil penalty proceedings ought to be under a duty of disclosure similar to that owed by a prosecutor to an accused. He accepted, however, that the authority was against him on this point. Draft witness statements are 'confidential communications' for the purposes of section 117 of the [Evidence Act 1995 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "default) and thus subject to legal professional privilege under section 119 of the Evidence Act.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.6 Enforcement of undertakings given to the ACCC**  (By Alex Dunlop, Blake Dawson)   Australian Competition and Consumer Commission v StoresOnline International, Inc [2007] FCA 1597, Federal Court of Australia, Tamberlin J, 19 October 2007  The full text of this judgment is available at [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1597.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1597.htm" \t "default) or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)   **(a) Summary**   This case involved an application for relief by the Australian Competition and Consumer Commission (ACCC) against StoresOnline International Inc (StoresOnline).     StoresOnline was made up of two companies incorporated in America that sold computer software packages that allowed purchasers to set up and operate online stores, and conducted seminars and workshops in Australia to promote the software packages.  The ACCC commenced proceedings against StoresOnline in the Federal Court in 2005, alleging that StoresOnline had, through its seminars and workshops, engaged in misleading and deceptive conduct in breach of the [Trade Practices Act 1974 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "default) (TPA).  In settlement of those proceedings, StoresOnline gave an undertaking on 24 April 2006 under section 87 of the TPA (undertaking), whereby it agreed not to conduct seminars and workshops in Australia without complying with certain conditions imposed by the ACCC.    The present matter arose because the ACCC alleged that StoresOnline had breached the terms of the undertaking, and so the ACCC sought injunctive relief preventing any further breaches of the undertaking and orders placing further conditions upon any further seminars or workshops conducted by StoresOnline in Australia.    **(b) Facts**   Section 87B(4) of the TPA provides that if the court is satisfied that a person has breached a term of an undertaking given under section 87, the court may make a range of orders, including (a) an order directing the person to comply with that term of the undertaking; and (b) any other order that the court considers appropriate.    The ACCC alleged that StoresOnline had breached terms of its undertaking, and was likely to continue to breach the undertaking in future presentations.  The ACCC considered that its application (heard on 16 October 2007) was urgent on the basis that StoresOnline representatives were scheduled to arrive in Australia on 22 October 2007 to make further presentations.     StoresOnline conceded that it had breached some terms of the undertaking, but submitted that these breaches were minor and that it had taken measures to ensure it did not commit further breaches.    **(c) Decision**   His Honour Tamberlin J considered that there were three issues to be determined in this case.    **(i) The jurisdiction of the Federal Court to grant relief**   The ACCC submitted that section 23 of the [Federal Court of Australia Act 1976 No. 156 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default) (FCA Act), which gives the court "power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders.as the court thinks appropriate", gave the court power to grant interlocutory relief in the present case.     In contrast, StoresOnline relied on the decision of Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ in Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1, where their Honours held (at 29) that the court's power under section 23 of the FCA Act "cannot be invoked to grant an injunction where the court acquires its jurisdiction under a statute which provides an exhaustive code of the available remedies and that code does not authorise the grant of an injunction".  StoresOnline argued that section 80 of the TPA was such a code, relying on the judgment of Gibbs CJ, Stephen, Mason and Wilson JJ in Thomson Australia Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150 (Thomson), where their Honours noted (at 162) that section 80 of the TPA "proceeds upon the footing that it constitutes the Federal Court's exclusive charter to grant injunctions restraining, or relating to, contraventions of the Trade Practices Act".    This argument was rejected by his Honour, who noted that section 87B was inserted into the TPA in 1992, after the court's decision in Thomson.  His Honour also rejected the suggestion by StoresOnline that Parliament must have inserted section 87B into the TPA with the decision in Thomson in mind, as such an inference was not supported by any other evidence.  Instead, his Honour preferred the view that the inclusion of section 87B in the TPA was to "enhance the enforcement by the ACCC by increasing the scope and flexibility of the powers of the Court to provide effective means of dealing with breaches or apprehended breaches of the TPA" (at [13]).     **(ii) Whether StoresOnline had breached the undertaking**   StoresOnline conceded that it had breached the terms of the undertaking that required it to ensure that testimonials used in presentations contained certain information and to notify the ACCC of the dates and locations of presentations to be given in Australia.  His Honour noted (at [19]) that these breaches were themselves sufficient to warrant the court exercising its power under section 87B(4)(a) of the TPA to make orders requiring StoresOnline to comply with the relevant provisions of the undertaking.    StoresOnline denied that it had committed any of the additional breaches of the undertaking alleged by the ACCC.  However, his Honour found that, at the least, StoresOnline had breached paragraph 14 of the undertaking, which required StoresOnline to make known to purchasers of its software packages that they had a three business day cooling off period for their purchases.  In so finding, his Honour noted that some of the disclaimers relied upon by StoresOnline were "manifestly inadequate on their face", and accepted evidence from purchasers of StoresOnline's packages that on some occasions, StoresOnline either failed to notify purchasers of the cooling-off period or provided notification "in a manner which was not readily brought to the purchasers' attention and not easy to understand, so that it could not be said to have been 'made known' as required".  This breach also justified the use of section 87B(4)(a) to order StoresOnline to comply with this term of the undertaking.    Finally, while his Honour did not make findings as to whether any of the other breaches of the undertaking alleged by the ACCC in fact occurred, he was nonetheless satisfied that in light of the conceded breaches and the breach that had been found to have occurred, it was appropriate to exercise the court's discretionary jurisdiction pursuant to section 87B(4)(d) of the TPA to make orders that StoresOnline comply with the others terms of the undertaking.     **(iii) Whether the balance of convenience favoured granting or refusing to grant the relief sought by the ACCC**   The ACCC submitted that the balance of convenience in granting the relief sought was in its favour, as it argued there was a "very strong public interest" in ensuring StoresOnline complied with its undertaking, which the ACCC had originally agreed to for the purpose of protecting Australian consumers.  In response, StoresOnline argued that neither the ACCC nor purchasers of its product had suffered any material harm or prejudice, and that reliance on the public interest was not a decisive factor in deciding whether or not to grant injunctive relief.    His Honour agreed with the ACCC's submission on this point, and noted granting the relief sought by the ACCC would not prevent StoresOnline from conducting workshops and presentations in Australia, only that doing so would serve to discourage it from breaching the terms of its original undertakings.  His Honour commented that allowing the relief sought struck an appropriate balance between the ACCC's desire to protect Australian consumers and StoresOnline's commercial interest in promoting its product in Australia.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.7 Judicial accord on Graywinter principle relating to statutory demands**   (By Stephen Magee)   Saferack Pty Ltd v Marketing Heads Australia Pty Ltd [2007] NSWSC 1143, Supreme Court of New South Wales, Barrett J, 16 October 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1143.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1143.htm" \t "default)  or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)    **(a) Summary**   "There are nine and sixty ways of constructing tribal lays, And every single one of them is right!" (Rudyard Kipling)   The many and unusual methods of serving statutory demands have probably passed "nine and sixty" by now. This case adds another to the list and, according to the Supreme Court of NSW, it is definitely right.   The case also sees Barrett J modify his stance on the application of the Graywinter principle.    The Graywinter principle is that, when a company is applying to set aside a statutory demand,  it can only rely on grounds raised in affidavits filed within the 21 days allowed by section 459G.    Until now, there has been disagreement among NSW judges about how explicitly a ground has to be raised in the affidavit.   Most judges have taken the view that the ground simply has to be an "available inference" from the affidavit. Barrett J, on the other hand, hitherto took the view that the ground must be identified expressly or by necessary inference in the affidavit itself. This issue can arise where, for example, a document (such as a contract) is annexed to the affidavit and, although the affidavit doesn't mention it, the ground is obvious from the document.   In this case, Barrett J reviews the authorities and changes his position. In the case before him, a copy of the statutory demand and the affidavit in support of the statutory demand were annexed to the affidavit in support of the set-aside application. He says that the set-aside application could therefore rely on three defects that were obvious on the face of the affidavit in support of the statutory demand. Two of those defects were held to be sufficient to warrant setting aside the demand.   **(b) Facts**    According to ASIC records, the registered office of Saferack Pty Ltd was "c/- Stratford Fisher & Associates, Level 4, 44 Miller Street, North Sydney".   In fact, although Stratford Fisher had apparently once occupied Suite 17 on Level 44, it had subsequently moved to another part of Sydney. Its principal still occasionally used another firm's office in Suite 15 of Level 4.    A creditor's solicitor went to 44 Miller Street, with a statutory demand. The ground floor directory still showed Stratford Fisher as being present on Level 4. The solicitor went to Level 4 and went into the reception area of Suite 15. There, a man accepted delivery of the demand. A desk in the reception area had a in-tray bearing the name of Stratford Fisher.   Saferack applied to have the demand set aside, on a number of grounds. These included a contention that the demand had not been served on it.    **(c) Decision**    **(i) Service of demand**   Saferack appeared to argue that, once Stratford Fisher moved out of Suite 17, its registered office became Level 4, rather than a particular suite on that floor. The court rejected this argument, on the grounds that, by keeping its name on the in-tray and on the ground floor directory, Stratford Fisher had held out Suite 15 as a place through which it could be contacted.   **(ii) Section 459J(1)(b)**   At trial, Saferack argued that the demand should be set aside under section 459J(1)(b), because there were three alleged defects in the affidavit served with the demand:   * it did not state that the debt the subject of the demand was "due and payable"; * it did not state a belief of the deponent as to the absence of genuine dispute about the existence and amount of the debt; and * it did not state the source of the deponent's knowledge of the matters stated in the affidavit.   The creditor argued that these alleged deficiencies could not be raised by way of challenge under section 459J(1)(b) because they were not identified in either of the affidavits supporting the set-aside section 459G application. This required Barrett J to consider the correct approach to applying the Graywinter principle.    In earlier cases, his Honour had said that the ground of challenge must be raised expressly in, or appear by necessary inference from, the supporting affidavit. However, he noted that there were a number of authorities which took a more liberal view and, on the basis of those authorities, concluded that his earlier approach had been "too strict". Accordingly, he was now of the view that a ground is "raised" (for the purposes of Graywinter) if it is evident from the supporting affidavit, even if only because it can be "discerned from some annexed document the content of which `reveals' it".    In the present case, Saferack's three grounds of objection were evident on the face of the affidavit accompanying the statutory demand, which itself was annexed to the affidavit in support of the set-aside application.   He then went on to deal with the effect of those three defects, applying his interpretation of section 459J(1)(b) as a provision to be used "to counter some attempted subversion of the statutory scheme":   * failure to state that the debt was "due and payable" - this was "a material departure from the statutory demand process envisaged by section 459E"; * failure to state a belief that there was no genuine dispute about the debt - which constituted the creditor's "using the demand for a purpose and in a way not contemplated by the provisions under which a creditor may obtain the benefit of [the statutory presumption of insolvency]"; and * failure of the person swearing the affidavit to state the source of their knowledge -  this was not a major issue if the person was a director of the creditor (as in this case).   On the basis of the first two defects, the demand was ordered to be set aside. In obiter, his Honour also said that there was a genuine dispute about the debt the subject of the demand.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.8 Duty of a liquidator and trustee in bankruptcy to realise true value and avoid causing pure economic loss when selling assets**  (By Tom McGregor, Mallesons Stephen Jaques)   Mills v Sheahan [2007] SASC 365, Supreme Court of South Australia, Full Court, Debelle, Sulan & Layton JJ, 16 October 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/october/2007sasc365.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/october/2007sasc365.htm" \t "default) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)   **(a) Summary**   This case examines the duty owed by a liquidator and trustee in bankruptcy to a third party indemnifier to avoid causing pure economic loss.  In determining whether there could exist a duty to a person in the position of the plaintiffs, the court examined the "salient features" of the relationship between the parties.  It was found that the imposition of a duty on a liquidator and trustee in bankruptcy may not be inconsistent with the duties owed to company shareholders and creditors, although the court was inclined to reserve the issue for full exploration at trial.  For the purposes of the application, it was determined that the plaintiffs' statement of claim disclosed a reasonably arguable cause of action sufficient to warrant further examination of the issues at trial.    **(b) Facts**     Rothmore Farms Pty Ltd ("RFPL") was trustee of the Jillian Cooper Trust ("the trust").  The trust conducted a farming business.  The trust deed provided the trustee with a right of indemnity out of the trust assets.  RFPL borrowed funds from various banks but was unable to service the loans.  To protect the trust assets from claim by the banks, RFPL transferred the trust assets to Belgravia Pty Ltd ("Belgravia"), which was subsequently appointed trustee of the trust.  Belgravia and its directors are the plaintiffs in the action.   In 1998 RFPL was placed into liquidation and in 1999 orders were made for winding up.  The defendant, Sheahan, was appointed liquidator.  The Federal Court later declared that RFPL was entitled to be indemnified out of the assets of the trust to the extent of its indebtedness to the banks.  The court also declared that RFPL had a lien over the trust assets to the full value of its indemnity which was enforceable against third parties (including Belgravia) who from time to time held title to the trust assets.  As liquidator, Sheahan sold the trust's plant and equipment.   In addition, the trust's farming business was conducted on land owned by members of the Cooper family and a company called Rothmore Pty Ltd.  Three members of the Cooper family agreed to act as guarantors of the bank loans to RFPL.  Following RFPL's default on the bank loans, the banks enforced the guarantees.  Sequestration orders were then entered against the guarantors and Sheahan was appointed trustee in bankruptcy of each estate.  Sheahan then obtained orders permitting partition and sale of the land.   The plaintiffs allege that Sheahan sold the trust assets for amounts substantially less than their market values.  It was alleged that Sheahan, in his capacity as liquidator and trustee in bankruptcy, breached his duty of care to third party indemnifiers to realise the true value of the trust assets and avoid pure economic loss.   This is an appeal from the decision of Besanko J who struck out the plaintiffs' statement of claim for failing to disclose a reasonable cause of action.   **(c) Decision**    **(i) Duty owed to the plaintiffs**  The court framed the main issue before it as "whether the plaintiffs' claim discloses no reasonable cause of action such that a duty could be said, with certainty, not to exist."     In relation to cases for pure economic loss, the court noted that:  .it is well established that a mere foreseeability of loss by the plaintiff is insufficient to establish a duty of care on the part of the defendant. In Perre v Apand (1999) 198 CLR 180, the High Court considered relevant whether the defendant's actual foresight of the likelihood of harm, whether the activities which caused the loss were within the control of the defendant, whether the defendant knew or could have known of the existence of an ascertainable class of vulnerable persons who were unable to prevent themselves from harm, and whether the imposition of a duty would impair the defendant's legitimate pursuit of his or her own commercial interests.  Sulan J rejected the defendant's claim that the plaintiffs had not pleaded anything more than mere foreseeability.  To the contrary, his Honour (with whom Layton J agreed) found that the plaintiffs pleaded that the defendant knew that the proceeds of the sale of the assets would affect the quantum of the indemnity of RFPL, and that, accordingly, any variation in the proceeds of the sale of the assets would affect the quantum of the judgment debt owed by the plaintiffs.     The court endorsed the plaintiffs' adoption of the "salient features" framework (as propounded in Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad" (1976) 136 CLR 529) in relation to the circumstances which meant that the relationship between the plaintiffs and the defendant was sufficiently close for there to be a duty of care.  The salient features present in the circumstances connoting the possibility of a duty to the plaintiffs include:   * the existing relationships between the plaintiffs, the bankrupts, and RFPL, both generally and in the sense that all had or would have some responsibility in various ways for the bank debt.  According to Debelle J, although no longer being indicative of a duty in this country, there was a real proximity between the defendant and the plaintiffs, since the defendant knew that the amount recovered from the sale of the assets would directly affect the amount payable by the plaintiffs; * the defendant's intention to sue the plaintiffs for the loss suffered by RFPL (which ultimately materialised); and * the vulnerability of the plaintiffs to the defendant in relation to the sale of the assets.  Citing the case of Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, it was found that the plaintiffs' vulnerability arose by virtue of their inability to protect themselves from the consequences of the defendant's want of reasonable care.  In particular, the quantum of the plaintiffs' indemnity was directly affected by the amount recovered from the sale of the trust assets.   Debelle J's judgment explored in detail the issue of whether the defendant, acting in the capacity of a liquidator or trustee in bankruptcy, actually owed a duty of care to the plaintiffs.  Sulan and Layton JJ noted that although Debelle J's decision contained persuasive reasons in favour of imposing a duty of care, it was unnecessary for the purposes of the present application to explore the merits of those arguments.     The majority judges also acknowledged that although a court ought to be cautious before interfering with a liquidator's conduct of a liquidation, this reluctance is merely one factor to be considered in determining the existence of a duty of care.  Accordingly, in the absence of clear principles from previous cases on pure economic loss, the court found it "inappropriate to preclude the plaintiffs from bringing their case".   **(ii) No conflict of duty**  The defendant submitted that the imposition of a duty on a liquidator to a third party indemnifier would be inconsistent with the duty a liquidator owes to the creditors and shareholders of the company.     Sulan J (with whom Layton J agreed) rejected this approach, finding that the position of the plaintiffs was analogous to an ordinary creditor.  In this regard, the court noted that:  ...the plaintiffs' financial liability arose from a Federal Court judgment, in which it was determined that the plaintiffs were required to indemnify the companies as a consequence of the plaintiffs' breach of fiduciary duty.  His Honour found that the fact that there may exist other parties to whom a liquidator owes a duty is not determinative of whether a duty exists towards the plaintiffs. Relying on the dicta from Sullivan v Moody (2001) 207 CLR 562, it was noted that:  ...the circumstance that a defendant owes a duty of care to a third party.does not of itself rule out the possibility that a duty of care is owed to the plaintiff. People may be subject to a number of duties, at least provided they are not irreconcilable.  In this regard, Debelle J found that the duties owed by a liquidator and trustee in bankruptcy were consistent with the other duties owed by the defendant.  His Honour noted:  ...the duty to take care to secure a fair price is entirely consistent with the duties of a liquidator and of a trustee in bankruptcy when realising assets. The duties are entirely compatible. The duty which the plaintiffs seek to enforce is a duty to secure the best price reasonably obtainable in the circumstances for the assets which have been sold. If the liquidator or trustee in bankruptcy has discharged that duty, there is no impairment to the rights of creditors.  The majority judges, however, decided that the issue of a potential conflict of duties, and the consequences of such a conflict, were ultimately matters to be explored at trial.  As Sulan and Layton JJ noted, the compatibility of duties "turns on the nature of the duties and the nature of the duties claimed," those issues being best reserved for determination at trial.  It was resolved that for the purposes of the present application, the mere possibility of there being a conflict of duties should not, by itself, preclude the plaintiffs from bringing a claim.    The court found that the plaintiffs' statement of claim disclosed a reasonable cause of action which, if established, would entitle the plaintiffs to relief.  Leave to appeal was granted.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.9 Highly questionable whether a "doctrine" of caretaker directors exists in Australian law**    (By Felicity Saxon, Clayton Utz)   Chimaera Capital Ltd v Pharmaust Ltd [2007] FCA 1539, Federal Court of Australia, French J, 9 October 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1539.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/october/2007fca1539.htm" \t "default)  or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)    **(a) Summary**   This case concerned an application by Chimaera Capital Limited ("Chimaera") for interlocutory relief to restrain the allotment of shares on a rights issue by Pharmaust Limited ("Pharmaust").   On 12 September 2007 Pharmaust lodged with the Australian Securities and Investments Commission a prospectus for a 1:1 entitlement rights issue at 3 cents per share with a view to raising $3,550,618.  At the time an extraordinary general meeting ("EGM") of members of the company had been requisitioned by disaffected shareholders seeking the removal of the existing board of directors.  The EGM had been fixed by the directors for 22 October 2007 which was the last date upon which it could have been held after the notices requisitioning it.     Chimaera applied for an interlocutory injunction to restrain the allotment of shares under the rights issue. It argued that the directors of Pharmaust:   * were acting beyond power in making the rights issue, because they were caretaker directors pending the outcome of the EGM requisitioned by the aggrieved shareholders; * had breached their duty under section 181 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) in making the rights issue for an improper purpose; and * were acting contrary to the interest of the shareholders as a whole or in a way that was oppressive or unfairly prejudicial to Chimaera and other shareholders.   French J held that even if the "doctrine" of caretaker directors existed, which he considered was "highly questionable", it could not be relied on to restrict the directors' power to embark upon the rights issue simply because of the requisitioned EGM.     The evidence outlined that the board had endeavoured to find a solution to pressing difficulties facing the company in both the short and the long term.     French J considered that the timing of the EGM, which effectively allowed the rights issue to proceed, did not of itself support the proposition that the rights issue was for an improper purpose protective of the directors.  However French J considered that might be so if it was clear that the rights issue would lead to a changed majority, which was not the case here.   French J held that the evidence did not point to a persuasive conclusion that the rights issues was anything other than a bona fide judgment by the directors of what was in Pharmaust's best interests The balance of convenience did not favour the restraining of the rights issue.   **(b) Facts**     In July 2007 the cash position of Pharmaust was poor and getting worse.  At this time Pharmaust had secured finance from the National Australia Bank ("NAB") by way of a facility in the amount of approximately $1,350,000 which was due to expire at the end of July.  The managing director of Pharmaust had also resigned.   From July 2007 to September 2007 Pharmaust received various conditional proposals to raise interim working capital and refinance the NAB facility.  These proposals were, in the opinion of the directors, unsuitable for a number of reasons, including being conditional upon the lender's taking control of Pharmaust and providing insufficient funds.  Entities associated with disaffected shareholders of Pharmaust had also made proposals to Pharmaust which were in part driven out of concerns over the falling share price, having dropped from around 20 cents in 2006 to 3.5 cents by August 2007 and dissatisfaction with the board of directors.  Pharmaust did not accept any of these proposals.   On or about 20 August 2007 shareholders of Pharmaust holding approximately 15% of the issued shares issued notices requisitioning an EGM to remove the directors and to appoint a new board.  The directors fixed the shareholder requisitioned EGM for the last date upon which it could have been called, 22 October 2007.   On 28 August 2007 Pharmaust entered into a formal loan agreement with Mr Vassileff. This was conditional upon Pharmaust's instigating a rights issue to repay the capital. On 13 September 2007 Pharmaust announced to ASX a 1:1 entitlement rights issue at 3 cents per share with a view to raising $3,550,618.   Chimaera, the parent of some Pharmaust shareholders, then instituted proceedings. Among other things, it sought an interlocutory injunction preventing the allotment of shares under the rights issue until there had been a vote on the directors' positions.   **(c) Decision**    To obtain the interlocutory injunctive relief, Chimaera was required to demonstrate a serious question to be tried and that the balance of convenience favoured the grant of the injunction.   Chimaera relied on the following 3 propositions to support its claim for interlocutory relief:   * the directors were acting beyond power in making the rights issue because they were caretaker directors pending the outcome of the EGM requisitioned by the aggrieved shareholders; * the directors were in breach of their duty under section 181 of the Act in making the rights issue for an improper purpose; and * the directors were acting contrary to the interest of the shareholders as a whole or in a way that was oppressive or unfairly prejudicial to Chimaera and other shareholders.   **(i) Caretaker directors**   French J held that the directors' power to effect rights issues is constrained by their statutory and fiduciary obligations, including the obligation to act in good faith in the best interests of the corporation and for a proper purpose.   He held that the term "caretaker" is a metaphorical adjective which did not define a doctrine and at best might be regarded as a shorthand reference to the kinds of duties that may constrain the exercise of directors' powers in particular situations including circumstances in which an extraordinary general meeting for the removal of directors has been requisitioned.     French J held that even if the "doctrine" of caretaker directors existed, which he considered was "highly questionable", it could not be relied on to restrict the directors' power to embark upon the rights issue simply because of the requisitioned EGM.     **(ii) Acting for a proper purpose**   The history of the matter outlined that the board had endeavoured to find a solution to the pressing difficulties facing the company in both the short and the long term.  The two most pressing issues were the need to discharge or renegotiate the NAB facility and to obtain ongoing working capital.    French J held that the evidence did not point to a positive conclusion that the board's acceptance of Mr Vassileff's proposal was anything other than a bona fide judgment of what was in the company's best interests as this proposal dealt with the NAB facility problem and also with the requirement for ongoing working capital.  It was noted that the acceptance of this proposal did not solve the long term issues facing Pharmaust. However, the directors could reasonably conclude that none of the other alternatives would resolve those issues as well.     **(iii) Balance of convenience**   The balance of convenience assessment disclosed factors on both sides of the argument.  The existing shareholders might face dilution of their shares, but the evidence did not allow any conclusions on that point. On the other hand, blocking the allotment of shares pending the EGM might have effects on third parties and result in a delay in raising the necessary funding for the company.     While it may be said that there was an arguable case raised against the directors, it was, on the materials before the court, a weak case.    Having regard to the weakness of the case, the balance of convenience was not sufficiently weighted in favour of Chimaera or disaffected shareholders to justify the grant of the interlocutory relief which was sought.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.10 Schemes of arrangement - convening a meeting under section 411(1)**   (By Trent Duffield, DLA Phillips Fox)   In the matter of Coles Group Ltd [2007] VSC 389, Supreme Court of Victoria, Robson J, 27 September 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/september/2007vsc389.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/september/2007vsc389.htm" \t "default)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)    **(a) Summary**   In accordance with section 411(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("the Act"), Coles Group Limited ("Coles") sought and was granted an order to convene a meeting of a class of its shareholders in order to consider a scheme of arrangement proposed by Wesfarmers Limited and Wesfarmers Retail Holdings Pty Ltd ("Wesfarmers").    **(b) Facts**     Coles sought an order under section 411(1) of the Act which would enable Coles to convene a meeting of a class of its shareholders for the purpose of considering a scheme of arrangement ("Scheme").  The Scheme related to the proposed acquisition of Coles by Wesfarmers.  The Scheme, as proposed, was between Coles and its members (other than Wesfarmers and persons holding shares on Wesfarmers' behalf) ("Scheme Shareholders").  Coles not only sought an order pursuant section 411(1) of the Act to convene the meeting, but sought further orders as to the manner in which the meeting should be convened and conducted, including its time and place and the person authorised to act as its Chairman. Also pursuant to section 411(1), Coles sought approval of the explanatory statement that was before court that related to the Scheme setting out it nature and terms.   There was no defendant in the application and no appearance by ASIC.   **(i) Should the meeting be ordered?**  In considering whether a meeting should be ordered, Robson J cited the judgment of Street J in F.T. Eastman & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd (1977) 3 ACLR 69 where it was observed that the court will not ordinarily summon a meeting unless the scheme proposed is of such terms that, if it achieved the relevant majority at the meeting, the court would be likely to approve it on hearing of a petition which was unopposed.  Robson J noted that the approach by Street J was supported in the High Court decision of Australian Securities Commission v Marlborough Goldmines Ltd (1977) 3 ACLR 6 and also by  Hayne J in Re Sonodyne International Ltd  (2003) 45 ACSR 34 where Hayne J stated that: "In the end the question as presented at this stage of the process of a company propounding and implementing a scheme of arrangement is whether the scheme is such that it could reasonably be supposed by sensible business people to be for the benefit of the clients concerned.  That is, the test is... whether it is reasonable to suppose that sensible business people might consider the arrangement proposed by the company is of benefit to its members".   **(ii) What were the relevant factors?**   To determine if it were reasonable to suppose that sensible business people might consider the arrangement proposed by Coles was of benefit to its members, Robson J focused on those factors that had been considered relevant by Lindgren J in Re APN News & Media Ltd (2001) 36 ACSR 758, in particular those which came under the headings of performance risk, 'no-shop' restriction, break fee and deemed warranty.    **(iii) 'No-shop' restriction**   In respect of the 'no shop' restriction within the Scheme Implementation Agreement (where Coles would agree to terminate discussions with parties other than Wesfarmers regarding competing transactions), Robson J observed that any such restriction should:   * be limited to a reasonable period capable of precise ascertainment; * be framed such that it is subject to the overriding fiduciary duties of directors; and * be highlighted adequately in the explanatory statement.   Robson J held that the restriction in this instance satisfied these requirements and did not contain anything which should prevent the Scheme going forward for consideration by the Scheme Shareholders. In particular, it was highlighted that the restriction included an express "fiduciary carve out" for the directors of Coles and expired on 31 December 2007. Robson J considered that the period to 31 December 2007 was a reasonable time given the size and complexity of the proposed transaction.    **(iv) Performance risk**   Robson J accepted the submissions of Coles that adequate provision had been made for performance risk as under the Scheme the shares were not to be transferred until consideration had been provided.    **(v) Break fee**   It was emphasised that any break fee under a scheme of arrangement should be a consequence of normal commercial negotiation, and not the result of any pressure or influence from one of the parties involved. It was accepted that Coles and Wesfarmers both considered that it was appropriate and reasonable to have agreed to the payment of the break fee to secure the benefits available to each of them from their participation in the Scheme. Moreover, it was accepted by Robson J that the break fee was not likely to significantly deter any other serious competing offer by a company or companies other than Wesfarmers, given the percentage of the break fee against the total value of the offer. The break fee of $150 million only represented 0.81% of the low end of an assessment received by the court of the value of the Wesfarmers' offer.    It was also noted that the break fee would not be payable where the Scheme failed to attract support of the requisite majorities at the meeting. Accordingly, it could not be suggested that the provision of payment of the break fee would operate to coerce Scheme Shareholders to vote in favour of the offer.   **(vi) Deemed warranty**   The Scheme provided that each Scheme Shareholder was deemed to have warranted to Coles that all of their ordinary shares would, at the date of transfer, be fully paid and free from all encumbrances. Further to this, each Scheme Shareholder would be deemed to have warranted that they had full capacity and power to sell and transfer those shares. Robson J observed that the purpose of a deemed warranty should be to prevent a shareholder whose shares are subject to encumbrances from receiving the same consideration as that to be received by a shareholder whose shares are free from encumbrances without obligation to refund the amount required to be discharged under the encumbrance.  As the deemed warranty in the present circumstances did no more than to operate as a device to ensure this outcome, Robson J considered the deemed warranty reasonable and acceptable in the circumstances.    **(vii) Explanatory statement**   His Honour directed that references in the explanatory statement to "directors' fiduciary duties" should be amended to refer more broadly to "directors' duties".  It was considered that the limitation of the duties to fiduciary duties may mean that the prescriptive duties of directors, such as the duty to act bona fide in the best interests of the company and the duty to exercise reasonable skill and care, may not be included.    **(c) Decision**    Robson J held that it was reasonable to suppose that sensible business people might consider the arrangement proposed could be of benefit to members of Coles and accordingly made the orders sought by Coles, which included an order to convene a meeting of Scheme Shareholders to consider the Scheme and approval of the explanatory statement before the court that related to the Scheme.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.11 The requirements of section 459G are essential conditions of the right to make an application for an order setting aside a statutory demand**   (by Kathryn Finlayson, Minter Ellison)   Pearlburst Pty Ltd v Summers Resort Group Pty Ltd; Landmark Leisure Group Pty Ltd v Summers Resort Group Pty Ltd [2007] NSWSC 1126, Supreme Court of New South Wales, Barrett J, 11 October 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1126.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/october/2007nswsc1126.htm" \t "default) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)   **(a) Summary**   The requirements of section 459G are essential conditions of the right to make an application for an order setting aside a statutory demand. As the time requirement was not observed, the court had no jurisdiction to order that the statutory demands be set aside.   Rule 35.8 of the Uniform Civil Procedure Rules does not restrict fulfilment of the section 459G conditions.   **(b) Facts**    On or about 15 August 2007, the defendants served statutory demands on the plaintiff. On 5 September 2007, the plaintiff filed two applications under sections 459G and 459J of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) for orders setting aside the statutory demands served by the respective defendants.     On 27 September 2007, the defendants each filed a notice of motion seeking an order that the respective proceedings be dismissed pursuant to Rule 13.4 of the [Uniform Civil Procedure Rules 2005 No. 418 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "default).  The defendants submitted that no cause of action existed or, alternatively, that the proceedings represented an abuse of process. In reply, the plaintiff submitted that the defendants had not proved service of the statutory demands and that summary dismissal should not be ordered.   As the circumstances in each proceeding were identical, the proceedings were heard together and the Supreme Court delivered one set of reasons.   The main issue before the court was whether the plaintiff had properly invoked the jurisdiction of the court under section 459G.     **(c) Decision**    His Honour Justice Barrett held that the plaintiff had not complied with the requirements of section 459G in respect of both applications. In particular, the plaintiff had not filed and served affidavits in support of its applications within the required time limit as specified by section 459G(3). As the time requirement was an essential condition of the right to make the application, the court had no jurisdiction to order that the statutory demands be set aside.    His Honour dismissed the plaintiff's submission that Rule 35.8 of the Uniform Civil Procedure Rules restricted the plaintiff's ability to fulfil the section 459G conditions. Section 459G created a condition of jurisdiction dependent upon the filing of an affidavit and as a Commonwealth statute, did so in a way which caused any prohibition under state law to be invalid to the extent of the inconsistency.    In response to the plaintiff's submission that the defendants had not proved service of the statutory demands, his Honour held that although the procedures in section 109X of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) were not shown to have been followed, the principles of 'informal service' meant that the evidence before the court about the plaintiff's receipt of and dealings with the statutory demand could and did establish that the statutory demand was served on the plaintiff on or after 15 August 2007.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.12 Judge considers Evans & Tate winery won't get better with age - application to extend second meeting of creditors in an administration**    (By Duncan Longstaff, Blake Dawson)   Re Evans & Tate Ltd (Administrators Appointed) (Receivers and Managers Appointed); ex parte Jones [2007] WASC 235, Supreme Court of Western Australia, EM Heenan J, 7 September 2007  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2007/september/2007wasc235.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2007/september/2007wasc235.htm" \t "default) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)  **(a) Summary**  The plaintiff administrators sought ex parte orders for an extension of three months to hold the second meeting of creditors required by section 439A of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) ("Act") so that further information could be gathered in order to develop a viable scheme of arrangement.  His Honour EM Heenan J considered it inappropriate to order such an extension on an ex parte basis, especially given the potential prejudice to some creditors if the costly administration was prolonged.  His Honour also noted that, because the companies were effectively controlled by receivers with substantial secured debts, there was no real prospect of the administrators assuming control and accessing the necessary information before a significant proportion of the asset pool available to creditors had been consumed by the expenses of administration.  In the circumstances, his Honour found it appropriate to order a reduced extension of 30 days in which to convene the second creditors meeting, with liberty to apply for a further extension should it be thought necessary.    **(b) Facts**   The case concerns the group of companies headed by Evans & Tate Ltd, the esteemed vineyard operator and winemaker from Western Australia's famous Margaret River region.  The group was treated as one for the purposes of this decision, because each of the twenty wholly‑owned Australian companies was under external administration and had, along with three wholly‑owned UK subsidiaries and one partly‑owned US company, entered into a deed of cross guarantee which made them jointly and severally liable for the debts of each other.  After a sustained period of financial difficulties, administrations across the group were catalysed by the appointment of receivers by the group's principal secured creditor, ANZ, on 21 August 2007.     Pursuant to section 436E of the Act, the first meeting of the companies' creditors after the administrators were appointed had to be held on or before 27 August 2007, and the meetings for each company were held concurrently on that day.  According to the timetable specified by section 439A, the second meeting would ordinarily need to have been convened by 10 September 2007 and to have been held on or before 17 September 2007.  The application was made on 6 September 2007 and heard the next day, which happened to be a Friday and therefore the last business day for convening a second meeting of creditors, making the urgency of the application extreme.    The application for an extension of time was brought by the administrators, who could not access sufficient information to comply with their obligations under section 439A(4) of the Act to report to creditors detailing the companies' businesses, property, affairs and financial circumstances before convening the second creditors' meeting.  This was because ANZ's receivers and managers controlled the assets and operations of almost all of the companies in the Evans & Tate group.  The receivers' task was itself considerable, as it was submitted by counsel (albeit without substantiating evidence due to the administrators' access problems) that the aggregate liabilities of the group amounted to approximately $185 million, nearly $100 million of which was owed to ANZ.   Consequently, the receivers were likely to take up to three months to finalise any sale of assets to satisfy the secured debt, particularly as they were attempting to sell the group of companies as a going concern.  Only after this, it was submitted, could the administrators gain sufficient control of the companies to meaningfully assess any remaining assets and trading advantages which might then be sold or integrated into a reduced, but profitable, operation for the companies in the group under a suitably designed scheme of arrangement.     **(c) Decision**    His Honour EM Heenan J began his analysis by observing that the effect of granting the orders sought by the administrators would be to allow them to render charges for conducting the administration for a longer period than contemplated by the scheme of the Act.  These increased fee liabilities would be secured by a lien over all of the companies' assets in favour of the administrators, further reducing the pool from which creditors will be able to recover outstanding debt amounts.  EM Heenan J's reluctance to bring about this situation was reflected in his rejection of the administrators' application for an order under section 447A of the Act permitting them to have access to the 'pooled assets' of all the companies as security for payment of their remuneration and expenses, which His Honour considered to be artificial and unfairly disadvantageous for other creditors competing for liquidated assets to satisfy their debts.     His Honour further explained that extending an administration not only prejudiced creditors by reducing the assets that will ultimately be allocated to each debt, but also had more immediate impacts on creditors' cashflow.  An immediate effect of entering external administration is the suspension of the rights of the creditors, lessors, and any other party seeking to recover debts, to be determined and prioritised by the administrators, with the effect that debt repayments cease in the interim.  In light of this circumstance, his Honour noted that:  ...an action or proceeding in a court against the company under administration (section 440D of the Act), should be for no longer than is reasonably necessary for an informed decision to be made about whether or not to approve a deed of company arrangement, or, otherwise, to end the administration or to proceed to a winding up . There may well be cases, such as the present, where the usual period of 28 days contemplated by the Act is insufficient for these purposes.  However, it should not, in my view, be open‑ended . the starting point for any application for an extension of these time limits must be that, generally, the court will expect that administrators adhere to the specified time limits.  His Honour then considered whether to deviate from this general position, noting that there does not need to be special grounds for granting an extension and that no single ground will be determinative.  However, the court will consider whether the extension is necessary to enable the administrator to report pursuant to section 439(4) and also take account of creditors' wishes.  The plaintiff administrators pointed to the size and complex nature of the companies' operations, the fact that receivers retained effective control, the absence of apparent prejudice to any creditor or company member, the passive acceptance of creditors at their first meeting and the need to wait until the secured debts were satisfied as factors favouring an extension of time.  His Honour acknowledged the benefits to the administrators motivating their push for an extension of time, but noted that their position was based on a "latent assumption" that should not be ignored:  In a metaphorical sense, this application by the administrators assumes that there is some light at the end of the tunnel and that, if time is extended to allow a series of sales or realisations to be proposed and effected by the secured creditor and then for the administrators to formulate a scheme of arrangement in relation to the residue of the available assets, some meaningful proposal can be designed and put to the creditors.  Such an approach is, no doubt, admirable.  However, there is no tangible evidence of the financial position of the companies or the extent of the indebtedness to the principal creditor put before the court to allow the conclusion to be drawn that there is, indeed, light at the end of the tunnel.  It could not be said whether there is in fact any 'light at the end of the tunnel' in terms of assets to satisfy unsecured debts (including administration fees), as EM Heenan J found there was no tangible evidence of the companies' financial position or the extent of their indebtedness to ANZ, the principal creditor.  Taking into account all of these circumstances, his Honour considered it appropriate to extend the time for convening the second meeting of creditors by 30 days (until 10 October 2007), giving the administrators the opportunity to put more to the creditors, members and court (if necessary) in the nature of financial information than was presently available.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5)  **5.13 Whether section 459S precludes an allegation of abuse of process upon hearing of a winding up application**   (By Katrina Sleiman and David Ellenby, Corrs Chambers Westgarth)   TS Recoveries Pty Ltd v Sea-Slip Marinas (Aust) Pty Ltd [2007] NSWSC 1074, New South Wales Supreme Court, Barrett J, 25 September 2007   The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/september/2007nswsc1074.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/september/2007nswsc1074.htm" \t "default) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "default)  **(a) Summary**   TS Recoveries Pty Ltd (TS Recoveries) commenced winding up proceedings against Sea-Slip Marinas (Aust) Pty Ltd (Sea-Slip) on the basis of insolvency arising from the failure of Sea-Slip to comply with a statutory demand served by TS Recoveries.  Sea-Slip conceded the insolvency but argued that the court should either dismiss the application or adjourn it for a period on the ground that the pursuit of the application was an abuse of process.  The court concluded that section 459S of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default) (the Act) did not preclude Sea-Slip from advancing an argument that the conduct engaged in by TS Recoveries caused the pursuit of the application to be an abuse of process.  This was so even though some of the relevant facts could have been advanced by Sea-Slip to oppose the statutory demand under section 459J(1)(b) of the Act on the grounds of abuse of process.   **(b) Facts**    TS Recoveries sued for a winding up order solely on the ground of insolvency.  It had the benefit of a presumption of insolvency under section 459C(2)(a) of the Act due to Sea-Slip's failure to comply with a statutory demand filed by TS Recoveries.   Sea-Slip conceded insolvency, however it applied under section 467(1)(a) of the Act for the court to dismiss the application or adjourn it for a period.  Sea-Slip alleged that pursuit of the winding up application was an abuse of process.  Sea-Slip contended that TS Recoveries embarked on and followed a course of conduct calculated to stifle or make more difficult attempts by Sea-Slip to obtain financial benefits properly obtainable by it under contracts that it had with an associate of TS Recoveries.  This course of conduct, it was alleged, began before the statutory demand was served and continued through to the filing of the winding up summons and up to the time of the hearing (the pursuit of the winding up application being part of the conduct).    TS Recoveries argued that the objections of improper purpose and abuse of process were available in relation to the statutory demand.  Therefore, it was argued that section 459S of the Act prevented Sea-Slip from relying on the abuse of process allegation in relation to the winding up application.  The effect of section 459S of the Act is to preclude a company the subject of a winding application from opposing that application on a ground that the company could have relied on, but did not rely, to oppose the statutory demand.   **(c) Decision**    The court noted that abuse of process can be a ground on which the court may decline to make a winding up order, citing the New South Wales Court of Appeal's recent decision in Australian Beverage Distributions Pty Ltd v Evans and Tate Premium Wines Pty Ltd (2007) 61 ACSR 441.     The court focused on whether reliance on the abuse of process ground was precluded by section 459S(1) of the Act.  The court examined the timing and facts available to challenge a statutory demand and oppose a winding up application.  A statutory demand can only be challenged by reference to circumstances existing before the end of the 21 day time limit specified in section 459G(2) of the Act.  Conversely, the position with regard to a winding up application must be examined in light of the circumstances existing when those proceedings are pursued and prosecuted.    In relation to a winding up application, the court held that the implication of the facts must be judged as a whole.  Although the ground emerging from the whole of the facts is not available at the section 459G stage, even if some of the facts could have been relied on to oppose the statutory demand, that was not a barrier to a consideration of the whole of the facts.  Accordingly, the court held that section 459S did not preclude the application.   Further, the court noted that abuse of process is concerned predominately with propriety of purpose.  The primary purpose of service of a statutory demand is to obtain payment of a debt.  With the present facts, a winding up application is designed to secure the imposition of a scheme of insolvent administration aimed at, among other things, ending the company's activities, rather than payment of a debt.  Accordingly, the court held that these differences in purpose emphasised the separateness of application of abuse of process principles in relation to service of a statutory demand and application of the same principles in relation to a creditor's pursuit of winding up proceedings.  This is the case at least where insolvency is conceded, the defendant consciously decides to defend the winding up application and the alleged abuse is not really a collateral allegation of dispute about the existence of the debt grounding the statutory demand.   The court concluded that Sea-Slip was not precluded by section 459S from raising abuse of process in opposition to a winding up application even though some of the relevant facts could have been raised had it challenged the statutory demand on the ground of abuse of process.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h5) | |  |  | | --- | |  |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer%281%29.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007.htm%23h1) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer%281%29.gif |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer.gif | We welcome users' suggestions for improvement to this [service](mailto:helpdesk.asiapac@saiglobal.com).   |  | | --- | | **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](mailto:helpdesk.asiapac@saiglobal.com). | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20123%20November%202007_files/spacer.gif |
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