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| **Bulletin No. 147**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/147%20November%202009.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| **1.1 Executive pay termination payments legislation passed by Senate** On 16 November 2009, the [Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009](http://my.lawlex.com.au/default.asp?cid=107555&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) was passed by the Australian Senate.Key features of the legislative package include:* Termination benefits for company directors and executives exceeding one year’s average base salary are subject to shareholder approval.
* The scope of the requirements relating to termination benefits is expanded to include senior executives or key management personnel of a disclosing entity.
* The definition of what constitutes a “benefit” is broadened, including a requirement for a broad interpretation of the term “benefit” and a requirement that the substance should prevail over its legal form.
* New regulation-making powers to specify what types of payments are, or are not, a termination benefit, and to define "base salary".

The legislation and accompanying regulations will take effect the day after Royal Assent is granted.The Bill has been discussed previously in Item 1.15 of [Corporate Law Bulletin No 145](http://research.lawlex.com.au/news.asp?id=7233&sp=1" \t "_new) (September 2009) and Item 1.15 of [Corporate Law Bulletin No 141](http://research.lawlex.com.au/news.asp?id=6868&sp=1" \t "_new) (May 2009). etailed Contents**1.2 FRC highlights current challenges for audit committees and users of actuarial information** On 14 November 2009, the UK Financial Reporting Council (FRC), the independent regulator responsible for promoting confidence in corporate reporting and governance, published two documents highlighting the challenges being faced by audit committees and users of actuarial information arising from the difficult economic conditions.The current year questions for audit committees focus upon the risks that arise as companies change their business models to help manage through the effects of a significant recession. Such changes often involve modifying the terms of trade including arrangements with pension funds. The existence of such changes may call into question whether accounting policies remain appropriate, whether internal control systems capture all of the relevant data in a reliable way and whether assumptions used in models for accounting and actuarial purposes are appropriate in the circumstances.The current year questions for users of actuarial information are particularly relevant to the governing bodies of insurers and pension schemes, but may also be useful for scheme sponsors, auditors and audit committees. The questions focus on the risks surrounding the business model, how those risks are managed, on understanding the key assumptions and cash flows underlying discounted values and on the quality controls on actuarial work.The report titled ‘Challenges for audit committees arising from current economic conditions’ is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Challenges%20for%20audit%20committees%20November%2020092.pdf%22%20%5Ct%20%22_new) website.The report titled ‘Challenges for users of actuarial information arising from current market conditions 2009 update’ is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Challenges%20for%20users%20of%20actuarial%20information2.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.3 Proposed law reform dealing with phoenix company activity** On 13 November 2009, the Australian Assistant Treasurer, Senator Nick Sherry, released a package of new proposals for dealing with phoenix company activity.Fraudulent phoenix activity involves avoiding the payment of tax liabilities, wages, superannuation and leave entitlements and other responsibilities, such as supplier accounts, through the deliberate liquidation of a company. The business in question then continues, free of liabilities, in the form of another corporate entity, controlled by the same person or group of individuals. The package of reforms released which are now open for public consultation, includes:* ensuring that there are anti-avoidance provisions in the taxation law to cancel any benefits derived through fraudulent phoenix activity;
* reinstating the failure to remit offence that would make it an offence for an entity not to remit the required Pay-As-You-Go (Withholding) (PAYG(W)) amounts;
* making it an offence for directors to claim credits in relation to their own income for PAYG(W) amounts that have not been remitted by the company of which they are a director;
* extending the promoter penalty regime to provide a disincentive to those who promote fraudulent phoenix activity;
* expanding the Australian Securities and Investments Commission's powers to disqualify directors; and
* expanding the role of the director penalty notice to impose stricter liabilities on directors and to cover a broader range of taxes and superannuation guarantee payments.

The proposals are available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1647" \t "_new) website. etailed Contents**1.4 Guidance on human rights reporting for companies** On 11 November 2009, the Global Reporting Initiative (GRI) released two reports that examine trends in corporate measurement and reporting on human rights performance and provide practical guidance for companies engaging on this emerging area of corporate citizenship and accountability.The first report, a survey of recent sustainability reports by over 50 leading companies, examines trends in current corporate disclosures on human rights and highlights good practice examples as well as ongoing shortcomings in reporting in this area. The second report offers a practical guide for companies on steps they can take to improve their coverage of human rights as part of their sustainability reports. The reports are available on the [GRI](http://www.globalreporting.org/HumanRights%22%20%5Ct%20%22_new) website. etailed Contents**1.5 Financial Stability Board releases reports submitted to the G20**On 7 November 2009, the Financial Stability Board (FSB) published four reports submitted to G20 Finance Ministers and Central Bank Governors. **(a) Progress since the Pittsburgh Summit in implementing the G20 recommendations for strengthening financial stability**This updates the progress report made to the Pittsburgh Summit in September 2009, and includes a description of the actions to date to implement the policy measures for improving financial regulation set out by the FSB in Pittsburgh. The areas on which it provides updates include:* Building high quality capital and mitigating pro-cyclicality;
* Strengthening accounting standards;
* Reforming compensation practices to support financial stability;
* Improving over-the-counter derivatives markets;
* Addressing cross-border resolutions and systemically important financial institutions;
* Strengthening adherence to international supervisory and regulatory standards.

**(b) Exit from extraordinary financial sector support measures**This report reviews policies to withdraw from exceptional financial support measures. Exit policies in this area should be pre-announced, flexible, transparent and credible. Although decisions on the timing of withdrawal of measures will depend on judgments on the strength of national financial systems, there are gains from advanced information exchange between countries and from stronger forms of co-ordination where cross-border spillover effects are potentially significant.The report includes a report by the staffs of the International Association of Deposit Insurers and the International Monetary Fund (IMF) on strategies to unwind temporary deposit insurance arrangements.**(c) Guidance to assess the systemic importance of financial institutions, markets and instruments: Initial considerations**This report by the IMF, Bank for International Settlements and FSB responds to a request made by the G20 Leaders in April 2009 to develop guidance on this subject for use by national authorities. It outlines conceptual and analytical approaches to the assessment of systemic importance and discusses a possible form for general guidelines that would be sufficiently flexible to apply to a broad range of countries and circumstances.**(d) The financial crisis and information gaps**This report by the staff of the IMF and the secretariat of the FSB identifies information gaps and sets forth proposals for strengthening data collection to better capture the build-up of risk in the financial sector, improve data on international financial network connections, monitor the vulnerability of domestic economies to shocks, and improve the communication of official statistics.The reports are available on the [FSB](http://www.financialstabilityboard.org/%22%20%5Ct%20%22_new) website. etailed Contents**1.6 MINCO agrees on principles for reform of directors' liability provisions** On 6 November 2009, the Australian Minister for Financial Services, Superannuation and Corporate Law, Chris Bowen MP, announced the agreement reached by the Ministerial Council for Corporations (MINCO) on the next step in reform of directors' liability provisions. MINCO agreed on a set of principles by which all jurisdictions will audit their legislative provisions that deal with personal liability on company directors where the corporation contravenes a statutory provision. This is the next step towards achieving consistency across Australia on the laws that impose personal liability on directors. The Council of Australian Governments (COAG) referred to MINCO, for its advice, a reform proposal to implement a consistent and principled approach to imposing personal liability on company directors for corporate misconduct across Australian law.**Principles recommended by MINCO**Ministers recommend the following principles for adoption on a national basis in relation to corporate liability and the circumstances in which directors may also be liable for corporate fault: 1. Where a corporation contravenes a statutory requirement, the corporation should be held liable in the first instance. 2. Directors should not be liable for corporate fault as a matter of course or by blanket imposition of liability across an entire Act. 3. A "designated officer" approach to liability is not suitable for general application. 4. The imposition of personal criminal liability on a director for the misconduct of a corporation should be confined to situations where: * there are compelling public policy reasons for doing so (e.g. in terms of the potential for significant public harm that might be caused by the particular corporate offending);
* liability of the corporation is not likely on its own to sufficiently promote compliance; and
* it is reasonable in all the circumstances for the director to be liable having regard to factors including:
	+ the obligation on the corporation, and in turn the director, is clear;
	+ the director has the capacity to influence the conduct of the corporation in relation to the offending; and
	+ there are steps that a reasonable director might take to ensure a corporation's compliance with the legislative obligation.

5. Where principle 4 is satisfied and directors' liability is appropriate, directors could be liable where they: * have encouraged or assisted in the commission of the offence; or
* have been negligent or reckless in relation to the corporation's offending.

6. In addition, in some instances, it may be appropriate to put directors to proof that they have taken reasonable steps to prevent the corporation's offending if they are not to be personally liable.Ministers recommend the following action with a view ensuring that legislation imposing liability on directors for corporate fault operates fairly and can be clearly justified: 1. A legislative review by each jurisdiction to identify those existing offences for which directors' liability, or removal of that liability, is appropriate in accordance with above principles. 2. Harmonisation following cross-jurisdictional comparison in key policy areas. 3. A harmonised legislative approach to provisions imposing directors' liability around key concepts and definitions, including the clarification of the term "director". 4. Greater clarity about the offences for which directors may be liable through a specific listing or schedule approach. etailed Contents**1.7 IOSCO consults on principles to mitigate private equity conflicts of interest** On 3 November 2009, the International Organization of Securities Commissions’ (IOSCO) Technical Committee published a consultation report titled ‘Private Equity Conflicts of Interest’. The Report proposes a number of principles for the effective mitigation of the potential conflicts of interest encountered in private equity firms, and the risks these conflicts pose to fund investors or the efficient functioning of the market. The report examines the material conflict of interest risks encountered at each stage of the life cycle of a typical private equity fund, managed by a multi-fund, multi-strategy firm, and sets out the potential and common methods for mitigating these potential conflicts of interest alongside each risk. Mitigation typically takes the form of appropriate alignment of interest through incentive structures, disclosure and legal agreements. This issue was originally identified as an emerging risk from the private equity industry in a report published by IOSCO in June 2008. **Proposed principles for the mitigation of conflicts of interests** These principles were developed using a multi-fund, multi-strategy private equity firm as a reference point. They are designed to be applied to all types of private equity firms allowing for firms different size, structure and operations. 1. A private equity firm should seek to manage conflicts of interest in a way that is in the best interests of its fund(s), and therefore the overall best interests of fund investors. 2. A private equity firm should establish and implement written policies and procedures to identify, monitor and appropriately mitigate conflicts of interest throughout the scope of business that the firm conducts. 3. A private equity firm should make the policies and procedures available to all fund investors both at inception of their relationship with the firm, and on an ongoing basis. 4. A private equity firm should review the policies and procedures, and their application, on a regular basis, or as a result of business developments, to ensure their continued appropriateness. 5. A private equity firm should favour mitigation techniques which provide the most effective mitigation and greatest level of clarity to investors. 6. A private equity firm should establish and implement a clearly documented and defined process which facilitates investor consultation regarding matters relating to conflicts of interest. 7. A private equity firm should disclose the substance of opinion given through the investor consultation process and any related actions taken to all affected fund investors in a timely manner (save where to do so would breach any other legal or regulatory requirement or duties of confidentiality). 8. A private equity firm should ensure that all disclosure provided to investors is clear, complete, fair and not misleading. The consultation period closes on 1 February 2010.The consultation paper is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD309.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Financial sector surveillance and the IMF** On 1 November 2009, the International Monetary Fund (IMF) published a paper titled “Financial Sector Surveillance and the IMF”. The global financial crisis has magnified the role of Financial Sector Surveillance (FSS) in the Fund's activities. This paper surveys the various steps and initiatives through which the Fund has increasingly deepened its involvement in FSS. Overall, this process can be characterized by a preliminary stage and two main phases. The preliminary stage dates back to the 1980s and early 1990s, and was mainly related to the Fund's research and technical assistance activities within the process of monetary and financial deregulation embraced by several member countries. The first "official" phase of the Fund's involvement in FSS started in the aftermath of the Mexican crisis, and relates to the international call to include financial sector issues among the core areas of Fund surveillance. The second phase focuses on the objectives of bringing the coverage of financial sector issues "up to par" with the coverage of other traditional core areas of surveillance, and of integrating financial analysis into the Fund's analytical macroeconomic framework. By urging the Fund to give greater attention to its member countries' financial systems, the international community's response to the global crisis may mark the beginning of a new phase of FSS.The paper is available on the [International Monetary Fund](http://www.imf.org/external/pubs/ft/wp/2009/wp09247.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.9 Implementation of recommendations on promoting choice in the UK audit market** On 27 October 2009, the UK Financial Reporting Council published its fourth progress report on the implementation of the recommendations of the Market Participants Group (MPG) and other relevant developments.Progress achieved in implementation of the MPG recommendations since the May 2009 update includes:* The release by the Audit Firm Governance Working Party of a draft best practice code on the governance of audit firms; and
* The publication of a summary of responses to the European Commission’s consultation on audit firm ownership.

Other relevant developments include a new consultation on changes to Ethical Standards and the publication of proposals for alternative business structures for law firms.The report is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Fourth%20progress%20report%20October1.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.10 European Commission adopts additional legislative proposals to strengthen financial supervision in Europe**On 26 October 2009, the European Commission announced that it has adopted additional legislative proposals to further strengthen financial supervision in Europe. Following the adoption of a legislative package to strengthen financial supervision in Europe on 23 September 2009, including the creation of a European System of Financial Supervisors with three new European Supervisory Authorities, the Commission proposes to make targeted changes to existing financial services legislation to ensure that the new Authorities can work effectively. In particular, these proposals lay down in detail the scope for the Authorities to exercise their powers, ensuring a more harmonised set of financial rules through the possibility to develop draft technical standards, settle disagreements between national supervisors and facilitate the sharing of micro-prudential information. The package will now be sent on to the Council and the European Parliament for consideration. The legislative proposals complement a package of proposals on financial supervision presented by the Commission on 23 September (IP/09/1347). In addition to proposals to create a European Systemic Risk Board, the package envisages the creation of a European System of Financial Supervisors (ESFS) for the supervision of individual financial institutions ("micro-prudential supervision"). The ESFS will consist of a network of national financial supervisors working in tandem with new European Supervisory Authorities, created by the transformation of existing Committees for the banking, securities and insurance and occupational pensions sectors. There will be a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA).The new Authorities in the ESFS will take over all of the functions of the existing committees, and in addition have certain extra competences, including the following:* Developing proposals for technical standards;
* Resolving cases of disagreement between national supervisors, where legislation requires them to co-operate or to agree;
* Contributing to ensuring consistent application of technical Community rules (including through peer reviews);
* The European Securities and Markets Authority will exercise direct supervisory powers for credit rating agencies;
* A coordination role in emergency situations.

Further information is available on the [Europa](http://ec.europa.eu/internal_market/finances/committees/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.11 Insurance supervisors strengthen framework for sound insurance markets**On 26 October 2009, the International Association of Insurance Supervisors (IAIS) announced several new initiatives including: * The launch of the Access to Insurance Initiative which is a new collaborative approach between international development agencies and insurance supervisors designed to strengthen the capacity and expertise of insurance supervisors and to facilitate their role in expanding access to insurance markets.
* The signing of three further insurance supervisory authorities to the IAIS Multilateral Memorandum of Understanding (MMoU). The MMoU facilitates cooperation and exchange of information between supervisors.
* The adoption of a guidance paper providing the key features for effective supervisory colleges in group-wide supervision.
* The extension of the Financial Stability Institute (FSI) on-line training tutorials to areas of specific interest to insurance supervisors, supported by the IAIS. Over the next few years, the FSI will introduce a number of additional insurance-focused tutorials.
* The adoption of a standard and guidance paper on the capital resources for solvency purposes to support the enhancement, improved transparency and comparability and convergence of insurer solvency internationally.

Further information is available on the [IAIS](http://www.iaisweb.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.12 FSA announces new code for financial reporting disclosure** On 26 October 2009, the UK Financial Services Authority (FSA) announced that the major UK-headquartered banks have agreed to implement a new code for financial reporting disclosure. The code forms part of proposals, designed to enhance investors’ confidence in financial reporting and to aid their ability to compare and contrast banks’ performance. It is based on an overarching principle that UK banks are "committed to providing high quality, meaningful and decision-useful disclosures to users to help them understand the financial position, performance and changes in the financial position of their businesses".The FSA is inviting views on the application of this code to banks and other credit institutions. In the meantime, the major banks, at the FSA’s request, have agreed to implement the code in their 2009 year end annual reports.If the banks are unable to sufficiently improve the quality and comparability of their disclosures in their 2009 annual reports, the FSA is also seeking views as to whether the code needs to be supplanted by more detailed disclosure templates.The Code of Practice is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2009/09_05.shtml%22%20%5Ct%20%22_new) website. etailed Contents**1.13 Reform of US bank remuneration policies** On 22 October 2009, the US Federal Reserve Board issued a proposal designed to ensure that the incentive compensation policies of banking organizations do not undermine the safety and soundness of their organizations. The proposal includes two supervisory initiatives. One, applicable to 28 large, complex banking organizations, will review each firm's policies and practices to determine their consistency with the principles for risk-appropriate incentive compensation set forth in the proposal. These firm-specific policies will be assessed by supervisors in a special "horizontal review," a coordinated examination of practices at the 28 firms. The policies and implementing practices adopted by these firms in response to the final supervisory principles will become a part of the supervisory expectations for each firm and will be monitored for compliance.Second, supervisors will review compensation practices at regional, community, and other banking organizations not classified as large and complex as part of the regular, risk-focused examination process. These reviews will be tailored to take account of the size, complexity, and other characteristics of the banking organization.According to the Federal Reserve, flaws in incentive compensation practices were one of many factors contributing to the financial crisis. Inappropriate bonus or other compensation practices can incentivise senior executives or lower level employees, such as traders or mortgage officers, to take imprudent risks that significantly and adversely affect the firm. With that in mind, the Federal Reserve's guidance and supervisory reviews cover all employees who have the ability to materially affect the risk profile of an organization, either individually, or as part of a group.The findings from these reviews will be incorporated into the banking organization's supervisory ratings. In appropriate circumstances, the Federal Reserve may require an organization to develop a corrective action plan to rectify deficiencies in its incentive compensation programs and processes.To monitor and encourage improvements, Federal Reserve staff will prepare a report after the conclusion of 2010 on trends and developments in compensation practices at banking organizations.Further information is available on the [Federal Reserve](http://www.federalreserve.gov/newsevents/press/bcreg/2009bcreg.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.14 Special master for TARP executive compensation issues first rulings** On 22 October 2009, the Special Master for TARP executive compensation Kenneth R Feinberg released determinations on the compensation packages for the top executives at US firms that received exceptional TARP assistance. Under the Emergency Economic Stabilization Act (EESA) as amended in 2009, the Special Master has a mandate to review all forms of compensation for the five most senior executive officers and the next 20 most highly compensated employees at the seven firms that received exceptional TARP assistance (AIG, Citigroup, Bank of America, Chrysler, GM, GMAC and Chrysler Financial). The determinations announced for the top 25 most highly paid at the seven firms receiving exceptional assistance are as follows: **1. Reform pay practices for top executives to align compensation with long-term value creation and financial stability:** * Reject cash bonuses based on short-term performance, as required by statute, in favour of company stock that must be held for the long term.
* Restructure existing cash "guarantees" into stock that must be held for the long term.

**2. Significantly reduce compensation across the board:** * Average cash compensation down by more than 90 percent.
* Approved cash salary limited to US$500,000 for more than 90 percent of relevant employees.
* Average total compensation down by more than 50 percent.
* Exceptions where necessary to retain talent and protect taxpayer interests.

**3. Require salaries to be paid in company stock held over the long term:** * Stock is immediately vested, requiring executives to invest their own funds alongside taxpayers.
* Stock may only be sold in one-third installments beginning in 2011 or, if earlier, when TARP is repaid-aligning executives' interests with those of taxpayers.

**4. Require incentive compensation to be paid in the form of long term restricted stock – and to be contingent on performance and on TARP repayment:** * Require executives to meet goals set in consultation with the Special Master, and certification of achievement of goals by an independent compensation committee.
* Any incentives granted to be paid only in stock that requires three years of service and can be cashed in only when TARP is repaid.

**5. Require immediate reform of practices not aligned with shareholder and taxpayer interests:** * Limits "other" compensation and perquisites.
* No further accruals under supplemental executive retirement plans or severance plans.

The determinations are available on the [US Treasury](http://www.financialstability.gov/about/executivecompensation.html%22%20%5Ct%20%22_new) website.etailed Contents**1.15 Improving protections for corporate whistleblowers** On 22 October 2009, the Australian Minister for Financial Services, Superannuation and Corporate Law, the Hon Chris Bowen MP, released an options paper exploring strategies for improving protections for corporate whistleblowers.Information from whistleblowers can make an invaluable contribution to the protection of investor interests and the preservation of market integrity. However, whistleblowers must be shielded from the risks they face in coming forward. Currently, corporate whistleblowers are protected under Part 9.4AAA of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). However, these protections have been in place since 2004 and only four whistleblowers have felt safe enough using them to provide information to ASIC.Issues for consideration include:* who is allowed to qualify for protection as a whistleblower – former employees, for example, currently do not qualify;
* what types of issues can be disclosed under the protections – some matters which ASIC can investigate cannot currently be the subject of a protected disclosure;
* whether motive should affect protection – currently an individual with malicious motives cannot be protected even if the information they disclose is genuine;
* whether anonymity should affect protection – many whistleblowers may wish to be anonymous, but if they do not disclose their name from the start then, should they later need to come forward, such as to give evidence, they cannot be protected;
* when can a court order the production of documents which reveal a whistleblower's identity – there is concern that whistleblowers will be discouraged from coming forward unless there is further guidance on this issue;
* what confidentiality restrictions should apply to those receiving disclosures second-hand – there may be a loophole in post-disclosure confidentiality protections; and
* whether prospective whistleblowers should be protected for seeking legal advice – this may encourage more whistleblowers to come forward by providing greater certainty in relation to how the law operates.

Several of the potential reforms also relate to the whistleblower protections provided by the banking and insurance prudential legislation. However, as these provisions are relatively recent, broad changes to the protections offered by these Acts are not anticipated.The closing date for submissions is 21 December 2009.The paper is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1620" \t "_new) website.etailed Contents**1.16 FSA publishes further analysis on systemically important banks and the cumulative impact of capital and liquidity reform** On 22 October 2009, the UK Financial Services Authority (FSA) issued a discussion paper (DP) focusing on policy measures to address the problem of systemically important ‘too-big-to-fail’ banks. The paper also examines the trade-offs involved in increasing capital and liquidity requirements, and stresses the need to assess the cumulative impact of multiple reforms. The paper identifies the dangers posed by those firms that are seen as too-big or too-interconnected-to-fail, or too-big-to-rescue. It describes the full range of policy options - including the creation of ‘narrow banks’ – in order to provide the basis for an informed debate, but also outlines the position which the FSA is currently proposing in international fora, namely that: * There is a strong case for applying some form of capital (and perhaps liquidity) surcharge internationally for systemically important banks; surcharges could be proportional to continuous and increasing measures of systemic importance, avoiding the dangers created by specific thresholds of systemic importance.
* A capital surcharge could be combined with an approach to global banking groups which places greater emphasis on the standalone sustainability of national subsidiaries, with overt understanding that home country authorities will not be responsible for the rescue of entire groups. The more that groups are organised on this basis, the less the required surcharge at group level might need to be.
* Action should be taken to reduce inter-connectedness in wholesale trading markets, with much over-the-counter (OTC) derivative trading moved to central counterparties (CCPs), and with effective collateral and margin call arrangements for bilateral trades which reduce the dangers of strongly pro-cyclical margin call effects.
* Reform to trading book capital should significantly increase capital requirements and differentiate more strongly between basic market making functions which support customer service and riskier trading activities, with a bias for conservatism in relation to the latter.
* Systemically important banks should be required to produce recovery and resolution plans which set out how operations would be resolved in an orderly fashion. If supervision examination of these plans reveals serious obstacles to resolution, then steps will need to be taken to reduce or remove them – this could require restructuring certain parts of the group. Restructuring could include clear separation between retail deposit taking business and businesses involved in proprietary trading activities, with the latter able to fail even if the former were supported in crisis conditions.

The DP also stresses the need to assess the possible cumulative impact of multiple reforms to capital and liquidity regimes now being considered by international standard-setting bodies. It describes the case for significant increases in capital and liquidity requirements to reduce financial instability risks, while recognising the potential implications for lending volumes and the cost of credit intermediation. It considers methodologies which can help inform judgments on the trade-offs involved. The DP makes clear, however, that the potential trade-off between improved stability and constrained lending does not arise in relation to required changes in trading book capital, nor where capital enhancement can be achieved by moderation of bonus payments. It therefore reasserts the Financial Stability Board message that the priority use of high investment bank profits must be to enhance capital levels rather than to support excessive bonus payments.The deadline for responses to the DP is 1 February 2010. The discussion paper is available on the [FSA](http://www.fsa.gov.uk/pubs/discussion/dp09_04.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.17 SEC issues proposals to shed greater light on dark pools**On 21 October 2009, the US Securities and Exchange Commission (SEC) voted unanimously to propose measures intended to increase transparency of dark pools so investors obtain a clearer view of stock prices and liquidity. Dark pools are essentially private trading systems in which participants can transact their trades without displaying quotations to the public. The largest dark pools are sponsored by securities firms primarily to execute the orders of their customers and proprietary orders of the firms.The number of active dark pools transacting in stocks that trade on major US stock markets has tripled since 2002. Given this growth of dark pools, a lack of transparency could create a two-tiered market that deprives the public of information about stock prices and liquidity.To make trading through dark pools more transparent, the SEC's proposals generally would require that information about an investor's interest in buying or selling a stock be made available to the public instead of just a select group operating with a dark pool. The proposals also would require that dark pools publicly identify that it was their pool that executed the trade.The SEC's proposals address three specific concerns related to dark pools.The first proposal would require actionable Indications of Interest (IOIs) — which are similar to a typical buy or sell quote — to be treated like other quotes and subject to the same disclosure rules. The second proposal would lower the trading volume threshold applicable to alternative trading systems (ATS) for displaying best-priced orders. Currently, if an ATS displays orders to more than one person, it must display its best-priced orders to the public when its trading volume for a stock is 5 percent or more. The proposal would lower that percentage to 0.25 percent for ATSs, including dark pools that use actionable IOIs. The third proposal would create the same level of post-trade transparency for dark pools - and other ATSs - as for registered exchanges. Specifically the proposal would amend existing rules to require real-time disclosure of the identity of the dark pool that executed the trade. In its proposals, the Commission is seeking public comment and data on certain issues relating to dark pools. Dark pools of liquidity are one of several issues that the Commission is currently considering as part of its broad review of equity market structure.A fact sheet on dark pools is available on the [SEC](http://www.sec.gov/news/press/2009/2009-223-fs.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.18 Senior supervisors group issues report on risk management practices**On 21 October 2009, the Senior Supervisors Group (SSG) comprised of senior financial supervisors from seven countries (United States, Canada, France, Germany, Japan, Switzerland, United Kingdom) issued a report that evaluates how weaknesses in risk management and internal controls contributed to industry distress during the financial crisis. The report titled ‘Risk Management Lessons from the Global Banking Crisis of 2008’ reviews in detail the funding and liquidity issues central to the recent crisis and explores critical areas of risk management practice in need of improvement across the financial services industry.The report concludes that despite firms' recent progress in improving risk management practices, underlying weaknesses in governance, incentive structures, information technology infrastructure and internal controls require substantial work to address.The observations and conclusions in the report reflect the results of two initiatives undertaken by the SSG. These initiatives involved a series of interviews with firms about funding and liquidity challenges and a self-assessment exercise in which firms were asked to benchmark their risk management practices against a series of recommendations and observations taken from industry and supervisory studies published in 2008.The report is available on the [SEC](http://www.sec.gov/news/press/2009/report102109.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.19 Commission consults on the measures necessary for a new EU framework for crisis management in the banking sector**On 20 October 2009, the European Commission adopted a Communication on an EU framework for crisis management in the banking sector. The purpose of the Communication is to consult as widely as possible on a broad range of issues aimed at safeguarding financial stability and the continuity of banking services in a cross border banking crisis. The Communication sets out questions on the tools that the Commission considers would be necessary for an EU crisis management framework. These tools range from “early intervention” action by banking supervisors aimed at correcting irregularities at banks, to bank resolution measures which involve the reorganisation of ailing banks, to insolvency frameworks under which failed banks are wound up. The Commission takes the view that the existing arrangements are clearly insufficient to stabilise and control the systemic impact of cross border financial institutions and that a new legal framework needs to be put in place. A new framework should equip authorities with the right tools and provide the legal certainty to handle cross-border banking failures, in ways that minimise costs to taxpayers and allow even the largest banks to fail without damaging financial stability.Further information is available on the [Europa](http://ec.europa.eu/internal_market/bank/news/index_en.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.20 Actions to strengthen the safety of EU derivatives markets** On 20 October 2009, the European Commission adopted a Communication for ensuring efficient, safe and sound derivatives markets. The Communication sets out future policy actions to increase transparency of the derivatives market, reduce counterparty and operational risk in trading and enhance market integrity and oversight. The future policy actions will:* Reduce counterparty risk by (i) proposing legislation to establish common safety, regulatory and operational standards for central counterparties (CCPs), (ii) improving collateralisation of bilaterally-cleared contracts, (iii) substantially raising capital charges for bilaterally-cleared as compared with CCP-cleared transactions, and (iv) mandate CCP-clearing for standardised contracts;
* Reduce operational risk by promoting standardisation of the legal terms of contracts and of contract-processing;
* Increase transparency by (i) mandating market participants to record positions and all transactions not cleared by a CCP in trade repositories, (ii) regulating and supervising trade repositories, (iii) mandating trading of standardised derivatives on exchanges and other organised trading venues, and (iv) increase transparency of trading as part of the review of the Markets in Financial Instruments Directive (MiFID) for all derivatives markets including for commodity derivatives;
* Enhance market integrity and oversight by clarifying and extending the scope of market manipulation as set out in the Market Abuse Directive (MAD) to derivatives and by giving regulators the possibility to set position limits.

Further information is available on the [Europa](http://ec.europa.eu/internal_market/financial-markets/derivatives/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.21 Pension supervisors strengthen global oversight** On 16 October 2009, the International Organisation of Pension Supervisors (IOPS) approved a series of guidelines and reports designed to strengthen the supervisory oversight of global pension systems and protect vulnerable pension fund members and retirees in the face of challenging and volatile economic conditions.The IOPS ‘Guidelines for Supervisory Intervention, Sanctions and Enforcement’ outline international good practice regarding powers needed and used by supervisory authorities in relation to intervening, applying sanctions and enforcement. Likewise Working Paper No 11 covering ‘Pension Funds’ Risk-management Frameworks: Regulation and Supervisory Oversight’ outlines the type of risk-management systems supervisory authorities expect pension funds to have in place, and ways for supervisors to check that these systems are operating in practice and not only on paper.Further, following the failures in effective oversight of the global financial system, IOPS members have been looking at their own operations and governance. IOPS Working Paper No 10 ‘Governance and Performance Mechanisms of Supervisory Authorities’ highlights how the good governance of pension supervisory authorities can be summarized in four categories: independence; accountability; transparency; and integrity. Further information is available on the [IOPS](http://www.iopsweb.org/%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **2.1 ASIC gives credit ratings agencies improved control over ratings use**On 12 November 2009, the Australian Securities and Investments Commission (ASIC) announced that it has decided to withdraw current class order relief that allows issuers of investment products to cite credit ratings without the consent of credit rating agencies.Following public consultation, ASIC has decided to remove the exemption from 1 January 2010. This will make credit rating agencies accountable for ratings cited in disclosure and strengthen credit rating agencies’ control over the use of their credit ratings.From 1 January 2010, issuers must ensure that the credit rating agency has given its consent for the inclusion of a credit rating (and its form and context) in any fund raising or takeover documents that will be issued after this date.Currently a class order provides relief from the requirement that an issuer must not cite a statement made by a person in a prospectus or PDS, unless the person has consented to that statement being included in the form and context in which it appears. Another class order provides similar relief in respect of bidder's statements and target’s statements in takeovers. The class order relief permits issuers to cite credit ratings from Standard & Poor’s, Moody’s Investor Service and Fitch Ratings in a prospectus or PDS without the consent of credit rating agencies themselves. As liability for the content of disclosure only attaches to persons who have consented to having their statements cited, the class order relief has implications for the accountability of credit rating agencies. By withdrawing relief, ASIC is allowing credit rating agencies to control the use and presentation of their ratings in disclosure by giving or withholding consent.**Background**ASIC Class Order [CO 07/428] declares that sections 716 and 1013K of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) are modified so that a disclosure document or PDS may include credit rating references without the consent of credit rating agencies.ASIC Class Order [CO 07/429] declares that sections 636 and 638 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) are modified so that a bidder's statement or target's statement may include credit rating references without the consent of credit rating agencies.In September 2009, ASIC sought public comment in Consultation Paper, 117 ‘Consent to quote credit ratings in disclosure documents and PDSs’ (CP 117) on whether to modify [CO 07/428] and [CO 07/429] to withdraw relief relating to the citation of credit ratings.etailed Contents**2.2 ASIC outlines improvements to regulation of credit rating agencies in Australia** On 12 November 2009, the Australian Securities and Investments Commission (ASIC) outlined changes to the regulation of credit rating agencies in Australia. From 1 January 2010, credit rating agencies will be required to hold an Australian Financial Services (AFS) licence. Under the AFS licensing regime, general licensee obligations set out in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) will require credit rating agencies to: * manage conflicts of interest that may arise in their businesses;
* have resources available (including financial, human and information technology resources) that are adequate for the nature, scale and complexity of their businesses;
* ensure their credit analysts are trained and competent to be involved in the preparation of credit ratings;
* ensure credit rating services are provided efficiently, honestly and fairly; and
* have in place risk management systems.

Credit rating agencies that wish to give credit ratings for investment products offered to retail investors must also comply with a general licensee obligation under the Corporations Act to have a dispute resolution system comprised of: * an internal dispute resolution procedure; and
* membership of an approved external dispute resolution scheme, such as the Financial Ombudsman Service.

An alternative to court actions, external dispute resolution schemes provide quick, low-cost, independent resolution of disputes between retail investors and AFS licensees up to $150,000 (increasing to $280,000 on 1 January 2012).In addition to the general licensee obligations, ASIC will impose specially tailored conditions on AFS licences granted to credit rating agencies. These tailored licence conditions will require credit rating agencies to:1. comply with the IOSCO Code of Conduct Fundamentals for Credit Rating Agencies (on a ‘if not why not’ basis to 30 June 2010 and mandatory from 1 July 2010); 2. annually lodge with ASIC an IOSCO Code Annual Compliance Report; 3. disclose procedures, methodologies and assumptions for ratings; 4. have in place arrangements to monitor and regularly review credit ratings; 5. review ratings affected by material changes to rating methodologies within six months of the change; 6. have in place training programs for credit analysts that have been externally assessed as adequate and appropriate (to take effect from 1 July 2010); 7. refrain from ‘notching’ credit ratings for an anti-competitive purpose (e.g. with an anti-competitive purpose, threatening to issuer a lower credit rating for a structured finance product because an asset underlying the product is not also rated by the credit rating agency); and 8. consent to information sharing between ASIC and foreign regulators.These improvements will in substantial respects align Australia’s regulation of credit rating agencies with International Organization of Securities Commissions (IOSCO) principles and with regulation passed or proposed in major markets such as the United States, Europe and Japan.etailed Contents**2.3 ASIC grants transitional relief from regulation for funded class actions** On 4 November 2009, the Australian Securities and Investments Commission (ASIC) announced its intention to grant transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions. The relief, which will apply until 30 June 2010, is from the requirements that would otherwise apply to funded class actions as ‘managed investment schemes’ under Chapter 5C and Chapter 7 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act). These requirements include:* appointing an AFS licensed public company as 'responsible entity' to operate the scheme
* adopting a complying constitution and compliance plan for the scheme
* registering the scheme with ASIC
* preparing a Product Disclosure Statement for the scheme
* providing ongoing disclosure to members of the scheme.

The Full Federal Court’s recent decision that a funded class action was a ‘managed investment scheme’ within the meaning of the Act has the potential to disrupt the conduct of a number of class actions currently underway. ASIC will grant transitional relief to avoid any disruption that could adversely impact plaintiffs in those actions, or interfere with the timely and efficient conduct of the subject litigation. The relief will allow time for Government and ASIC to consider and consult on how funded class actions should be regulated under the Act in future. Depending on the outcome of that process, existing class actions may need to be restructured to meet the requirements of the Act by the end of the relief period. Relief will generally be granted, on individual application, to lawyers and litigation funders involved in the conduct of class actions that were commenced before 4 November 2009.**Background**On 20 October 2009 the Full Court of the Federal Court handed down its decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147. The Full Court held that a funded class action currently being maintained against Brookfield Multiplex was a ‘managed investment scheme’ within the meaning of section 9 of the Corporations Act. The court’s judgment is discussed in Item 5.4 of this Bulletin.A managed investment scheme must be registered with ASIC in certain circumstances, including where it has more than 20 members or is promoted by a professional promoter. To qualify for registration, it must be operated by a public company that holds an Australian financial services licence and must have a constitution and a compliance plan that meet the requirements of Chapter 5C of the Act. The offer of interests in a registered managed investment scheme must generally be made through a complying Product Disclosure Statement (PDS) that contains information about the scheme.The Commission noted that without any form of relief from ASIC, existing class actions with members who would qualify as retail clients under the Corporations Act will immediately suffer considerable delay, expense, uncertainty and disruption as a consequence of the decision.ASIC has power under the Act to modify or grant exemptions from some or all of the regulatory requirements. Government may, by regulation, declare a particular arrangement not to be a managed investment scheme.etailed Contents**2.4 Updated regulatory guide regarding acquisitions by a broker as principal** On 27 October 2009, the Australian Securities and Investments Commission (ASIC) released an updated version of Regulatory Guide 31 ‘Acquisitions by a broker acting as principal for client facilitation purposes’ (RG 31).RG 31 provides guidance on when ASIC will grant individual relief from the 20% threshold as specified in section 606 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), which allows a broker to acquire as principal, a large parcel of securities from a client. ASIC will only grant relief where the broker acquires the parcel for prompt disposal in the course of providing client facilitation services to its client. ASIC will not grant relief where it appears to it that the broker has a control purpose. In other words, the broker must be acquiring the securities with the purpose of disposing them, rather than the purpose of holding or voting any of the securities. Applications for individual relief must demonstrate that the applicant does not have a control purpose.ASIC has simplified the conditions to individual relief. The updated conditions in the revised version of RG 31 are that the broker: * must reduce its voting power in the relevant entity to 20% or less within 14 days after acquiring the securities;
* must not exercise any voting rights attached to those securities in excess of 20% without ASIC’s consent; and
* in selling any securities acquired under the relief, must use its best endeavours to obtain as wide a placement as practicable, for the highest practicable price.

These conditions are designed to restrict the broker’s ability to exert control over the relevant entity and to prevent warehousing.Where ASIC grants individual relief, the broker will still be required to comply with the obligation to give substantial holding notices in section 671B. Under the revised version of RG 31, ASIC will no longer give relief from this requirement. This is because ASIC considers that compliance with the substantial holding provisions will promote the principle that the acquisition of control takes place in an efficient, competitive and informed market. It will also provide information to ASIC and the market about the process by which the relevant parcel has been sold down, including whether there have been any off-market transfers.The regulatory guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg31.pdf/%24file/rg31.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.5 Updated compensation and insurance arrangements for licensees** On 21 October 2009, the Australian Securities and Investments Commission (ASIC) released an updated version of Regulatory Guide 126 ‘Compensation and insurance arrangements for AFS licensees’ (RG 126).ASIC has removed the requirement for Australian Financial Services (AFS) licensees to obtain automatic run-off cover. Previously, AFS licensees were required to obtain professional indemnity (PI) insurance policies that included 12 months automatic run-off cover from 1 January 2010. Automatic run-off cover is cover for claims made after the insurance policy has ended which have arisen from the acts or omissions of the insured during the period of insurance cover. The cover is negotiated upfront at the commencement of the PI insurance policy, rather than separately.ASIC has decided to remove the requirement to obtain automatic run-off cover as it is not available to AFS licensees in the current insurance market. ASIC will continue to monitor the availability of automatic run-off cover and may reassess its position should the market soften and automatic run-off cover become available.The changes mean that:* until 31 December 2009 – adequate PI insurance is based on what is available in the market now, provided it meets the minimum requirements outlined in Section C of RG 126; and
* from 1 January 2010 – in addition to the above, AFS licensees are required to obtain switching cover that covers the situation where an AFS licensee moves a client from a product that is not on the approved product list to one that is on the approved product list.

The revised version of RG 126 also clarifies that fraud cover is not required for licensees who are sole traders. **Background**RG 126 sets out how ASIC will administer the compensation requirements under section 912B of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Act). Section 912B requires AFS licensees to have arrangements for compensating retail clients for losses they suffer as a result of a breach by the licensee or its representative of their obligations in Chapter 7 of the Act. Under these arrangements, licensees must obtain PI insurance that is adequate having regard to the nature of the licensees business and its potential liability for compensation claims, or be approved by ASIC as alternative arrangements. In determining what is adequate insurance, ASIC will take into account what is available in the market.The regulatory guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg126-1.pdf/%24file/rg126-1.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.6 Significant benefits from mutual recognition of securities offerings** Recent research has found that issuers using the trans-Tasman mutual recognition of securities offerings regime have saved on compliance costs for offering securities in the host country by up to 95 percent in some cases, according to a press release published on 23 October 2009.The regime allows issuers to offer securities in both Australia and New Zealand using home jurisdiction offer documents.The research found that the regime has reduced additional legal and documentation costs for some issuers by between approximately 55 and 95 percent. The time to go to market was also significantly reduced – in one case by 25 percent.Since its establishment in June 2008, the regime has been used by New Zealand companies seven times for capital raising in Australia. Australian companies have used it 253 times, predominantly for offering managed funds in New Zealand. The joint regulatory guide 190 is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg190.pdf/%24file/rg190.pdf%22%20%5Ct%20%22_new) website.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep174.pdf/%24file/Rep174.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.7 ASIC releases second report and proposals on unlisted, unrated debentures** On 21 October 2009, the Australian Securities and Investments Commission (ASIC) released its second report on the unlisted, unrated debenture market and a consultation paper outlining proposals to improve the benchmarks under ASIC's Regulatory Guide 69 ‘Debentures: Improving disclosure for retail investors’ (RG 69).The report, Report 173 ‘Debentures: Second review of disclosure to investors’ (REP 173) is ASIC’s latest report on the debenture industry and sets out ASIC’s findings on the effectiveness of the disclosure benchmarks; investor education; audit and supervision of debenture issuers; advertising; and ongoing disclosure to clients. REP 173 follows on from ASIC’s first report, Report 127 ‘Debentures: Improving disclosure for retail investors’ (REP 127), released in April 2008.Overall, ASIC’s second industry review found that the 'if not, why not' disclosure regime in RG 69 is working well but can be further strengthened to improve disclosure for investors and to respond to the failure of a number of debenture issuers. ASIC has also released Consultation Paper 123 ‘Debentures: Strengthening the disclosure benchmarks’ (CP 123), which sets out ASIC’s proposals to:* adjust the disclosure benchmarks in RG 69, including those relating to minimum amounts of equity capital, adequate liquidity, and disclosure about loan portfolios and valuations;
* improve the presentation and explanation of benchmark disclosures; and
* change how it administers the law regarding the naming of debentures.

The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP123.pdf/%24file/CP123.pdf%22%20%5Ct%20%22_new) website.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep173-.pdf/%24file/rep173-.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.8 ASIC releases new proposals on superannuation forecasts** On 21 October 2009, the Australian Securities and Investments Commission (ASIC) released proposals to grant relief to superannuation funds to enable them to provide superannuation forecasts to their members.Consultation Paper 122 ‘Superannuation forecasts: ASIC relief and guidance for super funds’ (CP 122), and the attached draft regulatory guide, describe the situations in which ASIC proposes to grant relief from licensing, advice, conduct and disclosure requirements under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) for the provision of such forecasts. This will allow super funds to provide their members with an estimate of the likely balance of their superannuation funds on retirement (retirement projection) with their periodic superannuation statements.The move will help Australians take charge of their superannuation and retirement planning decisions. ASIC believes consumers will benefit strongly from receiving a regular personalised retirement projection and that clear and effective information about their likely benefits will give them a sound basis for making choices that best suit their needs.ASIC’s proposals are set out in Section B of the consultation paper. The relief will be conditional on trustees meeting certain requirements in relation to the content, presentation and calculation of projections, and the timing and manner in which they are given. ASIC is also aiming to create greater clarity for super funds that take advantage of the current relief for providers of financial calculators. The draft regulatory guide gives guidance as to how providers of superannuation calculators can best comply with the requirement in ASIC Class Order (CO 05/1122) Relief for providers of generic calculators that all assumptions applied by the calculator be ‘reasonable’.ASIC proposals follow on from a consultation paper released in July 2008, consultation paper 101 ‘Superannuation forecasts’ (CP 101).**Background**Superannuation forecasts are likely to contain personal advice within the meaning of section 766B(1) of the Corporations Act 2001 (Corporations Act), as they take into account a consumer’s objectives, financial situation or needs (e.g. by using information about their current balance, salary, and age, etc). Therefore, without relief, providers of superannuation forecasts would need to comply with the personal advice requirements of the financial services licensing regime.ASIC currently gives licensing relief for providers of calculators, including superannuation calculators, where the calculator does not advertise or promote one or more specific financial product (Class Order (CO 05/1122) Relief for providers of generic calculators). While providers therefore do not need to be licensed, CO 05/1122 also gives providers who are AFS licensees relief from the advice, conduct and disclosure requirements of Part 7.7 of the Corporations Act. ASIC does not currently provide any relief for providers of projections.The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP122.pdf/%24file/CP122.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **3.1 New S&P/ASX Infrastructure Index**On 12 November 2009, ASX and S&P Indices announced the launch of an Australian infrastructure benchmark – the S&P/ASX Infrastructure Index – which is available from 16 November 2009. The new index will add to the Australian-focused S&P/ASX suite of indices while also forming part of the global S&P Thematic Indices family, which includes the S&P Global Infrastructure Index.The press release regarding the new index is available on the [ASX](http://www.asx.com.au/about/pdf/mr121109_infraindex_sp_nov09.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.2 ASX submission to the Productivity Commission on executive remuneration in Australia**On 9 November 2009, the Australian Securities Exchange (ASX) provided a submission to the Productivity Commission in response to its Discussion Draft on Executive Remuneration in Australia.Overall, ASX considers that the approach the Commission has taken in focussing on strengthening corporate governance arrangements aimed at enhancing transparency and board accountability and minimising conflicts of interest provides for an appropriate and proportionate approach to responding to the issues identified and improving executive remuneration practices in Australian listed companies.The submission is available on the [ASX](http://www.asx.com.au/about/pdf/submission_productivity_commission_executive_remuneration.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.3 Reporting and trading calendars for 2010** On 6 November 2009, the Australian Securities Exchange (ASX) released the reporting calendar for the 2010 calendar year, identifying the deadlines for periodic reports of Listed Companies with balance dates of 31 December or 30 June. ASX also released the trading calendar for 2010, identifying public holidays (national and state), non-business days and non-trading days.The reporting calendar is available on the [ASX](http://www.asx.com.au/research/pdf/company_reporting_dates_2010.pdf%22%20%5Ct%20%22_new) website.The trading calendar is available on the [ASX](http://www.asx.com.au/about/operational/trading_calendar/asx/2010.htm%22%20%5Ct%20%22_new) website.etailed Contents**3.4 SFE Operating Rules and SFE Clearing Rules amendments – Client documentation** On 2 November 2009, the SFE Operating Rules and SFE Clearing Rules were amended to require that the Exchange’s minimum terms be included in the agreements between Participants and clients. This will allow Full Participants who perform execution only business for their clients to be able to use the International Uniform Brokerage (“Give Up”) Agreements without the need to include the Exchange’s minimum terms.These amendments are covered by SFE Notice 184/09 and are available on the [ASX](http://www.sfe.com.au/content/notices/2009/notice2009_184.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.5 SFE Operating Rules amendments – Pre-negotiated business orders and block trades** On 2 November 2009, the SFE Operating Rules relating to Pre-Negotiated Business Orders and Block Trades were amended to allow Participants who have a genuine error in executing a Pre-negotiated order or a Block Trade, which have been allocated to the Participant’s Futures Division error account, to be allowed to trade out of the error by way of a Pre-Negotiated Business Order or a Block Trade.The amendments are available on the [ASX](http://www.sfe.com.au/content/notices/2009/notice2009_183.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.6 Consultation paper: ACH central counterparty risk management controls** On 30 October 2009, the Australian Securities Exchange (ASX) issued a consultation paper outlining potential changes to the ACH risk control framework. ASX considers that it is both timely and appropriate in the current market environment to further strengthen ACH’s existing risk controls in order to extend ACH’s overall contribution to Australia’s financial markets, position ASX to most effectively embrace and manage strategic opportunities and challenges, keep pace with evolving best practice and regulatory expectations and also better align clearing participants’ own risk management practices.ASX is seeking input regarding the initiatives raised in the document, which may have a significant impact on the market and its users. The deadline for ASX to receive formal responses is 23 December 2009.The consultation paper is available on the [ASX](http://www.asx.com.au/about/pdf/ccp_rm_controls_consultation_paper.doc%22%20%5Ct%20%22_new) website.etailed Contents**3.7 Reports** On 27 October ASX Market Supervision released its 2009 Annual Report.On 5 November ASX released:* the ASX Group Monthly Activity Report; and
* the SFE Monthly Volume and Open Interest Report for October 2009.

These reports are available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.8 Miscellaneous Rule amendments** On 23 October 2009, a number of minor miscellaneous amendments were made to the ASX Market Rules, ACH Clearing Rules and ASTC Settlement Rules. Further information is available on the [ASX](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_024242.pdf%22%20%5Ct%20%22_new) website.etailed Contents**3.9 Securities lending** ASX Settlement and Transfer Corporation Pty Ltd (ASTC) has begun the first phase of an initiative to improve the transparency of securities lending activity in the Australian equities market.All loan-related transactions submitted to the core equity settlement system, CHESS, will be tagged by participants with an 'L' (i.e. Securities Lending) transaction basis. This allows ASTC to publish on the morning of the next day (as also happens with short selling data) a daily security lending transaction report depicting gross transactional flow. Complementing this reporting will be information detailing the volume of securities lending transactions as a proportion of total transactions, the composition of the daily settlement batch and a report measuring daily settlement performance.This first phase of reporting will be followed by a second phase commencing 14 December whereby ASTC will release outstanding end-of-day loan and borrowing positions (net positions) in each ASX-listed security.Disclosure of securities lending activity aims to deepen understanding of the settlement risks arising from such activity.The new reports are available on the [ASX](http://www.asx.com.au/professionals/securities_lending/index.htm%22%20%5Ct%20%22_new) website.The associated changes to the ASTC Settlement Rules are available on the [ASX](https://www.asxonline.com/%22%20%5Ct%20%22_new) website.etailed Contents**3.10 ASTC Settlement Rules amendments – Email notifications** ASTC has amended its Rules to expand the current transmission of Holder Registration details to include email details. The changes are intended to improve the efficiency and effectiveness of Issuer management of shareholder communication by enabling Holders to nominate to receive shareholder communications via email.The changes are available on the [ASX](https://www.asxonline.com/%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **4.1 Multiplex Prime Property Fund 03 – Panel accepts undertaking**On 28 October 2009, the Takeovers Panel announced that it has accepted supplementary disclosure and an undertaking from Brookfield Multiplex Capital Management Limited (BMCM), the responsible entity of the Fund, and declined to make a declaration of unacceptable circumstances in respect of an application dated 9 October 2009 from Australian Style Investments Pty Ltd in relation to the affairs of the Multiplex Prime Property Fund (see TP09/78). The Panel was however minded to make a declaration, but for the further disclosure and undertaking. The application concerned the non-renounceable 178:1 entitlement offer announced by the Fund on 24 August 2009 and approved by unit holders on 7 October 2009. The Panel considered that, as submitted by BMCM, the Fund is in breach of its loan to valuation covenants in its debt facility and has obtained a temporary waiver from lenders until midnight on 16 November 2009 and had a clear and pressing need for funding. This was a very significant factor for accepting the undertaking. On 20 October 2009, the Panel decided to conduct proceedings and issued a brief to the parties seeking submissions on why the entitlement offer should not include an uncapped shortfall facility and bookbuild. These dispersion strategies, mentioned in Guidance Note 17, are designed to mitigate the potential control effects of a rights issue.The Panel also had raised concerns about disclosure of the options available to unit holders including the payments required and potential call under each option.On 22 and 23 October 2009, BMCM disclosed to ASX supplementary information on the entitlement offer and cash out facility. This information included:* enhanced disclosure;
* the provision of a shortfall facility to eligible unit holders; and
* a bookbuild to institutional investors who are wholesale clients (within the meaning of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default)).

As a result of further discussions with the Panel, BMCM undertook to the Panel to further amend the terms of the entitlement offer by doing the following.In relation to the shortfall facility:* agreeing to announce to ASX instances and reasons why it had used its discretion to reject shortfall applications. The Panel considered that this will make the process more transparent and
* waiving the condition not to allocate any shortfall units if it causes a person's voting power to exceed 20%. The Panel considered that this was sufficiently covered by the condition that no allocation takes place if it would breach a relevant law and allows participation according to any exception available.

In relation to the bookbuild:* as explained above, waiving the 20% condition and
* waiving the credit worthiness condition. The Panel considered that the requirements imposed on bookbuild applicants under this condition were too onerous and likely to discourage participation.

Further, BMCM undertook to the Panel that it will promptly seek a modification of section 606 to enable the underwriter to acquire a relevant interest in units under the cash out facility and accept any reasonable conditions imposed by ASIC in response to such an application. This will help remove the conditionality of the cash out facility so unit holders can consider whether they wish to participate.Also, BMCM will write to unit holders who accepted the entitlement offer before receipt of the supplementary disclosure inviting them to withdraw if they wish.The Panel considers that the disclosure and undertaking sufficiently addresses the circumstances and that it is not against the public interest to decline to make a declaration of unacceptable circumstances.Australian Style sought a review of this decision and on 4 November 2009, the Review Panel announced that it had declined to commence proceedings in relation to the application for review.etailed Contents |

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

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| **5.1 Challenge to AAT’s review of a decision of an ASIC delegate under section 206F of the Corporations Act**(By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)Cully v Australian Securities and Investments Commission [2009] FCA 1208, Federal Court of Australia, Tracey J, 30 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009FCA1208.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009FCA1208.htm%22%20%5Ct%20%22_new)or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The case involved an appeal from a decision of the Administrative Appeals Tribunal (AAT) relating to the AAT’s review of a decision of an Australian Securities and Investments Commission (“ASIC”) delegate under section 206F of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Cth) (“Act”) to disqualify a person from being the director of a company for two years. The court considered whether the AAT’s decision contained an error of law and whether the delay in ASIC’s investigation into a series of companies was unreasonable.**(b) Facts**In 2007 Mr Brian Culley was prohibited, by decision of an ASIC delegate pursuant to section 206F of the Act, from managing a corporation for a period of two years. That decision was upheld on appeal by the AAT. Mr Culley appealed on questions of law from the AAT’s decision.Section 206F of the Act provides that ASIC may disqualify a person from managing corporations if within 7 years immediately before ASIC gives a notice under paragraph (b)(i) the person has been an officer of 2 or more corporations; and while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) about the corporation's inability to pay its debts; and ASIC has given the person a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and an opportunity to be heard on the question.Culley appealed pursuant to section 44 of the [Administrative Appeals Tribunal Act 1975 (Cth)](http://my.lawlex.com.au/default.asp?cid=7115&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (“the AAT Act”). Cully raised the following questions of law:(i) Whether, on its proper construction, section 206F of the Act limited the AAT in its review of the decision made by the ASIC delegate to matters concerning the corporations specified in ASIC’s prescribed notice.(ii) If the answer to (i) is ‘yes’, whether the AAT ought to have ruled that Cully was not entitled to adduce evidence and material on the review in relation to Austbloom Pty Ltd as a corporation falling within subparagraph 206F(1)(a)(ii) of the Act.(iii) Whether the only conclusion reasonably open on the evidence was that the AAT should not have been satisfied that the disqualification of Culley was justified.(iv) Whether the AAT failed to comply with subsection 43(2B) of the AAT Act, which requires its findings on material questions of fact and a reference to the evidence or other material on which those findings were based to be included in the AAT’s written reasons.(v) Whether the statutory power of disqualification contained in section 206F of the Act is subject to an implied requirement that it be exercised within a reasonable time.(vi) Whether the respondent failed to exercise its statutory power of disqualification contained in section 206F of the Act within a reasonable time.**(c) Decision** On the first and second questions, the court held that there is nothing in section 1317B of the Act (or any other provision of the Act) which would require the AAT to make its determination on the same material that was before the delegate. The AAT was, therefore, entitled, as it did, to have regard to the evidence relating to Austbloom and Culley’s role as a director of that company.On the third question, the court held that the AAT’s findings in relation to the failure, over a long period, of the companies, over which Culley exercised control, to pay large sums, which had been deducted from employees’ wages, to the Australian Taxation Office, would, without more, have supported the AAT’s decision.In answering question four in the negative, the court held that even if it had been established that the AAT had not complied with the requirements of section 43(2B), this would not have constituted a reviewable error of law which would justify the setting aside of the AAT’s decision.Questions five and six arose from the considerable delay which occurred between the preconditions for the operation of section 206F being satisfied and the issuing of the notice to show cause to Culley. The court held that the delay was plainly unreasonable having regard to the public interest served by section 206F and the personal interests of Culley. Insofar as could be determined from the documents to which the court was referred, and which were before the AAT, the court was left with the impression that ASIC simply did not accord Culley’s case any priority. On the basis that ASIC failed to comply with its implied obligation to exercise its powers under section 206F within a reasonable time, the court answered question 6 in the affirmative. However, in circumstances where the period of Culley’s disqualification expired in February 2009 and the disqualification decision was made by the delegate and affirmed by the AAT, the court could see no practical purpose to be served by an order setting aside the AAT’s decision. Nor could the court discern any useful purpose to be served by remitting the matter for further hearing and determination by the AAT. The court was of the view that the AAT committed no reviewable legal error in the course of dealing with the appeal as presented to it and that Culley had but limited success in his appeal to the court and then only on a point which was not agitated before the AAT. etailed Contents**5.2 Letters of support: a legally binding agreement or a non-binding commercial arrangement?**(By Meg O’Brien, Mallesons Stephen Jaques) Atco Controls Pty Ltd v Newtronics Pty Ltd (receivers and managers appointed)(in liquidation) [2009] VSCA 238, Supreme Court of Victoria Court of Appeal, Warren CJ, Nettle and Mandie JJA, 21 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/october/2009vsca238.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/october/2009vsca238.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This matter involved an appeal from a decision of the Supreme Court of Victoria that decided that letters of support provided by Atco Controls Pty Ltd (“Atco”) to the auditors of its subsidiary Newtronics Pty Ltd (“Newtronics”) created a legally binding agreement. At first instance it was held that the context in which the letters were provided and the content of the letters themselves supported a finding that a legally binding agreement had been created. Consequently, Atco was found to have breached its contractual obligations when it demanded repayment of its secured debt following an unfavourable judgment against Newtronics in unrelated proceedings. The Court of Appeal upheld the appeal stating that it was not open for the Court to conclude that a legally binding agreement had come into existence. The Court of Appeal concluded that the letters of support did not evince an intention to create legal relations, no valuable consideration was given and that crucial terms of the agreement were missing. **(b) Facts** Atco was (and remains) a lighting manufacturer. Newtronics was a subsidiary of Atco that carried on a business designing, manufacturing and supplying electronic components for a variety of purposes. On several occasions between 1993 and 2001, Atco had provided Newtronics’ auditors with a letter of support in which Atco undertook that it would not call on the secured debt owed to it by Newtronics and that it would provide financial assistance if Newtronics was unable to meet its “current trading debts”.Over a number of years, Newtronics had been supplying Seeley International Pty Ltd (“Seeley”) with parts for installation in air-conditioning units it manufactured. In 1995 several of these units caught fire and Seeley subsequently commenced proceedings against Newtronics alleging breach of contract, negligence and misleading and deceptive conduct. On 21 December 2001 Newtronics received an adverse judgment in this matter and was ordered to pay damages of $8.9 million plus interest and costs. Atco made a demand for immediate repayment of its secured debt that same day. It received no response from Newtronics. Atco proceeded to appoint receivers and managers to Newtronics pursuant to the security document. The receiver sold the business and Newtronics was subsequently put into liquidation. The liquidator of Newtronics commenced proceedings against Atco on the basis that the undertakings contained in the letters of support amounted to contractual obligations. The liquidator argued that this contract consisted of both express and implied terms. Insofar as terms were implied, the liquidator argued that the facts and circumstances of the case, and the necessity to give business efficacy to the agreement between the parties, provided a reason to imply terms into the agreement. At first instance, Pagone J held that the letters of support and the context in which they were issued supported the conclusion that Atco had done “more than merely provide non-binding comfort to Newtronics’ auditors”. The letters confirmed “an agreement between parent and subsidiary which was well known to both and intended to be relied upon”. Pagone J added that “the letters were not mere representations for limited purposes with a clear intention to that effect”. Atco had agreed to subordinate its debt to Newtronics’ unsecured creditors and had agreed to provide financial support to Newtronics in particular circumstances. In return for this promise, Newtronics agreed to continue trading. On this basis, Pagone J found that a demand for repayment meant that Atco had breached its contractual obligations. Atco appealed the decision of Pagone J on a number of grounds but its primary submission related to whether it was open for Pagone J to conclude that a legally binding agreement had come into existence. **(c) Decision** In an unanimous judgment, Warren CJ, Nettle and Mandie JJA upheld the appeal on the basis that it was not open for Pagone J to conclude a legally binding agreement existed. **(i) Was there an intention to create legal relations?**One of the issues Warren CJ, Nettle and Mandie JJA considered was whether there was an intention to create legal relations. Pagone J had concluded that the directors of Newtronics would not have made the declarations they did regarding the company’s solvency unless they believed that Atco’s undertakings were legally binding. On this basis, Pagone J found that it could be inferred that the parties had concluded a legally binding agreement. On this point, Atco submitted that the letters were better characterised as non-binding assurances and Warren CJ, Nettle and Mandie JJA accepted these submissions. They held that it was “not unlikely” that Newtronics “would have been prepared to rely upon a non-binding undertaking.” They said the directors of Newtronics:“…knew that it was in Atco’s interest to keep Newtronics going. They also knew that Atco was prepared to provide Newtronics with support. Possibly, they may have expected that Atco would continue to provide such support for the foreseeable future. But assuming that the Newtronics’ board were endowed with at least a rudimentary level of commercial common sense, and so understood that holding companies tend to conduct operations through limited liability subsidiaries in order to avoid liability in the event of the subsidiary’s failure, they might also have well understood and accepted that Atco’s undertakings to provide support were intended not to be legally binding.”**(ii) Was there valuable consideration?**Warren CJ, Nettle and Mandie JJA also considered whether the agreement was supported by valuable consideration. At first instance, Pagone J decided that Atco had issued the undertakings contained in the letters of comfort in return for Newtronics’ promise to continue to trade and that this constituted valuable consideration. Warren CJ, Nettle and Mandie JJA disagreed with this conclusion. They decided that although Newtronics was entitled to expect Atco to honour the undertakings and use them as a basis for declaring that there were reasonable grounds that Newtronics was solvent, there was no evidence of valuable consideration. They added that the facts of the present case may have supported arguments based on estoppel but Newtronics made no submissions on this point. Warren CJ, Nettle and Mandie JJA concluded that Atco’s promises were not offered as the price of the quid pro quo for the action taken by Newtronics to continue to trade. They also concluded it was not possible to imply valuable consideration because if Atco had asked Newtronics to continue trading in exchange for the undertakings contained in the letters of support, such a request would have to “be so hedged about by implied exceptions as to be devoid of contractual certainty”. Warren CJ, Nettle and Mandie JJA added that it would have been unlikely that Newtronics would have bound itself to continue trading because of the different circumstances it may have found itself in the future and the requirement for the directors to act in the best interests of the company as a whole. **(iii) Was there sufficient certainty?**Warren CJ, Nettle and Mandie JJA also found that there was no evidence to support Pagone J’s finding that all the essential terms of the agreement had been agreed upon. They found that critical terms including the period of the agreement and the circumstances in which both parties were bound could not be ascertained.etailed Contents**5.3 Liquidators’ claims under section 588FF(1) of the Corporations Act: Whether transactions were ‘uncommercial’ under section 588FB and entered into ‘in good faith’ under section 588FE**(By Igor Golshtein, DLA Phillips Fox) Cussen v Sultan [2009] NSWSC 1114, New South Wales Supreme Court, Nicholas J, 20 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1114.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1114.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Karl Suleman Enterprises Pty Ltd (in liquidation) (‘KSE’) operated a business and an unregistered managed investment scheme. Under the scheme, KSE collected investment monies from investors promising returns of between 51.4% and 194.11% over the term of the investment. The business generated insufficient revenue to cover the promised returns. As such, KSE made payments to investors using funds received from new investors. The defendants were investors in the scheme and received payments from KSE as returns on their investment.Pursuant to claims made by KSE’s liquidators under section 588FF of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (‘the Act’), the court ordered the defendants to repay to KSE the payments received from it as the transactions pursuant to which these payments were received were ‘voidable’ under section 588FE of the Act (being uncommercial transactions entered into while KSE was insolvent) and were not entered into by the defendants in good faith.**(b) Facts** The first and second plaintiffs were the liquidators of the third plaintiff KSE. Karl and Vivian Suleman were KSE’s only shareholders. KSE operated a supermarket trolley collection business and an unregistered managed investment scheme under which it attracted investors to invest monies in its trolley business. Broadly speaking, investors entered into a contract with KSE under which, in consideration for each investment, KSE agreed to pay a fortnightly return over a set term (three, five or ten years). Usually, the rate of return on investment was high. The business operated between December 1999 and November 2001 during which time over 2,000 investment contracts were entered into.Save for monies actually invested with it under the investment contracts, KSE had no available source of income sufficient to pay investors in accordance with its obligations under the contracts. As such, returns to investors were paid mostly from funds received from new investors. Inevitably, the scheme was unsustainable and KSE became insolvent and went into liquidation in December 2001.There were 16 defendants in this case. The defendants entered into six investment contracts ('Contracts') with KSE that were the subject of the Supreme Court proceedings.The plaintiffs claimed declarations that each of the contracts constituted uncommercial transactions under section 588FB Corporations Act 2001 (‘the Act’), insolvent transactions under section 588FC, and voidable transactions under section 588FE. Consequential orders were sought under section 588FF(1)(a) and (c) directing that each defendant pay to KSE the benefits received by that defendant under the relevant transactions.**(c) Decision** **(i) The law**Nicholas J began by summarizing the requirements and operation of the above provisions. For the purposes of section 588FC, his Honour noted that the insolvency of KSE at all relevant times was not disputed. In addition, for the purposes of section 588FE, it was accepted that the relation-back day was 12 November 2001, being the day ASIC halted KSE's business.Section 588FF provides that on the application of a liquidator, courts ‘may’ make orders requiring persons who have received monies pursuant to a voidable transaction with a company, to pay those monies back to the company. The defendants contended that the word 'may' meant that the court had a discretion whether or not to make an order although satisfied that the relevant transaction was 'voidable'. The defendants relied on the ruling of Tilmouth J in *Sheahan Pty Ltd v Murdock & Gediz Pty Ltd* [2008] SADC 5. In that case, Tilmouth J ruled that the conclusion that the word 'may' should be read as conferring a discretion was consistent with, among other things, the central concept of section 588FE of 'voidable' transaction, "if it were otherwise, the nomenclature would be expressed in terms of 'void' transactions." However, Nicholson J found that Tilmouth J's judgment was in direct conflict with the judgment of Einstein J in *Cashflow Finance v Westpac Banking Corporation* [1999] NSWSC 671. In that case, Einstein J held that although section 588FF clearly required a choice to be made by the court as to which of the orders listed in the section were appropriate to be made, that did not mean that once the court was satisfied that a transaction is a 'voidable transaction', there is some separate discretion which the court can exercise in deciding whether to actually make the orders. The word 'may' is merely used to confer the authority that must be exercised, if the circumstances call for its exercise. Nicholson J preferred and followed the judgment of Einstein J, noting that Tilmouth J was regrettably not referred to and did not consider Cashflow Finance when making his ruling.Under section 588FG, courts must not make an order under section 588FF where the person entered into a voidable transaction, in addition to other things, in “good faith”. Nicholson J held that in cases concerning an uncommercial transaction, “good faith” should be understood to relate to the uncommercial nature of the transaction, and knowledge thereof. Defendants acting in "good faith” must demonstrate that in entering the transaction, they acted without an expectation that the transaction was uncommercial. Alternatively, if the defendants understood the transaction to be uncommercial, they would need to prove that in becoming a party to it, it was not their purpose to exploit its inherent uncommerciality.**(ii) Application of law to the contracts**Contract 1 (made on 15 February 2000) was between Karl Suleman as vendor and five of the individual defendants for the sale and purchase of a trolley collection business at several major supermarkets in Queensland. In consideration for the purchase price / investment amount of $160,000, Karl Suleman agreed to pay the defendants $3,900 every fortnight until 1 February 2015. On such terms, the initial investment would be recovered in 20.5 months and the internal rate of return would be 63.33% p.a. The investment amount of $160,000 was paid to Karl Suleman not KSE. However, although there was no evidence of an assignment of the Contract to it, KSE made payments to the defendants in accordance with the Contract.Nicholson J held that the definition of ‘transaction’ in section 9 of the Act was broad enough to encompass all of the payments made by KSE as well as each individual payment. Taken either way, Nicholson J regarded the transaction as “undoubtedly uncommercial”. The payments were made notwithstanding KSE was not a party to the Contract and was under no liability to make them. It appeared that the payments were made in discharge of Karl Suleman’s liability under the Contract, but in circumstances where KSE derived no benefit. There was no evidence that KSE received any part of the investment amount, or had a right to recoup the amount paid. Nicholson J found that it may be expected that a reasonable person in KSE’s position would not have made the payments. His Honour then considered whether each individual defendant had established the relevant matters under section 588FG(2).The defendants to the Contract had testified that they regarded the internal rate of return as “absurd”, “unbelievable” or “too good to be true”. All were aware that it would be more common for a small-business such as that being run by KSE to provide a return on such an investment (effectively a non-secured loan) of between 15% - 20% p.a. In summary, Nicholson J found that each individual defendant understood the arrangement as being uncommercial and risky, but that they willingly took the risk to reap the high returns. Thus, Nicholson J found the defendants did not enter the transaction in good faith and were required to repay to KSE all of the payments received pursuant to the Contract.Nicholas J then considered (although not strictly necessary given his Honour's finding that no defendant satisfied the 'good faith' requirement) whether any of the defendants had met the criteria in section 588FG(2)(b)(i) of having had 'no reasonable grounds for suspecting that the company was insolvent at the time of becoming party to the transaction'. Nicholson J stated that this onus could not be discharged where, as in this case, the defendants' evidence did not extend to their state of mind on the solvency of KSE.The defendants submitted that the interests of justice required that the court grant them an allowance which would allow them to recover the amount invested. Nicholson J rejected that submission as such an allowance would be tantamount to the defendants obtaining higher priority to the assets of the insolvent KSE relative to other unsecured creditors, and would be inconsistent with the basic principle that the available assets of an insolvent company are to be shared rateably amongst its creditors.The other Contracts were substantively similar to Contract 1 and Nicholson J made similar orders on substantially the same basis as per Contract 1. At the hearing, an experienced financial adviser provided evidence that the Contracts provided for internal rates of return on investment of between 51.90% p.a. and 194.11% p.a, whereas the average rate in 2000-2001 for investments of this sort was 15%. To the extent that under the other Contracts investment monies were actually paid to KSE, Nicholson J held that it was self-evident that the financial detriment to KSE in making the payments far exceeded the amounts invested, and represented a rate of return to the defendants beyond ordinary commercial experience. Nicholas J made orders accordingly and sought submissions on costs.etailed Contents**5.4 Arrangements for litigation funding - a managed investment scheme**(By Benjamin Dendle, Mallesons Stephen Jaques) Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd [2009] FCAFC 147, 20 October 2009, Federal Court of Australia, Full Court, Sundberg, Dowsett and Jacobson JJ, 20 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fcafc147.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fcafc147.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**The Full Court (Jacobson J dissenting) allowed an appeal by Brookfield Multiplex Ltd (“Multiplex”), overturning the decision of Finkelstein J at first instance. The court held that the litigation funding and solicitors’ retainer arrangements entered into by group members in the class action proceedings against Multiplex constituted a managed investment scheme under Part 5C of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (“Act”). It followed that the scheme was required to be registered under section 601ED of the Act.**(b) Facts** Multiplex sought declaratory and injunctive relief to restrain the litigation funders, Maurice Blackburn Lawyers (“MBL”), and the representative applicants from taking any further steps pursuant to the funding and retainer arrangements. The representative proceedings sought damages or compensation for the alleged failure of Multiplex to comply with the obligation of continuous disclosure under sections 674 and 675 of the Act. The claims arose from the losses suffered by Multiplex in the construction of Wembley Stadium. It was alleged that Multiplex failed to notify the market about cost and budget over-runs. These issues dramatically affected the profitability of the project.The representative proceedings commenced as a “closed class”. To become an eligible group member, investors were required to sign a:* funding agreement with International Litigation Funding Partners Pte Ltd (Funder); and
* retainer agreement with MBL.

The representative proceedings were brought by P Dawson Nominees Pty Ltd (“Dawson”) and Frederick Henry Hart (“Hart”). Both representative applicants were represented by MBL. The primary judge, Finkelstein J, ordered that the Dawson and Hart representative proceedings be consolidated and heard together. There were over 45 group members in the Dawson representative proceeding and over 100 in the Hart representative proceeding.**(i) Relevant provisions of the Corporations Act**The term “managed investment scheme” is defined in section 9 of the Act to mean:(a) a scheme that has the following features: (i) people contribute money or money’s worth as consideration to acquire rights (interests) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);(ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the members) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);(iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).The section 9 definition contains 13 excluded schemes including a partnership with more than 20 members, a body corporate (other than a time sharing scheme) and certain other arrangements, schemes and statutory funds.**(ii) Decision at first instance**Finkelstein J held that although the litigation funding and solicitors’ retainer arrangements constituted a “scheme”, they were not a managed investment scheme because the scheme’s features did not fulfil (a)(i) and (ii) of the section 9 definition of “managed investment scheme”. Paragraph (a)(i) was not satisfied because the group members’ were not made to acquire rights to benefits produced by the scheme. Paragraph (a)(ii) was not satisfied because contributions were not pooled and were not used in a common enterprise. **(c) Decision****(i) Sundberg and Dowsett JJ (majority)**The majority, after discussing the history of the corporations legislation concerning “interests” other than shares and debentures, held that the litigation funding arrangements and retainer arrangements amounted to a “managed investment scheme”.The majority applied a five element test to section (a) of the section 9 definition of “managed investment scheme”. This test was established by Barrett J in *ASIC v Takaran Pty Ltd* (2002) 170 FLR 388 at paragraph 12. A “managed investment scheme” has the following features:* the act of contribution of money or money’s worth by several persons;
* the accruing to those persons in return (as consideration) of certain rights to benefits produced by the scheme;
* pooling of the contribution or other use of them in common enterprise;
* an objective or expectation of accrual of benefits to persons for the time being holding the rights generated by contributions; and
* absence of day-to day control over the operation of the scheme.

**(ii) Contribution of money or money’s worth**The majority held that the group members had contributed money’s worth, that being the contractual promises made under the funding and retainer arrangements.**(iii) Consideration for acquiring rights to benefits**The majority held that the promises made by each group member and the Funder were made in consideration of them acquiring rights to participate in the distribution of funds from settlement or a successful claim. At first instance, Finkelstein J had found that it was necessary that the benefits were acquired by the contributors and produced by the scheme. Finkelstein J found that the group members would be entitled to recover damages from Multiplex because of the justiciable cause of action against that company which existed separately from the scheme. In other words, no group member has paid for those causes of action as part of the scheme. The majority disagreed, believing that the scheme clearly conferred other benefits on the group members (see heading (v) below). The majority stated at paragraph 80, “it would do violence to language to deny that the opportunity to prosecute a claim, with virtually no exposure to any costs or outgoing in the event of failure is a benefit…produced by the scheme.”**(iv) Pooling of the contribution in common enterprise**The majority found that “pooled” had a wider meaning than that adopted by Finkelstein J. There was no justification for limiting the meaning of the word “pooled” to a fund. The word “pool” need not involve a “physical concept”.**(v) Expectation of accrual of benefits**The majority held that the arrangements conferred the following benefits upon the group members:* legal services were provided at no cost to the group members;
* group members were protected from exposure to any costs order;
* the Funder provided security for costs; and
* contractual rights to participate in the distribution of funds from settlement or successful claim.

**(vi) Absence of day-to day control**There was no dispute regarding this issue. MBL clearly had day-to-day control of the scheme.**(vii) Jacobson J (dissenting)**His Honour found that the elements of “pooling” or “common enterprise” were not satisfied. The absence of a common fund for payments of the group members, combined with the intent of the individual group member (the realisation of a successful claim), resulted in there being no “pooling” of contributions. The “common enterprise” in this situation related to litigation. His Honour held that the “common enterprise” must relate instead to a business of commercial undertaking. His Honour also stated that the justiciable cause of action against the company existed separately from the scheme and no group member had paid for those causes of action as part of the scheme.**(d) Comments**On Wednesday 4 November 2009, ASIC granted transitional relief to lawyers and litigation funders involved in legal proceedings structured as funded class actions. Until 30 June 2010, lawyers and litigation funders will not have to comply with the requirements that would otherwise apply to funded class actions as “managed investment schemes” under Chapter 5C and Chapter 7 of the Act. The relief will allow time for Government and ASIC to consider and consult on how funded class actions should be regulated under the Act in the future.etailed Contents**5.5 Oppression and shareholder loans**(By Steven Grant, Minter Ellison) Ehsman v Nutectime International Pty Ltd (No 2) [2009] NSWSC 1096, Supreme Court of New South Wales, Gzell J, 16 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1096.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1096.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerns shareholder oppression in the context of shareholder loans, the implications for breach of director's duty where the shareholders are also directors and a number of cross-claims concerning the making of certain representations.**(b) Facts** The key facts are as follows:* The plaintiff, Patricia Ehsman (Mrs Ehsman) invented a wristwatch with its face split in two and held patents registered in Australia and in the United States of America.
* Mr and Mrs Ehsman and the second defendant, David Brady (Mr Brady) agreed to work together to exploit the invention, whereby Mr Brady engaged a Swiss company, Conseilray SA (Conseilray) to develop the watch.
* In March 1998 Mr Brady claimed that he telephoned Mrs Ehsman from Switzerland and informed her that Conseilray wanted a development agreement signed with a 60% advance payment of CHF540,000 and Mrs Ehsman agreed to proceed on the basis that she and Mr Ehsman would contribute to the venture with him on a 50/50 basis. However, Mrs Ehsman did not recall the conversation. On 17 April 1998, Conseilray entered into an agreement to provide development services including the construction of five working prototypes for a fee of CHF900,000 of which it acknowledged receipt of CHF540,000.
* The fifth defendant, Timentel Pty Limited (Timentel), was incorporated in October 1998 with Mr Brady and Mr and Mrs Ehsman each holding 50% of the shares. Subsequently, the third defendant, Francis Frasca (Mr Frasca) was allotted 5% of its shares for $75,000 as was David Paix (Mr Paix) and his wife. The shareholdings of Mr Brady and Mr and Mrs Ehsman were each reduced to 45%.
* In November 1998 Mrs Ehsman executed a deed with Timentel under which she granted the company an exclusive royalty free licence to commercialise and exploit her patents.
* At a meeting of Timentel members on 16 March 1999, it was resolved that Mr Brady continue his practice of paying invoices and seeking reimbursement from the shareholders and that all shareholders must guarantee payment of their respective payment amounts as and when bills occurred. It was also noted that Mr and Mrs Ehsman were having difficulty in raising their share and it was proposed that this matter be considered at a subsequent meeting.
* On 28 March 1999 it was resolved that all funding requirements be paid by each shareholder group at 25% as a means of assisting Mr and Mrs Ehsman through their tight financial situation and that all moneys paid previously and thereafter would be treated as shareholder loans ranking preferentially in front of any distribution of commissions or dividends.
* Mr Ehsman ceased to be a director in 2002 and on 9 June 2002, Mrs Ehsman was removed as secretary and Mr Paix was appointed in her place.
* At an adjourned meeting on 4 July 2002 it was resolved to increase the 5% shareholders to 15% with the reduction of the shareholding of Mr and Mrs Ehsman and Mr Brady to 35%.
* Mr Brady claimed that DNB Global Corporation (DNB) (a company incorporated in the Philippines of which he was one of five directors and a shareholder of one of its members) paid Timentel’s expenses and issued an invoice to Timentel for reimbursement.
* At a meeting of the board of directors of Timentel on 29 April 2005 (which Mrs Ehsman did not attend) Mr Brady advised that DNB was no longer prepared to carry debts on behalf of Timentel. It was resolved that the chairman and the secretary seek to borrow $120,000 offering a first registered charge over the company’s assets. On 6 May 2005, DNB sought $216,746.15 from Timentel being outstanding contributions from Mr and Mrs Ehsman.
* At a directors’ meeting on 9 May 2005 (which Mrs Ehsman did not attend), it was resolved to execute a loan facility agreement and a deed of fixed and floating charge over the assets of the company in favour of Mr Brady, Mr Paix and Mr Frasca and the documents were executed. The initial loan was $216,746.15 reflecting the unpaid contributions of Mr and Mrs Ehsman claimed from Timentel by DNB on 6 May 2005.
* There was no evidence that Mr Brady, Mr Frasca and Mr Paix paid funds to Timentel, Timentel discharged its indebtedness to DNB or their loan accounts increased by $216,746.15. In fact, the loan account balances of Mr Frasca and Mr and Mrs Paix remained the same.
* At a board meeting on 8 August 2005 (which Mrs Ehsman did not attend) Mr Brady, Mr Frasca and Mr Paix resolved that Timentel should accept their offer to purchase its assets.
* On 31 August 2005 Nutectime International Pty Ltd (Nutectime) was incorporated with 60 shares allotted to Mr Brady, 20 shares to Mr Frasca and 20 shares to Mr and Mrs Paix.
* On 2 September 2005 an asset sale agreement and a deed of assignment of intellectual property rights from Timentel to Nutectime were executed and settled on the same day.
* No moneys were actually paid at settlement. Rather Mr Frasca and Mr Brady attended with bank cheques made out to themselves respectively which were presumably used in a round robin manner, supposedly to discharge a portion of Timentel’s liabilities to them and to Mr Paix.

Mrs Ehsman sought relief from oppression under section 232 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) on the basis that the conduct of the affairs of Timentel was contrary to the interests of the members as a whole or were oppressive to, unfairly prejudicial to, or unfairly discriminatory against, herself as a member. Mrs Ehsman also claimed that Mr Brady, Mr Frasca and Mr Paix had breached their duty as directors.By cross-claim Mr Brady alleged that by oral agreement in March 1998 Mrs Ehsman agreed to pay 50% of the costs incurred in commercialisation. Mr Paix also made the following cross-claims:* Mr Paix alleged that Mr and Mrs Ehsman owed him a duty to take reasonable care in making representations in October 1998 that if he invested in Timentel he would at least treble his investment in three months which Mr and Mrs Ehsman said they would guarantee, upon which he relied when he invested $75,000 for a 5% shareholding in Timentel.
* Mr Paix claimed damages for misleading and deceptive conduct under section 68(1) of the [Fair Trading Act 1987 (NSW)](http://my.lawlex.com.au/default.asp?cid=3955&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) with respect to the statements attributed to Mr Ehsman.

**(c) Decision** **(i) Oppression**Section 232(e) provides that the court may make an order under section 233 if the conduct of a company’s affairs, an actual or proposed act or omission by or on behalf of a company or a resolution, or a proposed resolution, of members or a class of members of a company, is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.If the loan facility agreement and the deed of fixed and floating charge were otherwise effective, they had the effect of preferring $216,746.15 of the past loans of Mr Brady, Mr Frasca and Mr and Mrs Paix to the loans of Mr and Mrs Ehsman, thereby discriminating against them. The loans of Mr and Mrs Ehsman remained unsecured but portions of Mr Brady, Mr Frasca and Mr and Mrs Paix's existing loans became secured. Accordingly, the effect of Timentel's failure to repay $216,746.15 was to enable Mr Brady, Mr Frasca and Mr Paix to exercise their charge in preference to the discharge of Mr and Mrs Ehsman’s loans and the debts of any other creditors. The consequence was that Mr and Mrs Ehsman were left with a debt due to them by a company which had no capacity to pay and would have no capacity to pay in the future because all of its assets had been transferred to Nutectime.Accordingly, Gzell J held that the execution of the loan facility agreement, the deed of fixed and floating charge and, later, the asset sale agreement and the deed of assignment of intellectual property rights were oppressive to, unfairly prejudicial to, or unfairly discriminatory against Mrs Ehsman, if not contrary to the interests of the members of Timentel as a whole. Gzell J refused to accept Mr Brady's contention that there was no other alternative, rather an application to wind up Timentel could have been made, whereby the interests of Mr and Mrs Ehsman would have been treated equally with the interests of the other shareholders. Having reached this conclusion, it was unnecessary for Gzell J to consider whether that conduct was contrary to the interests of the members as a whole in terms of section 232(d).Section 233(1) provides that the court can make any order that it considers appropriate in relation to the company, including an order '(a) that the company be wound up; … (d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law; … or (j) requiring a person to do a specified act.' Gzell J concluded that the fact Timentel was an empty shell should not prevent an order being made addressing the oppression by requiring Nutectime to transfer back to Timentel for no consideration the assets acquired by it under the asset sale agreement and the deed of assignment of intellectual property rights, and to restore the shareholder loan accounts to the state they were in before DNB issued its 6 May 2005 invoice. That would restore Timentel to its former position and Mrs Ehsman was entitled to such an order.Gzell J also ordered that Timentel be wound up pursuant to section 233(1)(a). Accordingly:* if it is established that DNB paid the amounts in its 6 May 2005 invoice, that those amounts were owed by Timentel and that Mr Brady, Mr Frasca and Mr Paix lent moneys to Timentel for it to discharge the DNB invoice, the liquidator should adjust the shareholder loan accounts;
* if it is established that Nutectime paid moneys for the assets of Timentel, the liquidator should admit a proof of debt; and
* if it is established that Nutectime paid moneys or is liable to pay any amounts in furtherance of the commercialisation of the split-faced watch, the liquidator should admit a proof of debt.

**(ii) Breach of directors' duty**In entering into the loan facility agreement and the deed of fixed and floating charge and causing Nutectime to enter into the asset sale agreement and the deed of assignment of intellectual property rights, Gzell J held that Mr Brady, Mr Frasca and Mr Paix were in breach of their fiduciary duty to Timentel. They had exercised their powers to obtain a private advantage and acted for their benefit and not that of Timentel, by leaving it as an empty shell whilst gaining the advantage of their secured debts being discharged. Imputed with the knowledge of its directors Mr Brady, Mr Frasca and Mr Paix, Nutectime received the assets of Timentel with knowledge of the breach of duty of its directors and was within the first limb of *Barnes v Addy* (1874) LR 9 Ch App 244 at 251-252. However, given Gzell J's decision to transfer the assets of Timentel back to it, there was no need for a declaration that Nutectime holds the assets of Timentel on trust for Timentel or to order Mr Brady, Mr Frasca or Mr Paix to pay equitable compensation to Timentel for their breach of duty. **(iii) Costs of commercialisation**Gzell J concluded that the March 1998 oral agreement was superseded by a written agreement of 30 April 1998 and that the minutes recording Mr Frasca stating that all shareholders must guarantee payment of their respective payment amounts as and when bills occurred was not a binding legal agreement. Rather all parties had agreed to consider this proposition and it was resolved to meet on 28 March 1999 to finalise and resolve the strategy when it was resolved that until further notice all funding requirements would be paid by each shareholder group not pro rata to percentage shareholding but at 25% for each shareholder group as a means of assisting Mr and Mrs Ehsman through their tight financial situation. Accordingly the cross-claims failed.**(iv) Representations by Mr and Mrs Ehsman**Gzell J also dismissed this cross-claim on the following basis:* Mr Paix could have made his own enquiries before investing and, in particular, from Mr Brady.
* A cause of action for negligent misstatement occasioning economic loss requires the maker of the statement to foresee that the recipient of the misstatement is likely to enter into a transaction in reliance upon the misstatement. Gzell J considered that as Mr Ehsman referred Mr Paix to Mr Brady, Mr Ehsman did not foresee that Mr Paix would rely upon his statements.
* The plaintiff's vulnerability is an important requirement in cases where damages for pure economic loss are sought. However, Mr Paix exhibited no such vulnerability.

**(v) Breach of section 68(1) of the Fair Trading Act 1987 (NSW)**Whilst Mr Ehsman probably made the statements attributed to him, the claim was dismissed on the following basis:* The discussion was at a general level, development details were not discussed and Mr Ehsman lacked first-hand knowledge of the project.
* The statements were exaggerated and in the nature of puffery.
* Mr Paix was advised to speak with Mr Brady before he made any investment and Mr Paix did not speak with Mr Brady.
* Mr Paix purchased the shares not only because of the promised returns, but also because he was very good friends with Mr Ehsman and wanted to help him out.

etailed Contents**5.6 Watch out for wash outs: Appeal Court upholds conviction for misleading trades**(By Clara Bowman, Freehills) Braysich v The Queen [2009] WASCA 178, Supreme Court of Western Australia, Court of Appeal, Pullin, Buss and Miller JJA, 16 October 2009The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/wa/WASCA/2009/178.html](http://www.austlii.edu.au/au/cases/wa/WASCA/2009/178.html%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The appellant, a stockbroker, appealed against convictions for creating a false or misleading appearance of active trading in securities on a stock market in breach of former subsection 998(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (the Act).Held:* A person will create a ‘false or misleading appearance of active trading’ if, relevantly, the person enters into or carries out any transaction which does not reflect the forces of genuine supply and demand, and the transaction in question constitutes or induces a pattern of new trading in volumes or at prices that would not otherwise have occurred: at [101].
* Subsection 998(5) may be relied on by the prosecution to prove that the accused, by engaging in a transaction for sale or purchase of any securities that did not involve any change in the beneficial ownership of the securities, created a false or misleading appearance of active trading in those securities: at [54].
* If the prosecution relies on the deeming provisions in subsection 998(5), the prosecution needs only to prove that the accused had knowledge of the relevant activity the subject of the deeming provisions: at [90].
* To establish the defence available in subsection 998(6), the accused must prove on the balance of probabilities that none of his or her purposes for entering the relevant transaction included the purpose of creating a false or misleading appearance of active trading: at [96].

**(b) Facts** The appellant was a director of Paul Morgan Securities, a stockbroking company. The appellant acted as the broker for a Mr Dean Scook. The transactions in question concerned the purchase by Challiston Pty Ltd (Challiston), a company associated with Mr Scook, of shares in Intrepid Mining Corporation NL (Intrepid) from Walthamstow Pty Ltd (Walthamstow), a finance company. Walthamstow agreed to advance Challiston all of the funds required for the purchase of shares in Intrepid in accordance with a series of loan agreements. Challiston purchased shares in Intrepid in its own name. At or before the time when settlement of a purchase of shares in Intrepid was required, the relevant shares were re-booked to Walthamstow as security in accordance with the loan agreement. The appellant effected the re-booking by way of a ‘crossing’, that is, by acting as a broker for both the buyer and the seller. It was alleged that at all material times Challiston retained a beneficial interest in the shares in question.**(c) Decision** **(i) Background**At the time of the offence, section 998 of the Act provided as follows:* Subsection 998(1) prohibited a person from creating, or doing anything that is intended or likely to create a false or misleading appearance of active trading in any securities on a stock market.
* Subsection 998(5) deemed a person who had directly or indirectly entered into or carried out a transaction for the sale or purchase of securities that did not involve any change in the beneficial ownership of the securities to have created a false or misleading appearance of active trading in those securities on a stock market.
* Subsection 998(6) provided that if the deeming provision in subsection (5) is relied on by the prosecution, it is a defence if proven that the accused’s purpose or purposes for acting was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on a stock market.

Section 998 has since been repealed. Section 1041B of the Act provides an offence in relation to creating a false or misleading appearance of active trading.At trial the appellant was charged on 26 counts of creating a false or misleading appearance of active trading on the Australian Stock Exchange (ASX) in breach of subsection 998(1) of the Act, by way of causing to be carried out transactions in respect of shares in Intrepid that did not involve a change in beneficial ownership of those shares. The prosecution relied on the deeming provision in subsection 998(5) in relation to all of the counts against the appellant. The appellant was convicted by a jury on 25 of the counts. The appellant sought leave to appeal. The Court granted leave but dismissed the appeal. Buss JA, with whom Pullin and Miller JJA agreed, delivered the reasons for judgment, outlined below. **(ii) Analysis of prohibition**Buss JA noted that the prohibition against wash sales applied to ‘genuine’ transactions (in the sense that they are intended to operate according to their terms) that created a false or misleading impression in the market as well as ‘fictitious’ or ‘colourable’ transactions: *North v Marra Developments Ltd* [1981] HCA 68 at [59], per Mason J.Buss JA broke down section 998(1) into three limbs, at [39]:* the first limb prohibits a person from creating a false or misleading appearance of active trading in any securities on a stock market;
* the second limb prohibits a person from doing anything that is intended to create a false or misleading appearance of active trading; and
* the third limb prohibits a person from doing anything that is likely to create a false or misleading impression of active trading.

The deeming provisions of section 998(5) and the defence in section 998(6) are confined to the creation of a false or misleading appearance of active trading within the first limb of the prohibition and do not apply to the second or third limbs of section 998(1). Buss JA noted that all of the counts against the appellant charged that he had created a false or misleading appearance of active trading in Intrepid’s shares: that is, the charges all fell within the first limb of section 998(1).At [101], Buss JA found that a person creates a false or misleading appearance of active trading in securities for the purposes of the first limb of section 998(1) if, relevantly, the person enters into or carries out any transaction which does not reflect the forces of genuine supply and demand and the transaction constitutes or induces a pattern of new trading in volumes or at prices that would not otherwise have occurred.**(iii) Nature and effect of deeming provision**Buss JA, at [52] to [54], found that the purpose of the deeming provision in section 998(5) was to “facilitate proof”. The provision could be relied on by the prosecution to prove that the accused, by engaging in a transaction for sale or purchase of any securities that did not involve any change in the beneficial ownership of the securities, created a false or misleading appearance of active trading in those securities within the first limb of section 998(1). The accused cannot avoid the deeming provision once the conditions for its engagement are proved. However, the accused can attempt to make out the defence conferred in section 998(6). **(iv) State of mind** Buss JA reviewed the authorities relating to the requirement for a subjective fault element at common law, and requirements for its displacement by statute. His Honour concluded, at [79], that where the prosecution does not rely on the deeming provisions in section 998(5) it must prove beyond reasonable doubt that the accused’s purpose was to create a false or misleading appearance of active trading in the relevant securities. However, where the prosecution does rely on the deeming provisions in section 998(5), the prosecution does not need to prove that the accused had a blameworthy state of mind beyond knowledge of the relevant activity the subject of the deeming provisions: at [90]. **(v) Defence**Where the prosecution makes out the conditions for engagement of the deeming provision the accused will be convicted unless able to rely on the defence in section 998(6). To establish the defence, the accused must prove on the balance of probabilities that the purposes for which he or she engaged in the relevant activity did not include the purpose of creating a false or misleading appearance of active trading: at [94], that is, that none of his or her purposes for entering the transaction included the purpose of creating a false or misleading appearance of active trading: at [96]. The defence will not be made out “if the accused merely raises a reasonable doubt as to whether he or she had the proscribed purpose, or merely establishes that there is a reasonable and rational inference available on the evidence that he or she did not have the proscribed purpose”.etailed Contents**5.7 Extension of time for lodgement of notices regarding changes to charges under section 266(4)(a) of the Corporations Act**(By Sarah Bitcon and Laura Keily, Corrs Chambers Westgarth) Dempsey Resources Pty Ltd v Continental Coal Ltd, [2009] FCA 1157, Federal Court of Australia, Gilmour J, 12 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fca1157.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/october/2009fca1157.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerned the exercise of the court’s discretion to extend the time limit for lodging notices of change of detail in respect of certain charges with the Australian Securities and Investments Commission (ASIC). The court found that the reason the applicants had failed to lodge the notices within the time period, in this case, was because of inadvertence. As such, the case came within section 266(4)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Act), which gave the court discretion to extend the time period for lodgement of the notices.**(b) Facts**In January 2009, LinQ Capital Ltd (LinQ Capital) lent Continental Coal Ltd (Continental) $6 million. A Loan Facility Agreement (Facility Agreement) was entered into between these parties and also LinQ Finance No 2 Pty Ltd (LinQ Finance), who was the Facility Agent and Security Trustee and was responsible for administering the loan and acting as a conduit for all payments.At the same time, Continental and LinQ Finance entered into three security agreements (Security Agreements) which secured the money owed to LinQ Finance under the Facility Agreement.On 3 April 2009, an amendment deed (Amendment Deed) was prepared to facilitate the participation of new financiers. The Amendment Deed enabled the amount under the Facility Agreement to be increased by the execution of an Increased Commitment Deed (ICD).On 20 April 2009, Dempsey Resources Pty Ltd (Dempsey) executed the Dempsey ICD, making it a financier under the Facility Agreement.Perpetual Corporate Trust Limited (Perpetual) executed the Perpetual ICD, also making it a financier under the Facility Agreement, which was dated 5 June 2009 to reflect the date on which it advanced funds under the Facility Agreement.LinQ Corporate lodged notices alerting ASIC to a change in the terms of a charge, however it did this after the time period for lodgement had expired. The applicants’ argued that this was due to inadvertence, and, as such, the court should use its discretion to extend the time period for lodgement. Continental did not oppose the application.**(c) Decision**Justice Gilmour exercised the court’s discretion under section 266(4)(a) of the Act and extended the time period for the applicants to lodge the notices with ASIC.**(i) Relevant law**Section 268(2) of the Act provides that where there is a variation in the terms of a registrable charge having the effect of increasing the amount of debt or increasing the liabilities secured, or prohibiting or restricting the creation of subsequent charges on the property, then the company which created the charge is obliged to lodge a notice of such variation within 45 days of the variation having been made. A failure to lodge a notice does not automatically destroy the security. However, under section 266(3) of the Act, it does render the charge void as a security against the liquidator or administrator of the company or the administrator of a deed of company arrangement. The charge is otherwise a valid security but, in certain circumstances, it is postponed in priority in favour of a registered charge.Section 266(4)(a) of the Act gives the court a discretion to extend the period for lodging a notice of a charge if it is satisfied that the failure to lodge a notice in respect of a charge, or in respect of a variation in the terms of a charge, was due to inadvertence.**(ii) Analysis**In this case, Gilmour J held that, in determining whether the court should exercise its discretion under section 266(4)(a), the following factors were important considerations:* the period of delay in lodging the notice;
* the solvency of the company in regard to which the charge is registered;
* whether there were any other registered charges on the property; and
* whether there was remediation of the default within a reasonable time.

**(iii) Application of principles** In regard to the Dempsey ICD, the notice was registered late due to a misunderstanding between directors. A director of LinQ Corporation, Mr Brewer, had given the ICD to a director of LinQ Finance, Mr Durack, assuming he would register the notice, but without specifically instructing him to do so. Mr Durack assumed the registration would be taken care of by Mr Brewer, who had conducted the matter. Because of this misunderstanding, the parties did not realise the notice had not been registered until the time period had expired, at which point Mr Brewer promptly rectified the oversight.In regard to the Perpetual ICD, Mr Brewer was busy organising an equity raising at the relevant time, and failure to lodge the notice was an oversight which was rectified immediately by Mr Brewer upon realisation of the mistake.Justice Gilmour held that in both instances, the oversight was due to inadvertence within section 266(4)(a) of the Act. His Honour noted that the notices were both lodged only a short amount of time beyond the time period, being 9 days and 55 days respectively.In addition, Gilmour J noted that Continental was not in any form of external administration and that it had net assts of $7,269,734. As remedial step were taken promptly by Mr Brewer, Gilmour J determined that the court’s discretion should be exercised to extend the time period for the lodgement of notices.etailed Contents**5.8 Legal professional privilege and information obtained by a regulator**(By Jodene Chia, DLA Phillips Fox) Australian Securities and Investments Commission v Andrew Alexander Lindberg and AWB Limited [2009] VSCA 234, Supreme Court of Victoria Court of Appeal, Warren CJ and Neave and Mandie JJA, 9 October 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/october/2009vsca234.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/october/2009vsca234.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://www.law.unimelb.edu.au/bulletins/_new) **(a) Summary**This was an application for leave to appeal (if necessary) and an appeal by the Australian Securities and Investments Commission (‘ASIC’) against orders made by a Trial Judge in the Trial Division of the Supreme Court of Victoria on 12 August 2009.The orders related to an application by a non-party to the relevant proceedings, AWB Limited (‘AWB’), and required ASIC to provide to AWB's external lawyers, copies of certain witness statements and transcripts of examinations conducted pursuant to section 19 of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/default.asp?cid=56481&itid=0&ntid=0&nid=&alpha=&alphaid=&jurid=&ihl=&nhl=&fp=&top=exp&nav=col&pact=coredoc" \t "_default) (‘the ASIC Act’). These orders were made to allow AWB to examine the documents and, if necessary, assert legal professional privilege (‘LPP’) in them.ASIC appealed the decision on numerous grounds claiming, among other things, that LPP could not attach to information that is in the hands of a third party who has obtained it from someone other than the holder of the LPP.The court upheld ASIC’s appeal. Accordingly, the orders of 12 August 2009 were set aside. AWB has since filed an application in the High Court for special leave to appeal the decision.**(b) Facts** The orders related to a civil penalty proceeding commenced on 19 December 2007, under the provisions of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (‘the Corporations Act’). The proceeding was brought by ASIC against Andrew Lindberg, the former managing director of AWB, for alleged contraventions of sections 180 and 181 of the Corporations Act, alleged to have occurred when Mr Lindberg was an officer of AWB. In particular, ASIC was investigating the activities of AWB and others in connection with wheat sales to Iraq under the United Nations Oil-for-Food Program. Prior to the trial date, the judge ordered ASIC to make discovery of all transcripts of examinations conducted under section 19 of the ASIC Act and all other witness statements, including draft statements, which had not previously been provided to Mr Lindberg, relating to any questions raised by the pleadings in the proceeding.AWB subsequently sought and was granted orders requiring ASIC to produce such documents to it before producing them to Mr Lindberg, to enable AWB to review the documents and determine whether they contained communications over which AWB wished to assert a claim of LPP. ASIC sought leave to appeal (if necessary) and sought to appeal these orders on the following grounds:* The Trial Judge erred in finding that the court had inherent jurisdiction to order that a party to a proceeding produce documents to a non-party.
* The Trial Judge erred in finding that the doctrine of LLP includes not only immunity from revealing privileged communications but also a right to be given a practical and realistic opportunity to assert the privilege in order to resist revealing information or documents potentially subject to LLP.
* The Trial Judge erred in finding that, in reliance upon a possible claim to LLP over documents or information in the possession of ASIC as a result of the exercise of its statutory powers, AWB was entitled to restrict the use which ASIC could make of that information and documentation in performing its statutory functions.
* The Trial Judge erred in finding that AWB was entitled to have access to certain witness statements and transcripts of examinations made and received by ASIC when exercising its statutory powers to investigate aspects of the conduct of AWB for the purpose of possibly asserting LLP over some information or documents provided to ASIC.
* The Trial Judge erred in failing to consider whether his refusal to uphold ASIC’s claim to public interest immunity, based upon the insufficiency of supporting evidence, might result in the disclosure of information to AWB which should have been withheld in the public interest.
* The Trial Judge erred in failing to properly assess the public interest immunity claim made by ASIC by failing to give ASIC the opportunity to submit affidavit material before making his order and failing to inspect the documents in question to consider the merits of the claim.

**(c) Decision** In making its decision, the Court of Appeal distinguished on the facts the case of the *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, the primary authority relied upon by AWB and accepted by the Trial Judge as providing the legal basis for the relevant orders made.The Court of Appeal held that the principle enunciated in that case that a practical and realistic opportunity be given to the person holding the documents to claim privilege, is not one which applies or is capable of applying to a situation in which the authority has already obtained possession of the documents from third persons. Furthermore, the principle does not extend to creating a right to such a practical and realistic opportunity to claim privilege by some other person. The Court of Appeal reinforced the common law position that once such documents come into the possession of another party, the privilege is lost or cannot be asserted except in the context of a claim in equity to protect confidentiality.For the above reasons, the Court of Appeal held that AWB was not entitled to the orders obtained on the basis of the doctrine of LLP. It was noted that this was a case of granting an injunction and thus leave to appeal was not required. Alternatively, the decision of the Trial Judge was held to be attended by sufficient doubt to justify the grant of leave to appeal, and substantial injustice would be done to ASIC if the orders were left undisturbed, as ASIC would be required to disclose to AWB substantial documentation for no good reason.Accordingly, leave to appeal, insofar as necessary, was granted, the appeal allowed and the orders set aside.AWB has since filed an application in the High Court for special leave to appeal the decision.etailed Contents**5.9 One last chance before winding up under sections 232 and 461(1)(k) of the Corporations Act?**(By Ben Hopper, Blake Dawson) Haselgrove v Lavender Estates Pty Ltd [2009] NSW 1076, Supreme Court of New South Wales, Ward J, 9 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1076.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswsc1076.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**Upon an application for winding up of a company under section 233(1)(a) or section 461(1)(k) - (Note two errata in the unreported judgment at the key terms and paragraph [1]: reference to section 463(1)(k) should read "461(1)(k)") of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ('the Act'), the court may deem it appropriate to grant the application where:* one director has been, in a practical sense, denied information about the company's affairs and excluded from past management of the company;
* another director acts in her own interests in running company affairs insofar as applying company funds to the payment of personal expenses;
* there is a position of deadlock between the directors, at least as to whether the company should be wound up in advance of any sale of company assets.

However, given the drastic nature of the remedy, the court may attach a condition staying the operation of the winding-up order to allow for resolution of the issues between the parties.**(b) Facts** **(i) Parties**Mr Haselgrove applied to wind up Lavender Estates Pty Ltd ('the Company'). He was the holder (as executor and trustee of the estate of the late Mr Delmont) of 62.5% of the shares of the Company and was appointed Company director.The main asset of the Company was a property known as Broadview Apartments—holiday rental units and a cottage.Ms Gibson was the other director of the Company. She was the sole director and shareholder of Pitlochry Guesthouse Pty Ltd, which held the remaining 37.5% shares of the Company.Mr Haselgrove claimed that, as director, he had been excluded from financial information, Ms Gibson had been running the company unilaterally and Ms Gibson had been diverting funds from the company for her own purposes.**(ii) Relevant law**Mr Haselgrove submitted that such conduct constituted grounds for winding up under section 232 and / or section 461(1)(k).Section 232 provides that the court may make a winding up order under section 233(1)(a) if, inter alia, the conduct of a company's affairs is either:(d) contrary to the interests of the members as a whole; or(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.Section 461(1)(k) provides that the court may order the winding up of a company if:(k) the court is of opinion that it is just and equitable that the company be wound up.**(iii) Issues**The issues before Ward J were:* Had Mr Haselgrove been denied information about the company's affairs or been excluded from Company management?
* Had Mrs Gibson acted in her own interests in running Company affairs?
* Was there a position of deadlock as between Company directors or members, in particular in relation to whether the Company should first pursue a strata title application for Broadview Apartments or sell the building in one line?
* Had there been a failure of the Company's substratum?
* Did one or more of the foregoing, if it were held true, constitute grounds for a winding up order?

**(c) Decision** **(i) Judgment on issues**In relation to the above issues, Ward J held as follows:* Yes. Mr Haselgrove had been denied access to the Company's bank accounts and excluded from the day-to-day management of the Company. Ms Gibson's stated beliefs that she was the best person to manage the Company caused concern that Mr Haselgrove's full involvement in the Company would continue to be frustrated. Given his statutory and fiduciary obligations to the Company, this state of affairs was clearly unsatisfactory.
* Yes. Ms Gibson had applied company funds to the payment of personal expenses. This was also unsatisfactory.
* Yes. There was a fundamental point of difference between Mr Haselgrove and Ms Gibson as to whether the Company should be wound up before any sale of Broadview Apartments. Such a difference of opinion could not be resolved, absent a change of mind by one or the other, otherwise than by a winding up application.
* No. Although there had clearly been a change in the Company's underlying business from that contemplated when it was established, it is recognised that the intentions and understandings of Company members may change over time (*Re NRMA Ltd* (No 1) (2000) ACSR 595, 619-620 (Santow J)).
* Findings 1 and 2, evidencing oppressive conduct, justified a winding up order under section 232. Findings 1 to 3 warranted a winding up order under section 461(1)(k), whether or not oppressive conduct had been established.

**(ii) Order**Ward J, mindful of the "drastic nature" of the remedy (*Re City Meat Co Pty Ltd* (1983) 8 ACLR 673, 674 (Millhouse J)) thought it appropriate for there to be a final opportunity for the shareholders to consider the position in relation to the sale of Broadview Apartments, failing agreement on which the differences between the parties would seem to be stark and irreconcilable and it would be just and equitable for the company to be wound up.Accordingly, his Honour granted the winding up order but stayed its operation for 30 days in order to allow a general meeting to be held to consider the sale of Broadview Apartments. If agreement could be reached, Ward J would vacate the winding up order and make orders intended to redress Mr Haselgrove's difficulties in management of the Company. If not, the order would come into effect automatically upon expiration of 30 days.**(iii) Comment**In two of the three authorities cited for imposing a condition deferring a winding up order, the matter was adjourned—for 10 days (*Re Wondoflex Textiles Pty Ltd* [1951] VLR 458) or 14 days (*Re Tivoli Freeholds Ltd* [1972] VR 445). Accordingly, the court kept the matter within its control. In the third authority (*Re City Meat Co Pty Ltd* (1983) 8 ACLR 673), no winding up order was made (only a declaration that it was just and equitable that the company be wound up). Ward J cited no precedent for such an order automatically coming into effect upon expiry of a given period.Ward J granted the parties 30 days to come to a resolution. However, Mr Haselgrove could possibly frustrate the operation of the condition. By not attending any meeting, he might be able to "prove" the existence of a deadlock.One who seeks equity, must come with clean hands. If a party deliberately frustrates the convening of the meeting, what effect might this have on the winding up relief he or she has sought? Should a condition deferring operation of an order also impose an obligation upon the parties to make reasonable endeavours to negotiate?etailed Contents**5.10 Applications for stay of management disqualification orders pending an appeal denied**(By Edmond Park, Clayton Utz) O'Brien v Australian Securities and Investments Commissioner; Gillfillan v Australian Securities and Investments Commissioner; Koffel v Australian Securities and Investments Commission [2009] NSWCA 312, Supreme Court of New South Wales, Court of Appeal, Tobias JA, 1 October 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswca312.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/october/2009nswca312.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The applications for stay of management disqualification orders, pending an appeal, were denied.**(b) Facts**In February 2001 the board of James Hardie Industries Limited (JHIL) held a board meeting and approved a draft announcement to the ASX about the establishment of the "Medical Research and Compensation Foundation" to fund, in particular, all compensation claims for asbestos-related diseases from exposure to asbestos products manufactured and sold by subsidiaries of JHIL. The draft announcement stated that the Foundation would have sufficient funds to meet all legitimate present and future claims.The applicants - Geoffrey Frederick O'Brien, Michael John Gillfillan and Martin Koffel - who were non-executive directors of JHIL attended the board meeting. Mr O'Brien attended in person, whilst Messrs Gillfillan and Koffel participated by teleconference between Sydney and the United States where they reside.In February 2007, ASIC began proceedings against a number of JHIL board members. ASIC alleged that the draft announcement was false or misleading and that the directors had breached section 180(1) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) by authorising its release.The court held that the draft announcement was false or misleading and the applicants inter alios were found to have breached section 180(1). In respect of Mr O'Brien, he had failed to exercise the necessary due care and diligence to ensure that a proper basis existed for assertions about there being sufficient funds to meet present and future asbestos claims. In the case of Messrs Gillfillan and Koffel, they had failed to request a copy of the draft ASX announcement, properly consider its contents at the board meeting or abstain from voting on the resolution. This judgment is discussed in Item 5.4 of Corporate Law Bulletin No 141 (May 2009). Consequently, the applicants were each disqualified from managing a corporation for 5 years under section 206C of the Corporations Act. The applicants sought an order staying the disqualification orders pending an appeal against the decision of the primary judge to make those orders.**(c) Decision**Tobias JA considered the principles relevant to the determination of applications for the stay of a disqualification order.**(i) Power to grant stay**For applications to stay, the relevant rule for the Court of Appeal to rely upon to exercise its discretion to grant a stay is rule 51.44 of the Uniform Civil Procedure Rules 2005 (NSW) ("subject to the filing of a relevant originating process, the Court may order that the decision below or the proceedings under the decision be stayed").**(ii) General principles for stay applications**An applicant must show the following (see *Alexander v Cambridge Credit Corporation (Receivers Appointed)* (1985) 2 NSWLR 685 and *Kalifair Pty Ltd v Digi-Tech (Australia) Ltd* (2002) 55 NSWLR 737):* there is a reason or an appropriate case to warrant the exercise of the discretion in favour of the applicant;
* the balance of convenience and the competing rights of the parties favour the applicant;
* unless a stay is granted, a successful appeal will be rendered nugatory and there is a real risk that the applicant will suffer prejudice or damage; and
* the applicant has an arguable case on appeal without considering in detail the merits; the appeal raises serious issues for determination by the appellate court.

**(iii) Specific principles for stay of a disqualification order**An application for the stay of a disqualification order should also take into account the following additional relevant considerations (see *Whitlam v Australian Securities and Investments Commission* [2002] NSWCA 312, (2002) 43 ACSR 73):* special or exceptional circumstances are not required for the grant of a stay;
* there is no analogy between a bail application pending a sentencing appeal in criminal proceedings and an application for a stay of a disqualification order;
* seriousness of the findings;
* protection of the public;
* whether success on appeal may sufficiently vindicate the applicant and restore their reputation; and
* whether any significant repair to damaged reputation might be worked in the interim if it was to be held on the stay application that the findings of the primary judge were significantly in doubt.

It should be noted that any challenge on appeal to the findings of the primary judge must face the well-accepted limitations on appellate intervention based on restraint, especially where the findings are credibility-based for which the primary judge has had the benefit of seeing and hearing the witnesses. In the present case, the key findings as to whether the draft ASX announcement was put before the February 2001 board meeting and whether the announcement was considered and approved were supported by comprehensive reasons. This was "not a case in which such doubt has been shown as to the findings of the primary judge that, by so stating and granting a stay, any significant repair to damaged reputation might be worked" (*Whitlam v Australian Securities and Investments Commission* [2002] NSWCA 312, (2002) 43 ACSR 73 at [45]). **(iv) Conclusions**Mr O'Brien's application for stay of the disqualification order was rejected for the following reasons:* There was only a reasonably arguable case on appeal and not more.
* The breach was serious and flagrant.
* Even if his appeal were to succeed, the evidence was "so vague and general and so lacking in critical detail" that it did not show that a failure to stay the disqualification order would cause significant prejudice or irreversible damage in relation to the operation and management of the affairs of certain companies of which Mr O'Brien was a director before the disqualification order.
* The evidence did not show that Mr O'Brien had a hands-on role or that there was no one with the necessary business acumen or expertise to replace Mr O'Brien.
* The evidence did not show that the absence of Mr O'Brien from the board of those companies would significantly or materially affect their commercial activities, their profitability or the value of their shares.
* Mr O'Brien failed to show that loss of his director’s fees would render him destitute or otherwise unable financially to pursue his appeal.
* Any damage to Mr O'Brien’s reputation as a public company director had already been caused by the primary judge's published findings. If he was to be vindicated and his reputation restored, it would be as a result of the success of his appeal and any stay of the disqualification order would make no difference.

In the case of Messrs Gillfillan and Koffel, their applications for stay of the disqualification orders were rejected for the following reasons:* Although they had an arguable case, the reasonable prospects of succeeding on appeal were not so strong that justice could only be served by granting a stay.
* The breaches were serious and flagrant.

etailed Contents**5.11 Application for an injunction to restrain a company meeting from considering resolutions**(By Benjamin Copeland, Blake Dawson) Frazer v Macquarie Airports Management [2009] NSWSC 1057, New South Wales Supreme Court, White J, 29 September 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc1057.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/september/2009nswsc1057.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case was an interlocutory application for an injunction preventing the meeting of holders of securities in an investment vehicle whilst another final claim was still being heard.**(b) Facts** The plaintiffs were holders of stapled securities in an externally managed investment vehicle called Macquarie Airports (MAp). The securities consisted of shares in Macquarie Airports Limited (second defendant) and units in two unit trusts managed by Macquarie Airports Management Limited (first defendant).The plaintiffs sought an injunction to restrain the holding of meetings of holders of stapled securities in MAp and the putting of certain resolutions for the internalisation of the management of MAp. The plaintiffs also sought an order under section 247A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) that the plaintiff be allowed to inspect the books of the defendants.One of the two plaintiffs was a member of a consortium of individuals who had formed the company Global Airports Pty Ltd in an effort to take over the management of MAp.The plaintiffs sought an injunction pending the final hearing of a claim in relation to the adequacy of information provided to security holders, particularly in an explanatory memorandum, in the lead up to the abovementioned meetings.**(c) Decision** White J considered whether there was a serious question to be tried and the balance of convenience in relation to the application for the injunction. White J stated that 'where a decision whether to grant or refuse the interlocutory injunction would, in a practical sense, determine the substance of the matter, the court will assess the strength of the plaintiffs' case for the purpose of seeing where the balance of convenience lies' , referring to *Kolback Securities Ltd v Epoch Mining NL* (1987) 8 NSWLR 533. White J stated that the strength of the plaintiffs' claim for final relief was not the only consideration. White J also considered expenses in relation to the potential adjournment and rescheduling of the meetings, the risk that Macquarie might withdraw its original proposals, additional fees payable to the manager of MAp, third party losses, risk to Macquarie and other security holders in relation to additional exposures to the market in the delay period, losses suffered by entities comprising MAp arising from the delay in capital raising, and any savings that might eventuate from the delay.White J found that despite there being a serious question to be tried, the balance of convenience was such that it favoured the rejection of the plaintiffs' application. In making this statement White J stated that 'the general policy of the courts is not to restrain meetings.'In relation to the application for an order that the plaintiffs be able to inspect the defendants books, White J found that this was an application for final relief and such orders should not be made on an interlocutory basis.White J ordered costs on an indemnity basis because of time and resources the application had consumed. His honour stated that facts which the plaintiffs had not established at the start of the case would have prevented it from proceeding.etailed Contents**5.12 Breach of fiduciary obligations: financial manipulation by financial controller**(By Andrew Kirk, Freehills) Vigliaroni v CPS Investment Holdings Pty Ltd [2009] VSC 428, Supreme Court (Vic), Davies J, 29 September 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/september/2009vsc428.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/september/2009vsc428.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Numerous plaintiffs alleged various fiduciary, oppression and misappropriation related claims in relation to the administration, management and ownership of a group of companies and its underlying unit trusts. Held:* A person will owe a fiduciary duty if they are in a relationship of trust and confidence, such as a relationship between a trustee and a beneficiary or a relationship between a financial controller and a company.
* If a fiduciary finds themselves in a position of conflict, or stands to gain to the exclusion of the beneficiary, they must demonstrate that they brought all relevant information to the attention of the beneficiary to enable them to make an informed decision as to whether they should consent or excuse the breach.
* If a fiduciary receives a profit through a breach of its fiduciary obligations, the burden is on the fiduciary to establish that it would be inequitable to order any account of the profits derived from its conduct.
* Whether a director has engaged in oppressive conduct is determined by an objective assessment of whether there has been some unfairness in the conduct of the company’s affairs affecting a member, whether as a shareholder or in any other capacity.

**(b) Facts**Five proceedings for determination were heard concurrently, all involving common parties and a common subject matter. The proceedings concerned a dispute between the owners and controllers, Ivan Vigliaroni (“Ivan”) and Nick Gargaro (“Nick”), and other related parties as to the administration, management and ownership of the CPS group of companies and underlying unit trusts (“the CPS group”). The five claims involved:* (“Brayrock proceeding”) - Declaratory and other relief sought by Brayrock Pty Ltd (“Brayrock”), a company associated with Ivan’s brother, Domenic Vigliaroni (“Domenic”), against Nick and companies related to Nick and Ivan, concerning the refusal to recognise Brayrock’s ownership of shares and units in entities in the CPS group. Nick alleged that Ivan had made a representation to him to the effect that Ivan had authority to speak for and on behalf of Domenic and that, relying on this representation, the parties entered into a termination agreement whereby Brayrock’s interests would be relinquished. Nick further argued that at a meeting in September 2005 he gave a brief summary to Domenic about what Nick and Ivan intended to do and that Domenic gave his concurrence to the termination agreement and ratified the arrangement.
* (“V&G (Vic) misappropriation proceeding”) - Relief sought by V&G Concrete Constructions (Vic) Pty Ltd (“V&G (Vic)”), a company in the V&G group, a separate but associated group of companies and trusts to the CPS group, for the misappropriation of $400,000 of its funds to enable a CPS group member, CPS Property Holdings Pty Ltd (“CPSPH”) to acquire a property at 15 Network Drive, Carrum Downs, which was then used by CPSPH as security for the acquisition of 17 Network Drive, Carrum Downs.
* (“CPSIH derivative action proceeding”) - Relief sought by Ivan with leave of the court in the name of CPS Investment Holdings Pty Ltd (“CPSIH”), a CPS group member, for misappropriation by Nick of funds from CPSIH to enable CPSPH to acquire the properties at 15 and 17 Network Drive, Carrum Downs.
* (“CPS derivative action”) - Declaratory and other relief sought by Ivan, with leave of the Court, in the name of Concrete Precast Systems Pty Ltd (“CPS”), a CPS group member, against Nick and CPS Construction Group Pty Ltd (“CPSCG”) in relation to the services that CPSCG provided the CPS group. It was argued that Nick breached his obligations to the CPS group by making inadequate disclosure of his personal interest in CPSCG.
* (“Oppression proceeding”) - Relief sought by Ivan against Nick for conducting the affairs of the CPS group in a manner which is oppressive to interests other than those of Nick. This claim was based on, in particular, Nick’s exclusion of Ivan from participating in the management of the CPS group, Nick improperly diverting funds from an entity in which Ivan had an interest to an entity in which he did not, Nick denying Ivan access to company information, Nick using company funds to defend the oppression proceedings, Nick making unauthorised payments in breach of his fiduciary obligations and Nick placing his own interests ahead of those of the other members.

**(c) Decision** **(i) Brayrock proceeding**Davies J, at [23], found that Ivan and Nick intended, and put into effect, Domenic’s total exclusion from the CPS group. At [24], Davies J found that Ivan did not have Domenic or Brayrock’s authority to bind Brayrock to the termination agreement. Further, at [26], Davies J found that Domenic did not expressly or by conduct ratify the termination agreement. Davies J, at [29], relied on the comments of Deane J in *Chan v Zacharia* (1983-84) 154 CLR 178 to find that Nick owed to Domenic fiduciary obligations, as he was trustee for the shares held on behalf of Brayrock and also as a result of his professional relationship with Domenic as accountant, administrator and financial controller of the V&G and CPS entities. Further, her Honour held that the relationship between a trustee and a beneficiary is the archetypical fiduciary relationship and that the no conflict and no profit duty is applied strictly by the courts. Her Honour held that Nick placed himself in a position of conflict in which he stood to gain, and did gain, out of the relinquishment of Domenic’s interest. At [30], her Honour found that the onus is on Nick to show that Domenic gave informed consent and the threshold for discharging that onus is high. Her Honour found that Nick had not established that Domenic had received all relevant information required to give informed consent or to ratify the breach. Consequently, Nick breached his fiduciary obligation to Domenic. **(ii) V&G (Vic) misappropriation proceeding and CPSIH derivative action proceeding**Davies J, at [42], found that whilst Nick, as financial controller, had the general authority to perform a treasury function of looking after the flow of funds in the groups, this carried with it fiduciary and statutory duties to V&G (Vic) and CPSIH. Her Honour found that Nick entirely disregarded the separate corporate personalities and ownership interests of V&G (Vic) and CPSIH. He failed to avoid a conflict of interest, and instead misused his position as financial controller of V&G (Vic) and CPSIH to the benefit of his personal interests. **(iii) CPS derivative action**Davies J, at [50], found that Nick had duties to the CPS group to make full and frank disclosure of his personal financial interest, as beneficial owner of CPSCG, in appointing CPSCG as the service entity to the CPS group and other CPS entities, and determining the basis on which CPSCG would charge. Her Honour found that Nick deliberately withheld this information from Ivan at the time of engaging CPSCG as the service entity. Further, her Honour found that Nick lacked the proper authority of CPS to enter into contractual arrangements with CPSCG and to require them to incur the management fees of CPSCG. Consequently, Nick breached his fiduciary and statutory obligations to CPS and other CPS entities and the contract was unlawful. Davies J, at [51], found that Nick’s breach of fiduciary duties deprived CPS and other CPS entities of the opportunity to inquire into the reasonableness of the fees charged by CPSCG. The ramifications of this lack of opportunity to inquire into the reasonableness of these fees is accentuated by the substantial increase in fees charged by CPSCG, as compared to the previous service provider. In response to CPS’ election to seek an account of profits, Davies J, at [53], held that the burden is on Nick to establish that it would be inequitable to order any account of the profits derived from his conduct. Davies J has given the parties an opportunity to make submissions on whether it would be appropriate for Nick to retain a proportion of the profits to reflect his contribution of skill, expertise and other costs. **(iv) Oppression proceeding**At [61], Davies J made reference to section 232(e) of the Corporations Act 2001 (Cth) which allows the court to make an order if the conduct of a company’s affairs is oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members, whether in that capacity or any other capacity. At [62], her Honour held that this is determined by the standard of reasonable directors possessed with the skill, knowledge or acumen held by the actual directors. Davies J, at [84], found that Nick’s conduct was unfair and prejudicial to Ivan in his capacity as director, shareholder and unitholder because he took advantage of the trust and responsibility placed on him by Ivan for the management of the CPS group.etailed Contents |

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