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Recent Corporate Law Decisions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#5) [5.1 Liability of a director for publication of a statement to the ASX which is misleading or deceptive or likely to mislead or deceive](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#051)[5.2 Accessorial liability for the transfer of property in breach of trust](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#052)[5.3 Whether the court can extend the 6 year time limit to enable an action to recover loss for contravention of a civil penalty provision](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#053)[5.4 Application by liquidator to amend proceedings outside the three year statutory limit and to include further claims](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#054)[5.5 ASIC's power to 'begin and carry on' proceedings](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#055)[5.6 Legal professional privilege will not apply to communications to further any abuse or misuse of power or a deliberate breach of legal duty](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#056)[5.7 Appealing a liquidator's decision to reject a proof of debt](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#057)[5.8 Should a court approve a members' scheme of arrangement where new information is discovered after the members have voted?](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#058)[5.9 Access to share registers at a reasonable cost](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#059)[5.10 Section 237 of the Corporations Act 2001 (allowing derivative actions) does not apply to companies in liquidation](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#0510)[5.11 Application to bring statutory derivative action under the Corporations Act](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#0511)[5.12 Section 289 Co-operatives Act 1992 (NSW): What factors will the court consider when determining whether a co-operative has altered the maximum percentage of issued capital that can be held by any one member?](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#0512) [5.13 Challenge to statutory demand at winding up hearing where failure to update registered address](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008.htm#0513)  |

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

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| http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008_files/spacer%281%29.gif |
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| **1.1 Seminar - Insider trading: Recent developments and implications for market players - Melbourne (28 August) and Sydney (9 September)** ASIC has recently announced that it is giving higher priority to detecting and prosecuting insider traders. Other international regulators have made similar announcements. The current marker volatility has, according to some commentators, facilitated insider trading. At the same time, there have been criticisms of the insider trading laws, including criticisms by judges.This seminar brings together leading speakers from the ASX and a major investment bank and law firm to discuss recent developments in insider trading and their implications for market players.The topics discussed at the seminar will include:* The role and activities of ASX in dealing with insider trading and market manipulation.
* Current problems in relation to insider trading, including the extent of significant price movements ahead of M & A announcements, regulatory responses to these problems in Australia and elsewhere and some of the measures that firms can take to reduce the risk of market abuses.
* Topical issues in the current market including:- civil penalty proceedings: ASIC's scorecard to date- stock lending to hedge funds and margin call trigger points: is this inside information?- the equal information defence - can this be a fraud on the market?- narrowing the prohibition to exclude unlisted shares and OTCs.

The seminar will be convened by Professor Ian Ramsay, Director of the Centre for Corporation Law & Securities Regulation at The University of Melbourne.Speakers for the Melbourne seminar are: Michael Hoyle, a division director of Macquarie Capital Advisors, Robert Simkiss, Partner, Allens Arthur Robinson and Richard Flynn, Manager, Surveillance of ASX Markets Supervision Pty Ltd. Speakers for the Sydney seminar are: Cathie Armour, an executive director at Macquarie Capital Advisors Division, John Warde, Partner, Allens Arthur Robinson and Richard Flynn.The seminar is being held in Melbourne on 28 August 2008 and Sydney on 9 September 2008, 5.30pm to 7.00pm.  Further information is available from the [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/go/news/index.cfm%22%20%5Ct%20%22_new).etailed Contents**1.2 Study - which courts deliver most corporate law judgments?** On 22 July 2008, the Centre for Corporate Law and Securities Regulation published a study titled: "Which courts deliver most corporate law judgments? A research note". In Australia, plaintiffs in civil corporate law matters are generally free to choose between the Federal Court and a state or territory Supreme Court when commencing litigation. The study outlines the results of research indicating which courts deliver most corporate law judgments. The research indicates the states where the Federal Court has had the most impact in recent years in terms of hearing corporate law matters that could have gone to a state Supreme Court. Data is also presented on the numbers of hearing days relating to the judgments. Possible explanations for the differences in the numbers of judgments delivered are explored. One possible explanation is that there are more companies registered in those states which have the courts delivering the most judgments. The data does not support this explanation. However, there is a significant difference between the registrations of all companies and where the top 150 Australian Securities Exchange (ASX) listed companies (measured by market capitalisation) are registered. This data might provide a possible explanation for some of the differences between the courts in terms of the numbers of judgments delivered because it might be expected that the top 150 companies, because of their size and the extent of their operations, are more involved in litigation than smaller companies.The advantages of allowing plaintiffs to choose between courts when commencing corporate law litigation are discussed. The study concludes with discussion of whether courts compete for corporate law litigation and what might be the incentives to compete.  The study is available on the website of the [Social Science Research Network](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1168057" \t "_new).etailed Contents**1.3 Improved EU framework for investment funds** On 16 July 2008, the European Commission proposed an important revision of the EU framework for investment funds, which is aimed at providing consumers with access to professionally managed investments on affordable terms. These funds, known as 'UCITS' (Undertakings for Collective Investment in Transferable Securities) at the end of last year accounted for over ?6.4 trillion of assets in total which is equivalent to half of the Union's GDP and represents 11.5% of European household financial assets.  The new provisions will increase the efficiency of the current legislative framework in a number of key areas. First, it will allow UCITS managers to develop their cross-border activities and generate savings consolidation and economies of scale. Currently EU funds are on average 5 times smaller than US funds and the cost of managing them is twice as high as in the US.  Second, investors will benefit from a greater choice of investment funds operating at lower costs. Third, the proposal also seeks to improve investor protection by making sure that retail investors receive clear, easily understandable and relevant information when investing in UCITS. These improvements will help reinforcing the competitiveness of UCITS on global markets. Currently 40 % of UCITS originating in the EU are sold in third countries, mainly Asia, the Gulf region and Latin America. As part of the Commission's Better Regulation Strategy and its commitment to simplify the regulatory environment, the new Directive will replace 10 existing directives with a single text. The proposal now goes to the European Parliament and Council for consideration. Further information is available on the [Europa](http://ec.europa.eu/internal_market/investment/legal_texts/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.4 SEC enhances investor protections against naked short selling**On 15 July 2008, the US Securities and Exchange Commission (SEC) issued an emergency order to enhance investor protections against "naked" short selling in the securities of Fannie Mae, Freddie Mac, and primary dealers at commercial and investment banks.The SEC's order will require that anyone effecting a short sale in these securities arrange beforehand to borrow the securities and deliver them at settlement. The order took effect on 21 July. In addition to this emergency order, the SEC will undertake a rulemaking to address these issues across the entire market.The order is available on the [SEC](http://www.sec.gov/rules/other/2008/34-58166.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.5 Australia's capital markets report**On 14 July 2008, KPMG published a report on the Australian capital markets. KPMG's research found that overall equity raised in FY2008 was $54.2 billion which, although down from last years' record of $65 billion, is the second highest amount of equity raised since commencing the survey in 1999.Placements continued to raise the most equity ($19.9 billion) with a sharp decline in capital raised through IPOs to $6.0 billion. Rights issues and dividend reinvestment plans raised $12.0 billion and $11.4 billion respectively. This represented a 30 percent increase in the value of DRPs issued to the market on the year prior. Extreme volatility characterised the year with the benchmark ASX 200 index reaching a day-end peak of 6,829 on 1 November 2007 and bottoming-out, with a day end low of 5,086 on 18 March 2008, representing a fall of 25.5%.**Total equity raised 1999-2008 ($ billion)**

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| **Financial year ending** | **1999** | **2000** | **2001** | **2002** | **2003** | **2004** | **2005** | **2006** | **2007** | **2008** |
| IPOs | 4.90  | 15.43  | 3.86 | 1.99 | 3.22  | 9.98  | 9.79 | 11.89 | 10.41 | 6.00 |
| Rights issues | 2.92  | 2.13 | 1.95 | 2.58 | 6.86 | 10.10 | 5.70 | 6.80 | 11.61 | 12.04 |
| Placements | 5.37  | 8.66 | 7.48 | 13.74 | 7.33 | 7.74 | 8.75 | 11.66 | 19.51 | 19.88 |
| Dividend reinvestment plans | 3.63  | 3.85 | 3.91 | 4.63 | 4.30 | 5.17 | 7.19 | 7.33 | 8.70 | 11.35 |
| Calls | 7.86  | 0.32 | 7.57 | 0.03 | 0.79 | 0.23 | 0.70 | 2.06 | 1.77 | 0.23 |
| Exercise of options | 0.75  | 0.75 | 0.46 | 0.09 | 0.47 | 0.96 | 0.74 | 0.45 | 1.12 | 0.42 |
| Others | 1.35 | 1.34 | 2.69 | 2.87 | 2.02 | 3.15 | 1.98 | 3.50 | 3.93 | 4.27 |
| T3 | - | - | - | - | - | - | - | - | 8.50 | - |
| Total | 26.77  | 32.49 | 27.92 | 25.93 | 24.99 | 37.33 | 34.85 | 43.69 | 65.55  | 54.19 |

Note - "Others" include employee share plans and share purchase plans.Source: KPMG's Survey of the Australian Capital Markets 2007-08The survey is available on the [KPMG](http://www.kpmg.com.au/Default.aspx?tabid=1552" \t "_new) website.etailed Contents**1.6 SEC announcement regarding share price manipulation** On 13 July 2008, the US Securities and Exchange (SEC) Commission announced that the SEC and other securities regulators will immediately conduct examinations aimed at the prevention of the intentional spread of false information intended to manipulate securities prices. The examinations will be conducted by the SEC's Office of Compliance Inspections and Examinations, as well as the Financial Industry Regulatory Authority and New York Stock Exchange Regulation, Inc. The securities laws require that broker-dealers and investment advisers have supervisory and compliance controls to prevent violations of the securities laws, including market manipulation. Examiners will focus on these controls and whether they are reasonably designed to prevent the intentional creation or spreading of false information intended to affect securities prices, or other potentially manipulative conduct.  These examinations are in addition to the Commission's enforcement investigations into alleged intentional manipulation of securities prices through rumour-mongering and abusive short selling that are already underway.etailed Contents**1.7 Consultation on European guidelines for the assessment of mergers and acquisitions**On 11 July 2008, the Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR) opened a public consultation on their guidelines for the prudential assessment of acquisitions and increase of holdings in the financial sector required by Directive 2007/44/EC. Directive 2007/44/EC amends the sectoral Directives by introducing identical rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the banking, insurance and securities sectors. The 3L3 Committees of European Financial Supervisors (CEBS, CESR, and CEIOPS) have therefore agreed to work together to reach a common understanding on the five assessment criteria laid down by the Directive and foster convergence of supervisory practices in this field. In their consultation paper, CEBS, CESR, and CEIOPS have defined cooperation arrangements in order to ensure an adequate and timely flow of information between supervisors, taking into account the limited time provided under the Directive for completing prudential assessments. They have also established a harmonized list of information that proposed acquirers should include in their notifications to the competent supervisory authorities. The directive and these guidelines apply the principle of proportionality, both to the composition of the required information and to the assessment procedures. The public consultation period begins and runs until 3 October 2008.  The consultation paper is available on the [CEIOPS](http://www.c-ebs.org/documents/3L3%20MA%20Guidelines.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Money laundering typologies report** On 11 July 2008, the Asia/Pacific Group (APG) on money laundering published a report containing 118 case studies and other typology studies in a number of areas including:* Trade based money laundering;
* Abuse of non-profit organisations and charities;
* Investments in capital markets;
* Use of trusts;
* Use of internet payment systems;
* Identity fraud; and
* Life insurance.

The APG has been publishing typologies reports for a number of years. These reports provide information helpful to policy makers in order to target policy initiatives and to operational experts, such as law enforcement agencies and prosecutors, to develop strategies to combat these threats. The report is available from the [APG](http://www.apgml.org/documents/docs/6/APG_2008_Typologies_Rpt_July08.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.9 European statement on the current market turmoil and financial reporting** On 11 July 2008, the European Financial Advisory Group (EFRAG) announced that it has discussed the considerable difficulties many capital and other financial markets have experienced over the last months and does not believe that financial reporting has caused the crisis as some have claimed. However, EFRAG believes that a comprehensive review of existing financial reporting requirements needs to be carried out to determine whether any of those requirements have intensified some or all of the problems that have arisen. It is also essential that any weaknesses identified in the financial reporting requirements are addressed and improvements made as matter of priority. Some areas of possible weaknesses which are worth exploring further have widely been identified by several bodies:* The consolidation model, particularly in the context of SPEs.
* Derecognition and the disclosures provided about off-balance sheet items particularly those items that were near to being recognised.
* The requirement to measure many financial instruments at fair value and how that requirement should be applied, particularly in illiquid markets.
* The disclosures that should be provided to support the measure used.

The joint statement of the ASB, CNC, EFRAG and GASB is available from the [EFRAG](http://www.efrag.org/files/News%20related%20documents/Joint%20Statement%20on%20the%20Credit%20Crunch.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.10 Voting by US mutual funds: study**Mutual funds and other registered investment companies follow clear policies designed to avoid conflicts of interest and to advance the interests of fund shareholders when casting their votes on proxy issues at companies in their portfolios, according to a new study released on 10 July 2008 by the Investment Company Institute. The study, 'Proxy Voting by Registered Investment Companies: Promoting the Interests of Fund Shareholders', examines more than 3.5 million proxy votes cast by funds in 160 of the largest US funds during the 12 months ending 30 June 2007. The study is the largest known examination of proxy votes cast by funds.Since 2004, the U.S. Securities and Exchange Commission has required funds to disclose annually all votes they cast on proxy ballots of the companies in which funds are invested. Earlier, smaller studies of those votes have noted that funds vote strongly in favour of proposals sponsored by management of those companies, and critics have charged that funds "rubber-stamp" proposals recommended by management and vote against shareholder proposals.The ICI study finds that funds did vote in favor of management proposals more than 90 percent of the time in 2007. However, the study attributes much of that pattern to the predominance of non-controversial issues on proxy ballots: 83 percent of proxy issues that funds voted on in 2007 concerned uncontested elections of corporate directors and ratification of audit firms selected by companies. Funds' votes on these matters align closely with the recommendations of two well-known proxy advisory firms, Institutional Shareholder Services/Risk Metrics Group and Glass-Lewis & Company. Funds' voting policies often provide that funds will withhold votes from directors who failed to exercise good judgment or took actions contrary to the interests of company shareholders. The study found that funds apply those standards. In 2007, the majority of funds withheld votes from one or more director nominees at more than 10 percent of the companies they owned.On non-routine management proposals and proposals sponsored by shareholders, the study found:* Funds were more likely to favour proposals that promote shareholder rights and weaken corporate takeover defenses.
* Funds voted for almost 40 percent of shareholder proposals, while company boards supported fewer than 1 percent of such proposals. Among shareholder proposals, those calling for reduced corporate takeover defenses garnered the strongest support from funds, which voted for those measures 78 percent of the time in 2007. Funds supported almost half of shareholder proposals calling for modifications to corporate board structures or corporate election processes, and more than a third of shareholder proposals related to executive compensation.
* Funds' voting guidelines, which under SEC rules must be disclosed to the public, indicate that funds are more likely to support proposals that promote shareholder rights and oppose measures that would tend to entrench management or resist corporate takeovers, irrespective of whether such proposals are put forth by management or shareholders. Among 35 large funds roughly two-thirds follow voting guidelines that oppose supermajority voting requirements, dual-class stock, classified boards, or poison pills adopted without shareholder assent.

The study also examined the sponsorship of shareholder proposals that appeared on corporate proxy ballots during the 12 months ending 30 June 2007. Among 239 proposals sponsored by individual shareholders, 121 were sponsored by just five individuals; among 186 proposals sponsored by unions, 94 were sponsored by just three unions. These eight sponsors accounted for about one-third of shareholder proposals during this twelve-month period.Separately, the Independent Directors Council and ICI jointly released a paper, 'Oversight of Fund Proxy Voting', focusing on fund proxy voting responsibilities and the oversight function of fund boards.  The paper is available from the [ICI](http://www.ici.org/pdf/ppr_08_proxy_voting.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.11 CESR publishes for consultation a statement on fair value measurement and related disclosures of financial instruments in illiquid markets** On 10 July 2008, the Committee of European Securities Regulators (CESR) launched a consultation on a statement titled "Fair value measurement and related disclosures of financial instruments in illiquid markets" (Ref. CESR/08-437).  Recent market events imply that relevant and comprehensive financial information is needed to strengthen market confidence. Also, to ensure that investors can undertake comparisons between the financial statements of different issuers in order to evaluate their relative financial position, performance and changes in financial position, relevant disclosures about the valuation methods, assumptions used and related uncertainty as well as the judgments made by the management are highly important for investors and other users of financial statements.The CESR statement focuses on the following accounting issues regarding financial instruments in illiquid markets: **(a) Measurement** The starting point for the measurement of financial instruments is the assessment of whether the financial instrument is traded on an active or a non active market. The measurement of financial instruments on active markets is conducted with the reference to quoted prices. If an active market does not exist, the measurement is determined by using valuation techniques that incorporate all factors that market participants would consider in setting a price, minimising entity-specific inputs.The distinction between active and non active markets is therefore important in the application of the measurement of financial instruments.On the identification of active and non active markets the statement stresses:* As judgment is required, a well-documented valuation policy is needed. It should be consistent across time and across financial instruments;
* Even if the number of transactions is relatively low compared to other markets or to the past, the market could still be active;
* The size of the holdings of instruments is not a criterion to decide whether a market should be considered active;
* Different pricing sources can be available in an active market, such as prices for actual transactions or for binding quotes; and
* Market quotes can only be disregarded if there is sufficient evidence that they do not constitute a reliable reference for valuation.

On the use of valuation techniques CESR highlights that:* The issuer should document the criteria, the assumptions and the inputs to the valuation techniques to ensure consistency;
* Transactions conducted in a market that is not considered active can often provide the most relevant input for valuation techniques;
* Liquidity risk and correlation risk could also be relevant in addition to the inputs to valuation techniques listed in the accounting standards; and
* The use of indices (e.g. the ABX HE index) should be approached with caution.

**(b) Disclosures**Given the complexity of many business situations, the different business rationales for holding financial instruments and the uncertainty around fair values, clear disclosures are necessary for users to understand these aspects and their implications for the fair value measurements included in the financial statements.This emphasises the importance of comprehensive disclosures on how management has applied the valuation principles, the sensitivity of those valuations to changes in key assumptions and the degree of uncertainty around the values. Key messages in CESR's statement regarding disclosures are the following:* Good disclosure practices is a natural counterpart to the use of judgment in measurement practices;
* Issuers should consider publishing the most relevant criteria and accounting policies for deciding on:          - Active or non active markets;          - Identification of a forced transaction; and          - Prioritisation among several price sources.          and provide information (by asset subclasses) on:-   References used in active markets;-   Type of valuation techniques including inputs, assumptions and data; and- Any relevant change in techniques applied to specific instruments.

The statement also provides an example on how issuers could present a useful summary of their valuation procedures in a tabular form separating the information in the following categories:* Quoted prices in active markets;
* Valuation techniques with observable and non observable inputs.

The consultation period ends on 12 September 2008. CESR will review the statement if necessary according to the comments received and will publish the final document in October 2008. Further information is available on the [CESR](http://www.cesr-eu.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Industry associations release "Structured Products: Principles for Managing Distributor-Individual Investor Relationship"**On 9 July 2008, five leading trade associations, co-sponsors of the Joint Associations Committee (JAC), released "Structured Products: Principles for Managing the Distributor-Individual Investor Relationship". The global, non-binding Principles address a wide range of issues affecting distribution of retail structured products to individual investors.The Principles complement the JAC's "Principles for Managing the Provider-Distributor Relationship", which were released in July 2007. The Associations issued the Principles for public comment on 12 May 2008 and are now publishing them in final form.The JAC comprises the following trade associations: European Securitisation Forum (ESF), International Capital Market Association (ICMA), London Investment Banking Association (LIBA), the International Swaps and Derivatives Association (ISDA) and Securities Industry and Financial Markets Association (SIFMA). The Principles were based on extensive work and collaboration with the associations' member firms, and on consultation with distributor associations. The Principles are available on the Associations' websites at:[http://www.europeansecuritisation.com/](http://www.europeansecuritisation.com/%22%20%5Ct%20%22_new)[http:www.icmagroup.org](http://www.icmagroup.org/%22%20%5Ct%20%22_new)[http://www.isda.org/](http://www.isda.org/%22%20%5Ct%20%22_new)[http://www.liba.org.uk/](http://www.liba.org.uk/%22%20%5Ct%20%22_new)[http://www.sifma.org/](http://www.sifma.org/%22%20%5Ct%20%22_new)etailed Contents**1.13 Report on commodity derivatives and related business**On 9 July 2008, the European Commission published a report from the European Securities Markets Expert Group (ESME) on commodity derivatives and related business. The report concerns the Commission's review of the Markets in Financial Instruments Directive (MiFID) and the Capital Adequacy Directive (CAD) concerning the regulatory treatment of firms that provide investment services in relation to commodity and exotic derivatives. The report also requests advice from ESME on issues concerning record keeping and transparency of transactions in electricity and gas supply contracts and derivatives.The report is available on the [European Commission](http://ec.europa.eu/internal_market/securities/docs/esme/commodity_derivatives_en.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.14 European Council resolution on transparency and rating agencies**  On 8 July 2008, the Council of the European Union adopted a resolution on recent financial market turmoil and the role of transparency and rating agencies.The Council states that prompt and full disclosure by banks and other financial institutions of their exposures to distressed assets and off-balance sheet vehicles and of their write-downs and losses is essential to bring back confidence in the markets.  The Council considers that, given the central role ratings play in structured finance as well as their role in the European financial services regulation, it is of high importance to address the concerns that have been raised in the context of the financial turmoil concerning the transparency of the rating processes, risk of conflicts of interest related to the remuneration models of the rating agencies, accountability and the quality of ratings.  The Council welcomes the revision by IOSCO of its Code of Conduct at the international level, and CESR's and ESME's reports on rating agencies. The Council considers that the revisions to the IOSCO Code of Conduct provide a minimum benchmark for the actions that credit rating agencies should take to address concerns about their activities in the market for structured products. In this context, the Council takes note of the additional steps undertaken in this field by the rating agencies to better address the governance concerns and improve transparency concerning the value and limitations of the ratings.However, the Council shares the European Commission view that the current initiatives do not fully address the challenges posed, that further steps, are needed and that regulatory changes might be necessary.The Council supports the objective of introducing a strengthened oversight regime for rating agencies and notes in this regard the preliminary views by the Commission as well as the proposals by CESR and ESME. The Council supports an enhanced European approach and the objective of strengthening international cooperation to ensure a stringent implementation of internationally approved principles. To this end, and without prejudice to consideration of its practical application, the Council supports the principle envisaged by the Commission that the rating agencies should be subject to an EU registration system.The Council would also welcome intensified competition by entry into the market of new players.etailed Contents**1.15 SEC examinations find shortcomings in credit rating agencies' practices and disclosure to investors**On 8 July 2008, the US Securities and Exchange Commission (SEC) released findings from its 10-month examination of three major credit rating agencies that uncovered significant weaknesses in ratings practices and the need for remedial action by the firms to provide meaningful ratings and the necessary levels of disclosure to investors.Under new statutory authority from Congress that enabled the SEC to register and examine credit rating agencies, the agency's staff conducted examinations of Fitch Ratings Ltd, Moody's Investor Services Inc, and Standard & Poor's Ratings Services to evaluate whether they are adhering to their published methodologies for determining ratings and managing conflicts of interest. With the recent subprime market turmoil, the SEC has been particularly interested in the rating agencies' policies and practices in rating mortgage-backed securities and the impartiality of their ratings.The SEC staff's examinations found that rating agencies struggled significantly with the increase in the number and complexity of subprime residential mortgage-backed securities (RMBS) and collateralized debt obligations (CDO) deals since 2002. The examinations uncovered that none of the rating agencies examined had specific written comprehensive procedures for rating RMBS and CDOs. Furthermore, significant aspects of the rating process were not always disclosed or even documented by the firms, and conflicts of interest were not always managed appropriately.The Summary Report of Issues Identified in the Commission Staff's Examinations of Select Credit Rating Agencies describes the significant weaknesses in the rating agencies' processes in rating subprime RMBS and CDOs linked to subprime residential mortgage-backed securities from January 2004 to the present.Specifically, the examinations found:* There was a substantial increase in the number and in the complexity of RMBS and CDO deals since 2002, and some of the rating agencies appear to have struggled with the growth.
* Significant aspects of the ratings process were not always disclosed.
* Policies and procedures for rating RMBS and CDOs can be better documented.
* The rating agencies are implementing new practices with respect to the information provided to them.
* The rating agencies did not always document significant steps in the ratings process - including the rationale for deviations from their models and for rating committee actions and decisions - and they did not always document significant participants in the ratings process.
* The surveillance processes used by the rating agencies appear to have been less robust than the processes used for initial ratings.
* Issues were identified in the management of conflicts of interest and improvements can be made.

In June 2008, the SEC proposed a three-fold set of comprehensive reforms to regulate the conflicts of interests, disclosures, internal policies, and business practices of credit rating agencies. The first portion of rulemaking would address conflicts of interest in the credit ratings industry and require new disclosures designed to increase the transparency and accountability of credit ratings agencies. The second portion would require credit rating agencies to differentiate the ratings they issue on structured products from those they issue on bonds through the use of different symbols or by issuing a report disclosing the differences. The third part of the SEC's proposed rulemaking would clarify for investors the limits and purposes of credit ratings and ensure that the role assigned to ratings in SEC rules is consistent with the objectives of having investors make an independent judgment of credit risks. The report is available on the [SEC](http://www.sec.gov/news/studies/2008/craexamination070808.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.16 Global Working Group aims to restore confidence in the securitization markets** On 7 July 2008, the Securities Industry and Financial Markets Association (SIFMA), the American Securitization Forum (ASF) and the European Securitisation Forum (ESF) announced that they have formed a global, joint working group that will create and publish actionable, industry-developed recommendations designed to help revitalize the securitization and structured credit markets, and bolster investor and broader public confidence in those markets.  The goals of this initiative include improving the operation and function of these markets in ways that enhance market discipline and transparency, while preserving the essential role that securitization plays in funding consumer and business credit needs. In developing its recommendations, the joint working group will consult closely with industry participants and with regulators, legislators and policymakers worldwide.etailed Contents**1.17 Report on superannuation fund governance** On 7 July 2008, the Australian Prudential Regulation Authority (APRA) published a working paper titled "Superannuation fund governance: trustee policies and practices". APRA classifies superannuation into four major types or sectors: Corporate, Public Sector, Industry and Retail. The first three are described as "not for profit" funds while Retail funds offer superannuation to the public on a commercial basis. One of the features of the published statistics was the systematic difference in investment returns between the four sectors over the ten-year period.Under the auspices of the Council of Financial Regulators (a body composed of the Reserve Bank of Australia, the Australian Securities and Investments Commission, APRA and the Treasury), APRA has undertaken further research including the reasons for the differing performance between fund types. Two surveys were involved. The findings of the first survey, which examines superannuation fund governance, are reported in this study. A second survey seeks to disaggregate fund returns into constituent elements comprising asset allocation, investment performance and expenses. The findings of this survey will be published at a later time.The governance survey found that in many areas of trustee policies and practices, there was little difference between sectors. In other areas there were statistically significant differences. Some of the most important findings of the survey include: (a) Whilst there are few explicit policy requirements for the qualification, experience and training of trustee directors, in practice trustee directors of the large funds in the survey are typically well qualified, experienced and reasonably well trained in their trustee duties. APRA considers this outcome to satisfy "fit and proper" rules in this area, which avoid prescription in favour of trustee judgement. By and large this approach seems to be working well. There are some differences by trustee type, but all superannuation sectors in general seem to be successful in selecting experienced and qualified trustee directors. (b) Superannuation is typically an enterprise employing substantial outsourcing. Most trustees outsource many aspects of fund operations and, as a group, they report reasonably good practice in managing these outsourced arrangements. This finding is supported by trustee licensing and the results of APRA's supervisory activities, which in most cases demonstrate that trustees are doing a satisfactory job in managing their outsourcing risks.(c) In many areas, there are statistically significant differences in policies and practices between trustees in the four sectors. Retail trustee practice is more often different from those of the trustees in other sectors.(d) Broadly speaking, Retail trustee boards seem to act more like the boards of shareholder-owned corporations, whereas trustees of other sectors tend to act more like traditional mutual superannuation trustees. Relative to the other trustees, Retail trustees have fewer directors, shorter (but just as frequent) board meetings, and rely more on fund executives to take the initiative on most key decisions. By contrast, trustees in the other three sectors mostly make the decisions with the main input coming either from themselves or from their consultants.(e) More than half of all Retail trustee directors are employed by related parties or by the fund itself, and very few are nominated by fund members. By contrast, many Industry, Corporate, and Public Sector trustee directors are member-nominated. This is an inevitable difference flowing from the structure and the equal representation provisions associated with directors in "not for profit" funds. As a group, Retail trustee directors are paid considerably more for their trustee services than trustee directors in the other sectors.(f) More than half of Corporate, Public Sector, and Industry trustee directors are themselves members of their funds and, where they are members, they hold more than seventy per cent of their total superannuation assets in the fund. About one in five Retail trustee directors are members of their funds, typically for less than sixty per cent of their total superannuation assets. The working paper is available on the [APRA](http://www.apra.gov.au/RePEc/RePEcDocs/Archive/working_papers/wp2008-02.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.18 Committee on Global Financial Systems issues reports on the financial turmoil** On 4 July 2008, the Committee on the Global Financial System (CGFS) published three reports analysing important issues pertinent to the financial market turmoil that broke out in mid-2007.  They are:* Private equity and leveraged finance markets;
* Ratings in structured finance: what went wrong and what can be done to address shortcomings?; and
* Central bank operations in response to the financial market turmoil.

The private equity and leveraged finance markets report addresses two broad questions. First, what have been the important trends during the period of rapid growth in the markets for leveraged finance, private equity and LBOs, and how has market growth affected corporate finance? Second, how have leveraged finance markets performed since mid-2007, which risks have surfaced, and what preliminary lessons can be drawn for financial stability? The report highlights a number of risks, including short-term risks associated with the unwanted expansion of arranger banks' balance sheets due to undistributed leveraged loans, medium-term risk resulting from the refinancing needs of highly leveraged corporations and long-term risks for the availability of leveraged finance.The ratings in structured finance report draws on the lessons learnt during the turmoil about the vulnerabilities of ratings of structured finance products. While emphasising that credit rating information should support, not replace, investor due diligence, the report provides a number of specific recommendations on how the information provided on ratings of structured finance products can be improved.The report also includes a summary of the feedback received during a consultation process with credit rating agencies and investors. A number of initiatives to enhance the information provided on structured finance ratings are already under way. In the light of these initiatives, the CGFS will follow up with credit rating agencies and investors on the recommendations made in the report.The report, Central bank operations in response to the financial market turmoil, examines how central banks have adapted their liquidity operations in response to the money market tensions that emerged during the turbulence.  The report discusses the various measures taken by central banks, assesses the outcome of these measures and sets out seven recommendations for central bank liquidity operations. The report was drafted during a time when central banks were closely monitoring market developments and, more or less simultaneously, needed to respond to the evolving challenges. Indeed, some of the specific recommendations discussed by the study group had already been implemented during the drafting period. This report reflects the study group's experience and assessment up to end-April 2008, at which time market tensions persisted. Central banks continue to draw lessons from the turmoil and to examine how their liquidity operations can be made more effective. In particular, central banks are exploring the steps they might take to facilitate mobilising liquidity across national borders. The reports are available on the [Bank for International Settlements](http://www.bis.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.19 COAG agree to transfer responsibility for all consumer credit to the Commonwealth** On 3 July 2008, Senator the Honourable Nick Sherry, Australian Minister for Superannuation and Corporate Law, announced that the Commonwealth Government reached agreement with the States and Territories at the recent Council of Australian Governments (COAG) meeting, to assume responsibility for regulation of all consumer credit. Consumer credit includes personal loans, credit cards, pay day lending and micro loans.COAG has also formally agreed the that the Australian Government will assume responsibility for regulating mortgages, mortgage brokers, trustee companies, non-bank lenders and margin loans. In March, COAG requested that the case for reform of consumer credit be further examined. To this end, the Government released a Green Paper on Financial Services and Credit Reform in early June.  The agreement was formalised at the COAG meeting. During the coming months, the Commonwealth Government, in consultation with the States and Territories, will develop a plan to present to COAG before the end of 2008 on how this major agreement will be implemented.etailed Contents**1.20 Contracts for difference policy update in the UK**On 2 July 2008, the UK Financial Services Authority (FSA) published an update on disclosure for contracts for difference (CfDs).After receiving extensive feedback from a broad spectrum of interested parties on its November 2007 CfDs Consultation Paper, the FSA has decided a general disclosure regime for long CfD positions will be implemented as the most effective way of addressing concerns in relation to voting rights and corporate influence.  Existing share and CfD holdings, in the same company, should be aggregated for disclosure purposes.  The disclosure threshold will be at 3%, in line with the existing disclosure rules.  The FSA will develop an exemption for CfD writers, who act as intermediaries, similar to the Takeover Panel's Recognised Intermediary exemption to reduce unnecessary disclosures.The FSA will publish a Policy Statement in September 2008 with a Feedback Statement on the consultation responses, along with draft rules to implement the position described above.  Although the position has now been finalised, the FSA will accept technical comments on the rules to ensure the new rules are workable.  Final rules will be issued in February 2009. Further information is available on the [FSA](http://www.fsa.gov.uk/pubs/cp/cp07_20_update.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.21 Proposals to strengthen UK financial stability and depositor protection** Proposals for strengthening the framework for financial stability and protecting depositors were published on 1 July 2008 by HM Treasury, the Financial Services Authority and the Bank of England. The proposals build on a consultation document published in January and will now be the subject of a further period of consultation, prior to the introduction of legislation later this year.  They focus on five key objectives, which have received widespread support from stakeholders in the financial services industry and consumer groups, namely:* strengthening the stability and resilience of the financial system - in the UK and internationally;
* reducing the likelihood of individual banks facing difficulties - including regulatory interventions and liquidity assistance;
* reducing the impact if a bank gets into difficulties;
* providing effective compensation arrangements in which consumers have confidence; and
* strengthening the Bank of England, and ensuring effective coordinated actions by authorities, both in the UK and internationally.

The consultation paper is available on the [HM Treasury](http://www.hm-treasury.gov.uk/Consultations_and_Legislation/consult_index.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.22 SEC publishes proposals to increase investor protections by reducing reliance on credit ratings** On 1 July 2008, the US Securities and Exchange Commission (SEC) published for public comment proposed rule changes to make the limits and purposes of credit ratings clear to investors and ensure that the role assigned to ratings in SEC rules is consistent with the objectives of having investors make an independent judgment of credit risks. The Commission voted unanimously on 25 June 2008, to issue for public comment this third set of proposed recommendations to bring increased transparency to the credit ratings process and curb practices that contributed to recent turmoil in the credit markets. The Commission voted to propose the first two sets of recommendations on 11 June 2008. The Commission has reviewed the requirements in its rules and forms that rely on credit ratings. In many cases, it has concluded that such references can be removed or revised. These proposals also address recent recommendations issued by the US President's Working Group on Financial Markets, the Financial Stability Forum, and the Technical Committee of the International Organization of Securities Commissions (IOSCO). Consistent with these recommendations, the SEC has considered whether the inclusion of requirements related to ratings in its rules and forms has, in effect, placed an "official seal of approval" on ratings that could adversely affect the quality of due diligence and investment analysis. The SEC's proposal would reduce undue reliance on credit ratings and result in improvements in the analysis that underlies investment decisions. Public comments on this third set of proposed rules should be received by the Commission no later than 5 September 2008. The proposing releases comprising this third set of rule proposals are available at:[http://www.sec.gov/rules/proposed/2008/34-58070.pdf](http://www.sec.gov/rules/proposed/2008/34-58070.pdf%22%20%5Ct%20%22_new) [http://www.sec.gov/rules/proposed/2008/33-8940.pdf](http://www.sec.gov/rules/proposed/2008/33-8940.pdf%22%20%5Ct%20%22_new) [http://www.sec.gov/rules/proposed/2008/ic-28327.pdf](http://www.sec.gov/rules/proposed/2008/ic-28327.pdf%22%20%5Ct%20%22_new) etailed Contents**1.23 Data on the Australian M&A market** On 1 July 2008, KPMG published data on the Australian mergers and acquisition (M&A) market for financial year 2007-2008. The data revealed a number of dichotomies; during the first half there was significant growth (double in deal value), then a dip (roughly by half in value). Many sectors holding a neutral line in deal flow, while others, including the mining sector, are going from strength to strength.The value of deals pushed market growth by 23 percent to A$141 billion. The number of deals, however, went down by 7%.The number of deals shrunk overall in many sectors; however, real estate, materials and high technology (information technology and telecommunications) were standouts as these sectors saw high deal activity.**M&A transactions from 1 July 2007 to June 30 2008**

|  |  |  |  |
| --- | --- | --- | --- |
| **2008** |   | **Full Year 2006-2007** | **Full July 1 2007 - 30 June 2008** |
| **Australian Target** | **No.** | 1,233 | 1.148 |
| **Australian Acquirer**  | **Value** | $79,840 | $79,964 |
| **Non- Australian Target**  | **No.** | 351 | 358 |
| **Non- Australian Acquirer**  | **Value** | $33,223 | $61,299 |
| **All acquisitions (total)**  | **Value** | $114,751.3 | $141,507.8 |
|   |   |   |   |

\*Source: KPMG's Corporate Finance practice based on data compiled by Thompson Financial.Note: This data includes all deals for stakes of 10% or more, completed and unconditional, sourced 30 June 2008.etailed Contents**1.24 APRA releases draft requirements for the use of internal models by general insurers**  On 30 June 2008, the Australian Prudential Regulation Authority (APRA) released a consultation package that sets out its draft prudential requirements for the use of the Internal Model-based Method (IMB Method) for determining the Minimum Capital Requirements (MCR) of general insurers. The consultation package consists of a draft prudential standard, a prudential practice guide and a related discussion paper. The draft Prudential Standard GPS 113 Capital Adequacy: Internal Model‑based Method reflects developments in relation to the use of internal models that have occurred since APRA's internal model requirements for general insurers were first introduced in 2002. It also follows the principles and concepts developed for internal models in authorised deposit-taking institutions (ADIs) under the Basel II Framework. There are, however, differences of detail and emphasis because the nature and significance of the risks in the two industries are not the same. APRA's proposed approach is also consistent with the guidelines issued by the International Association of Insurance Supervisors, which supports the use of internal models for determining regulatory capital requirements. APRA invites interested parties to comment on the proposed package by 15 August 2008. APRA intends that the final prudential standards implementing the IMB Method for general insurers will be released at the same time as its final prudential standards for the supervision of consolidated general insurance groups. Both the packages are expected to be released in the fourth quarter of 2008 and will become effective on 1 January 2009. The consultation package is available on the [APRA](http://www.apra.gov.au/policy%22%20%5Ct%20%22_new) website. etailed Contents**1.25 FRC issues guidance on auditor liability limitation agreements** On 30 June 2008, the UK Financial Reporting Council (FRC) published guidance on the use of agreements between companies and their auditors to limit the auditor's liability, as provided for under the Companies Act 2006 (UK). The guidance: * explains what is and is not allowed under the 2006 Act;
* sets out some of the factors that will be relevant when assessing the case for an agreement;
* explains what matters should be covered in an agreement, and provides specimen clauses for inclusion in agreements; and
* explains the process to be followed for obtaining shareholder approval, and provides specimen wording for inclusion in resolutions and the notice of the general meeting.

In the introduction to the guidance, the FRC sets out its views on the use of auditor liability limitation agreements. The FRC will review the impact and content of the guidance in the second half of 2010 to ensure that it incorporates developments in generally accepted practice and any other new developments.  The Guidance is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/FRC%20ALLA%20Guidance%20June%202008.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.26 SEC proposes amendments to improve regulation of foreign broker activities in US** On 27 June 2008, the US Securities and Exchange Commission published for public comment proposed rule amendments to increase the range of services foreign broker-dealers are allowed to offer in the United States. The proposed amendments also would maintain a regulatory structure designed to protect investors and the public interest.The Commission voted unanimously on 25 June 2008 to issue the proposed rule amendments for public comment. The SEC's proposals would modify the requirement that any contact by a foreign broker-dealer with a US institution must be chaperoned by a person registered with a US broker-dealer.In general, the SEC's proposed amendments would expand and streamline the conditions under which a foreign broker-dealer could operate without triggering the registration, reporting and other requirements of the Exchange Act and related rules that apply to broker-dealers that are not registered with the Commission. Among other things, foreign broker-dealers would continue to be subject to the antifraud provisions of the federal securities laws. The full text of the rule proposal is available on the [SEC](http://www.sec.gov/rules/proposed/2008/34-58047.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.27 Directors of the top 200 Australian companies: study** The typical Australian company director of a top 200 company receives 96% of the vote when standing for re-election, according to research published by governance advisory firm RiskMetrics on 26 June 2008.  **Table 1: Vote results from S&P/ASX 200 director elections 2006 and 2007**

|  |  |  |  |
| --- | --- | --- | --- |
| **Year** | **2005** | **2006** | **2007** |
| **Average percentage of vote cast in favour** | 96.4 | 96.5 | 96.2 |

Based on a sample of 122 companies that were members of the S&P/ASX 200 throughout 2004 and 2007, RiskMetrics found the non-executive director pool renews itself every 10 years.  Over the period 2004 to 2007, new non-executive directors - those directors who on appointment to a board were not already directors of companies within the 122 company sample - made up 10.4 percent of all non-executive directors.  **Table 2: Non-executive director gene pool 2004 to 2007**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Year** | **2004-05** | **2005-06** | **2006-07** | **Average** |
| **New non-executive directors as percentage of all non-executive directors**  | 11.7 | 9.4 | 10.2 | 10.4 |

The study has also found that the non-executive director pool also appears to be getting shallower over time in the established companies that were part of the study. In 2005, 72.8% of non-executive director appointments at the sample companies involved directors who were not already directors of S&P/ASX 200 companies; in 2007 this had fallen to 62.3%.  Over the period 2004 to 2007, no director seeking board endorsement was defeated in a re-election bid at an S&P/ASX 200 company, although a handful of directors resigned immediately prior to the AGM being held.etailed Contents**1.28 Members' schemes of arrangement: reform proposals**On 26 June 2008, the Australian Corporations and Markets Advisory Committee (CAMAC) published a discussion paper on members' schemes of arrangement. Schemes of arrangement are a commonly used mechanism under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for achieving structural change within a company or a corporate group. They can be tailored to novel or complex corporate structures or be used for major group reconstructions. Members' schemes are increasingly used instead of takeover bids to achieve a change of corporate control.  The Advisory Committee was asked by the former Government to consider whether the 'headcount' test for shareholder approval of members' schemes (namely a majority in number of shareholders voting on the scheme) should be removed. The Committee considered that this issue might best be considered in the context of a wider review of whether the provisions for members' schemes operate in an effective and appropriate manner, and with appropriate safeguards, to facilitate corporate restructuring.  The paper includes a review of factors that may influence the choice between schemes, takeover bids and reductions of share capital to effect a change of corporate control.  The paper invites submissions on a range of issues, including: * whether the disclosure requirements for schemes should be amended to assist greater understanding by shareholders, for instance, by introducing a "clear, concise and effective" disclosure requirement for the explanatory statement;
* whether the procedure for determining classes of shareholders should be changed to permit earlier and binding determinations;
* whether the headcount test should be amended or repealed;
* whether ASIC should have modification powers for schemes comparable to those for takeover bids; and
* whether s 411(17), which relates to schemes that have been proposed for the purpose of avoiding the takeover provisions, should be repealed or amended.

The paper also considers whether the provisions for members' schemes: * should accommodate holders of options over unissued shares or convertible notes
* should be extended to listed or unlisted managed investment schemes
* should be simplified for mergers within wholly-owned corporate groups
* should be adapted for use in schemes opposed by the target company

The Committee is calling for submissions on the discussion paper by 26 September 2008. CAMAC will prepare its report following consideration of submissions received.  The discussion paper is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion%2BPapers/%24file/Members_Schemes_DP_Jun08.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.29 Worldwide governance indicators show some countries making progress in governance and in fighting corruption**This year's updated version of the Worldwide Governance Indicators (WGI) published by World Bank researchers on 24 June 2008 shows many developing country governments are making important gains in control of corruption. Some of them matching rich country performance in overall governance measures. Good governance can be found at all income levels, with some emerging economies matching the performance of rich countries on key dimensions of governance. Over a dozen emerging countries, including Slovenia, Chile, Botswana, Estonia, Uruguay, Czech Republic, Hungary, Latvia, Lithuania, Mauritius, and Costa Rica score higher on key dimensions of governance than industrialized countries such as Greece or Italy. In many cases these differences are statistically significant. Over 2002-2007, the Indicators show sharp improvements in governance, along with reversals.  Examples include strong improvements in Voice and Accountability in countries such as Ukraine and Haiti; improvements in Political Stability and Absence of Violence/Terrorism in Argentina; and improvements in Control of Corruption in Georgia and Tanzania. But despite governance gains in some countries, overall quality of governance around the world has not improved much over the past decade. Coinciding with countries that have done well, a similar number have experienced deteriorations in several governance dimensions, including Zimbabwe, Cote D'Ivoire, Belarus, Eritrea and Venezuela. In many other countries, no significant change in either direction is yet apparent in recent years. The Indicators suggest that where there is commitment to reform, improvements in governance can and do occur. Over the past decade from 1998-2007, countries in all regions have shown substantial improvements in governance, even if at times starting from a very low level.   Examples include:* Ghana, Indonesia, Liberia and Peru in Voice and Accountability;
* Rwanda, Algeria and Angola in Political Stability and Absence of Violence/Terrorism;
* Afghanistan, Serbia and Ethiopia in Government Effectiveness;
* Georgia and the Democratic Republic of Congo in Regulatory Quality;
* Tajikistan in Rule of Law; and
* Liberia and Serbia in Control of Corruption.

This year's study is the seventh update of the WGI, a decade-long effort by the researchers to build and update the most comprehensive cross-country set of governance indicators currently available. The newly released set of the six updated aggregate indicators, as well as data from the underlying sources. The Indicators cover 212 countries and territories, drawing on 35 different data sources to capture the views of tens of thousands of survey respondents worldwide, as well as thousands of experts in the private, NGO, and public sectors. The WGI are used by policymakers and civil society groups worldwide as a tool to assess governance challenges and monitor reforms, and by scholars researching the causes and consequences of good governance. Better governance helps in the fight against poverty and improves living standards. Research over the past decade shows that improved governance raises development, and not the other way around. When governance is improved by one standard deviation, infant mortality declines by two-thirds and incomes rise about three-fold in the long run. Such an improvement in governance is within reach, since it is a fraction of the difference between the worst and best performers. For example, in the dimension of Rule of Law, one standard deviation is all that separates the very low ratings of Somalia or Afghanistan from countries such as Kenya and Bolivia; or what separates these countries from countries such as Ghana or Egypt; or in turn what separates Ghana or Egypt from Portugal or Estonia; or what separates these from the best performers such as Denmark or Switzerland. Good governance has also been found to significantly enhance the effectiveness of development assistance in general, and of World Bank-funded projects in particular. Governance is defined by the WGI authors as the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them. The WGI measure six broad definitions of governance capturing the key elements of this definition:* Voice and Accountability: the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association, and a free media;
* Political Stability and Absence of Violence:  the likelihood that the government will be destabilized by unconstitutional or violent means, including terrorism;
* Government Effectiveness: the quality of public services, the capacity of the civil service and its independence from political pressures; the quality of policy formulation;
* Regulatory Quality: the ability of the government to provide sound policies and regulations that enable and promote private sector development
* Rule of Law: the extent to which agents have confidence in and abide by the rules of society, including the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence; and
* Control of Corruption: the extent to which public power is exercised for private gain, including both petty and grand forms of corruption, as well as "capture" of the state by elites and private interests.

The full "Governance Matters VII" paper, the synthesis of the main findings, and the new WGI data update are available from the [WGI](http://www.govindicators.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.30 Report: Shareholder engagement and participation** On 23 June 2008, the Parliamentary Joint Committee on Corporations and Financial Services published its report titled "Better shareholders - better company: shareholder engagement and participation in Australia". The committee's terms of reference were to inquire and report on the engagement and participation of shareholders in the corporate governance of the companies in which they are part owners, with particular reference to:1. barriers to the effective engagement of all shareholders in the governance of companies;
2. whether institutional shareholders are adequately engaged, or able to participate, in the relevant corporate affairs of the companies they invest in;
3. best practice in corporate governance mechanisms, including:(a)      pre-selection and nomination of director candidates;(b)      advertising of elections and providing information concerning director candidates, including direct interaction with institutional shareholders;(c)      presentation of ballot papers;(d)      voting arrangements (eg. direct, proxy); and(e)      conduct of annual general meetings.
4. the effectiveness of existing mechanisms for communicating and getting feedback from shareholders;
5. the particular needs of shareholders who may have limited knowledge of corporate and financial matters; and
6. the need for any legislative or regulatory change.

The structure of the committee's reports is as follows. Chapter 2 outlines Australia's current regulatory framework for corporate governance, the role of shareholders in ensuring good corporate governance, the importance of effective communication between company boards and shareholders and the voting mechanisms through which shareholders enforce the accountability of company boards. The final section of the chapter canvasses the opinion of contributors to the inquiry on the most appropriate way to approach shareholder engagement reform. Chapter 3 examines possible improvements to the flow of information and dialogue between companies and shareholders, with attention also given to the disclosure of stock lending and margin lending activities; as well as examining issues specific to the separate institutional and retail investor groups. Chapter 4 assesses issues raised with the committee pertaining to the efficacy and integrity of different absentee voting mechanisms and the ability of shareholders to express their views effectively through the voting process. The committee has made 21 recommendations. These are:1. The government should examine the implications of amending the tracing provisions in section 672 of the Corporations Act to include derivative instruments.
2. The ASX should clarify the scope of continuous disclosure requirements as they apply to engagement on environmental, social and governance issues.
3. ASIC should clarify the position of institutional investors engaging collectively with companies outside company meetings in terms of the Corporations Act.
4. The government should amend section 314 of the Corporations Act to remove the requirement to produce a concise financial year company report.
5. ASIC should establish best practice guidelines for company annual general meetings.
6. ASIC should establish best practice guidelines for clear and concise company reporting.
7. The government should continue to negotiate with the states to have the 100 member rule (which allows 100 members to call an extraordinary general meeting of members) abolished.
8. ASIC should selectively or periodically monitor and enforce company information disclosure in private briefings to institutional shareholders to ensure compliance with their continuous disclosure obligations.
9. The government should amend section 173 of the Corporations Act to limit access to the details of shareholders with non-substantial holdings, subject to a proper purpose test to allow access on certain conditions.
10. The government should amend section 113 of the Corporations Act to raise the limit for shareholders in a proprietary company to 100.
11. The government should investigate an alternative regulatory framework for small incorporated companies and not-for-profit organisations.
12. ASIC should clarify that companies are permitted to receive proxy votes electronically where it is not provided for in the company constitution.
13. The government should consult with industry on amending the record cut-off date.
14. The government should amend the Corporations Act to prevent non-chair proxy holders from cherry picking votes.
15. ASIC should periodically and systematically audit companies' vote recording and storage practices to ensure transparency and establish whether further regulation is required.
16. The government should investigate the most appropriate regulatory framework for ensuring that stock lenders retain the voting rights attached to the lent shares.
17. The ASX Corporate Governance Council should include an "if not, why not" provision on direct voting in its Corporate Governance Principles and Recommendations.
18. The government should consult with industry on the implementation of postponed voting after the close of company AGMs.
19. ASIC should develop a best practice guide to company constitutional recommendations and practice governing the nomination and election of directors.
20. The government should amend the Corporations Act to exclude shareholder directors from voting on their own remuneration packages either directly or by directing proxies.
21. The government should examine the on market exemption to Listing Rule 10.14 and the disclosure requirements pertaining to external management agreements as part of its green paper review of corporate governance regulations.

The report is available on the [Committee](http://www.aph.gov.au/senate/committee/corporations_ctte/sharehold/index.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.31 New Zealand Securities Commission publishes annual oversight review of NZX** On 20 June 2008, the New Zealand Securities Commission's third annual oversight review found that New Zealand Exchange Ltd's (NZX) performance as a registered exchange continues to be good. The Commission's overall conclusion is that NZX is satisfying its obligation to operate its markets in accordance with its conduct rules. The report is available on the [New Zealand Securities Commission](http://seccom.govt.nz/publications/documents/nzx-2007%22%20%5Ct%20%22_new) website. etailed Contents**1.32 Report on issues regarding the valuation of complex and illiquid financial instruments**On 18 June 2008, the Committee of European Banking Supervisors (CEBS) published its findings on issues relating to the valuation of complex and illiquid financial instruments. The report puts forward a set of issues that should be addressed by institutions and accounting and auditing standard setters in order to improve the reliability of the values ascribed to these instruments. CEBS has prepared this in response to a request set out in the October 2007 roadmap of the ECOFIN on the financial market situation.The analysis focuses on the following valuation related aspects:* challenges for the valuation of complex financial instruments or instruments for which no active markets exist;
* transparency on valuation practices and methodologies as well as related uncertainty; and
* auditing of fair value estimates.

The work has been based on the experience gathered by its members in the course of their supervisory responsibilities. It also draws on work carried out in other fora, such as the Basel Committee on Banking Supervision (BCBS) and the Senior Supervisors Group (SSG) as well as on discussions with industry representatives.The major findings can be summarised as follows:On valuation challenges:* accounting standard setters should consider the need for further guidance on measuring fair values when there is little market activity in the instruments concerned (or other instruments relevant to pricing).
* Institutions should:- enhance their practices and governance surrounding the use of modelling techniques; -  ensure that all appropriate risk factors are considered when determining a fair value; and- improve risk management practices to ensure adequate risk assessment of transactions and appropriate management of exposures;
* institutions and standard setters should consider wider valuation-related issues, including:- classification issues;- importance of timely impairment and possible changes to impairment rules for assets available for sale;- treatment of Day one profits and related reserves; and- impact and management of the own credit risk.

On transparency aspects:* institutions should enhance their disclosures on fair values and on valuation techniques; and
* accounting standard setters should review the disclosure requirements to enhance the information to be disclosed on fair values and valuation techniques.

On auditing aspects:* auditing standard setters should pursue their efforts to enhance the guidance for the audit of fair value estimates.

The report is available on the [CEBS](http://www.c-ebs.org/publications/other.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.33 Report on bank's transparency on activities and products affected by the recent market turmoil** On 18 June 2008, the Committee of European Banking Supervisors (CEBS) published the findings of an assessment of banks' transparency with regard to the activities and instruments affected by the recent market turmoil. This assessment has been carried out in accordance with the roadmap of the ECOFIN issued in October 2007 in response to the financial markets situation.CEBS analysed the disclosures made by 22 large banks - 19 of which originate from the EU, in the context of their 2007 4th quarter and preliminary results and 2007 audited annual reports.The assessment not only covered disclosures on exposures and their impacts on results but also looked at information on business models, risk management practices and accounting and valuation practices.The main findings of the analysis showed that institutions made:* limited disclosures on the business models underlying the activities affected by the sub-prime crisis and the related risk management practices (especially liquidity risk);
* diverse disclosures on exposures and on the impact of the crisis;
* generic disclosures on the valuation of exposures affected by the market turmoil and their accounting; and
* varied presentations of disclosures.

The report identifies examples of disclosures which CEBS believes represent good practice. CEBS believes that these good practices provide examples of: * comprehensive disclosures on business model and risk management;
* meaningful disclosures on exposures and impacts, with appropriate levels of granularity;
* useful disclosures on accounting policies; and
* improved presentation of the disclosures.

The report is available on the [CEBS](http://www.c-ebs.org/publications/other.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.34 IOSCO report on hedge funds** In June 2008, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published its final report on hedge funds. The report considers the particular regulatory issues arising from the investment of retail investors into hedge funds and describes some approaches for addressing the consequences of such issues upon retail investors. The report notes that most regulators are more concerned with funds of hedge funds than with hedge funds themselves, as the former are the primary vehicles used for attracting retail investment in the hedge fund area.  The report also presents the responses received from the four organizations that responded to the "Call for Views on Issues that could be Addressed by IOSCO on Funds of Hedge Funds" ("IOSCO Consultation Document") that was released for a three-month public consultation from April until July 2007. In their responses, the respondents insist that the information to be provided to investors should be understandable and useful. To that end, the information should be suitably detailed.  The report also notes that the consultation respondents have divergent views on particular matters and in particular with regard to the selection of the underlying hedge funds, the use of target performance by funds of hedge funds, the conditions or limitations in relation to diversification, the funds of hedge funds' valuation, the use of leverage by funds of hedge funds, the best practices regarding the due diligence to be performed by funds of hedge funds' managers, and the level of transparency on the part of the underlying hedge funds.  The report notes that experts consulted as part of preparing the report identified the following key risks attached to funds of hedge funds and provided preliminary views for the purpose of addressing such risks:  1. The risk of misselling funds of hedge funds: in this respect, the experts stressed the importance of the suitability and "know your customer" tests and of the disclosure of the relevant information to the investors.
2. The liquidity risk: for the purpose of addressing this risk, the experts suggested several possible actions such as the provision of a regulatory requirement that there be a real consistency between a fund of hedge funds' liquidity and that of its underlying hedge funds, the implementation of a lock-up mechanism, the use of "gates" and the limitation of a fund of hedge funds' investments into underlying hedge funds holding illiquid assets. It is noteworthy that in the opinion of a few experts, the funds of hedge funds' liquidity is not always an issue and may be a means to protect retail investors' interests.
3. The valuation risk: the experts proposed two measures for the purpose of tackling this risk: the first one consists in not investing in any asset that could not potentially be priced (and/or for which it would not be clear how it was priced) whereas the second one aims at prohibiting the payment of all redemption monies on the basis of the estimated net asset value.
4. The operational/fraudulent risk related to the underlying funds: the experts stressed the importance of the due diligence process to be carried out by funds of hedge funds' managers for the purpose of selecting and monitoring the underlying hedge funds. The experts specified that for such due diligence to be efficient, it had to be simple, straightforward and complied with at all times. They identified a few obstacles to the performance of a thorough due diligence, notably the poor level of disclosure of certain hedge funds, and the young age of hedge funds globally (i.e., less than three years old).

The other issues raised by the experts relate to the lack of harmonization of the funds of hedge funds' regulations (therefore preventing any cross-border regulation), as well as the level playing field issue between competing financial products.  The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD276.pdf%22%20%5Ct%20%22_new) website.  etailed Contents**1.35 BIS annual report comments on consequences of excessive credit growth** The fundamental cause of problems in the global economy is excessive and imprudent credit growth over a long period, says the Bank for International Settlements (BIS) in its 78th Annual Report which was released on 30 June 2008.  The results are a rise in inflation and an accumulation of debt-related imbalances which would at some point prove to be unsustainable. Both unwelcome phenomena are being experienced at the same time. The BIS notes that the experience of the recent financial turmoil shows the need for a new macro financial stability framework to resist actively the inherent procyclicality of the financial system. This would require a primary focus on systemic issues and a much more countercyclical use of policy instruments. It also demands closer cooperation between the central banking and regulatory communities in trying to identify the build-up of systemic risks, deciding what to do to mitigate them, and agreeing in advance on steps that might be taken to manage periods of stress.   The Annual Report is available on the [BIS](http://www.bis.org/publ/arpdf/ar2008e.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.36 IOSCO report on private equity** The Technical Committee of the International Organization of Securities Commissions (IOSCO) has published its final report on private equity. The report identifies seven specific issues relating to private equity markets that have been raised as potential risks to financial markets, of which six are relevant to IOSCO's objectives. The seven issues are increasing leverage; market abuse; conflicts of interest for management; transparency; overall market efficiency; diverse ownership of economic exposure and market access. The report examines these issues in relation to IOSCO's objectives and principles and reviews the work already done by regulators in relation to the issues. The Technical Committee states that it will undertake two projects following publication of the report. The first is a survey of the complexity and leverage of capital structures employed in leveraged buyout transactions across relevant IOSCO jurisdictions. This will allow assessment of the potential impact that the default of large private equity portfolio companies could have on the efficient operation of related public debt securities markets and any systemic issues which may arise as a result. As this work would involve input from leveraged finance providers and will include issues of interest to banking regulators, the Technical Committee will recommend this work for consideration within the Joint Forum. The second project is an analysis of conflicts of interest which arise during the course of private equity business and the controls utilised across relevant IOSCO member states which aim to provide appropriate levels of investor protection. Key areas of focus will be public-to-private transactions and the listing (or subsequent re-listing) of private equity portfolio companies. These situations potentially have a heightened impact on public securities markets and investors. This work will incorporate both private equity firms and market intermediaries and will focus on identifying conflicts which are present, or are unique, within the context of private equity transactions as they relate to public markets.The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD274.pdf%22%20%5Ct%20%22_new) website. etailed Contents |

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

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| http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008_files/spacer%281%29.gif |
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| **2.1 Report on relief applications decided between December 2007 and March 2008**On 18 July 2008, the Australian Securities and investments Commission (ASIC) released a report outlining its decisions on applications for relief from the corporate finance, financial services and managed investment provisions of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) between 1 December 2007 and 31 March 2008. The report, "Overview of decisions on relief applications (December 2007 to March 2008)" provides a summary of when ASIC has exercised, or refused to exercise, its exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Act. The report highlights when ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions and details the relief instruments it executed. The report contains hyperlinks to the ASIC Gazette where those instruments have been published.The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_133.pdf/%24file/REP_133.pdf%22%20%5Ct%20%22_new) website. **Background**ASIC is vested with powers to exempt or modify the Act under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Act. ASIC uses its discretion to vary or set aside certain requirements of the law, where the burden of complying with the law significantly detracts from its overall benefit, or where business can be facilitated without harming other stakeholders. ASIC publishes a copy of most of the exemption and/or modification instruments issued in the ASIC Gazette. The ASIC Gazette is available from the [ASIC](http://www.asic.gov.au/gazettes%22%20%5Ct%20%22_new) website.etailed Contents**2.2 Updated guidance on no-action letters**On 9 July 2008, the Australian Securities and investments Commission (ASIC) issued an update of Regulatory Guide 108 No-action letters (RG 108). A no-action letter is an expression of ASIC's regulatory intent and indicates that, at the time the no-action letter is given, ASIC does not anticipate taking other regulatory action in relation to conduct regulated by the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). RG 108 sets out ASIC's policy regarding when it will issue a no action letter.  RG108 has not been comprehensively reviewed since its release in 1996. The update of RG 108 took place as part of ASIC's program of updating its regulatory guides.  The updated guide clarifies when ASIC will consider issuing a no-action letter and formalises ASIC's approach to taking class no-action positions.  The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg108.pdf/%24file/rg108.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.3 Proposals to improve disclosure by unlisted mortgage and property schemes**On 7 July 2008, the Australian Securities and investments Commission (ASIC) released consultation papers and draft regulatory guides aimed at improving disclosure to retail investors by unlisted mortgage schemes and unlisted property schemes. When ASIC released its report on new disclosure measures by unlisted and unrated debentures in April this year, it foreshadowed extending the concept of an "if not, why not" approach to disclosure against key benchmarks to other areas of unlisted investments. Debt and equity market turbulence since late 2007 and a cyclical softening in the real property market has increased the financial stress on some sectors where retail investors are exposed, such as the unlisted mortgage scheme and unlisted property fund sectors. As with its work in the unlisted and unrated debentures, ASIC will be producing companion investor guides for both sectors to assist investors in understanding the enhanced disclosure and make better informed investment decisions.ASIC encourages responsible entities to communicate the enhanced disclosure information to investors in the most effective way possible and using existing effective investor communication channels (e.g. by the scheme's website and regular reports).ASIC has also included draft guidance for advertising of these products and its expectations of compliance plans, compliance committees and compliance plan auditors.**(a) Unlisted mortgage schemes**In formulating its proposed disclosure approach, ASIC has identified and profiled more than 200 unlisted mortgage funds, which represent about $42 billion in funds under management. ASIC's draft regulatory guide proposes a benchmark-based disclosure model for unlisted mortgage schemes. The eight benchmarks differ from the ones introduced for debentures to reflect the different risk profile of unlisted mortgage schemes and the different legal structures and rights associated with this type of investment.It is proposed that issuers disclose against the benchmarks on the "if not, why not" approach. ASIC is proposing that responsible entities for existing mortgage schemes report against benchmarks to existing investors by 31 October 2008. From this date, new fundraising documents for new and existing mortgage schemes need to comply with the "if not, why not" benchmarks. **(b) Unlisted property schemes**ASIC analysed about 300 unlisted property schemes managed by upwards of 100 responsible entities in formulating its enhanced approach to disclosure. These schemes represented approximately $32 billion in assets. The new proposals centre on eight disclosure principles that are designed to give issuers guidance on key areas that need to be prominently disclosed to existing and potential retail investors.Clear and prominent disclosure of information referred to in the disclosure principles will allow retail investors to compare the relative risk and return of unlisted property scheme investments. ASIC does not currently propose to extend the "if not, why not" approach to unlisted property schemes. ASIC will be reviewing the unlisted property schemes sector to see whether its guidance has improved investor disclosures. ASIC will also analyse the impact on the sector of any changes in market conditions. Based on these factors, ASIC may consider whether there is a need to establish benchmarks for property schemes to disclose against on an "if not, why not" basis.ASIC is proposing that responsible entities for existing unlisted retail property schemes provide updated disclosure to existing investors applying the new disclosure principles by 31 October 2008. From this date, responsible entities of all unlisted retail property schemes will need to apply the disclosure principles to PDSs and ongoing disclosures. Comments on the consultation papers and draft regulatory guides are due by 5 August 2008.Consultation Paper 99 Mortgage schemes - improving disclosure for retail investors (including the draft regulatory guide) is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_99_Mortgageschemes.pdf/%24file/CP_99_Mortgageschemes.pdf%22%20%5Ct%20%22_new) website.Consultation Paper 100 Unlisted property schemes - improving disclosure for retail investors (including the draft regulatory guide) is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_100_Unlistedpropertyschemes.pdf/%24file/CP_100_Unlistedpropertyschemes.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.4 Australia and Hong Kong sign deal to allow cross-border marketing of retail funds**On 7 July 2008, the Australian Securities and Investments Commission (ASIC) signed a "declaration of mutual recognition" with the Hong Kong Securities and Futures Commission (SFC) to facilitate the sale of retail funds to investors in each other's market. The declaration seeks to reduce regulatory duplication by allowing most funds registered in Australia for offer to retail investors in Hong Kong while making available to Australian investors similar funds authorised in Hong Kong. To facilitate Australian funds to take advantage of mutual recognition, the SFC has issued a set of practical guidelines for the industry. Similarly, ASIC will issue a class order shortly providing Hong Kong authorised funds with a "conditional relief" from registration in Australia and from certain licensing, product disclosure and fund-raising requirements. Mutual recognition is extended to authorised collective investment schemes that are regulated primarily by the SFC and managed by SFC-licensed managers, as well as ASIC-registered financial asset schemes except hedge funds. The memorandum of understanding also covers information sharing and regulatory co-operation regarding these fund activities.The declaration of mutual recognition is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Declaration_SFC_ASICv2.pdf/%24file/Declaration_SFC_ASICv2.pdf%22%20%5Ct%20%22_new) website.The information sheet is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/InfoSheet_93.pdf/%24file/InfoSheet_93.pdf%22%20%5Ct%20%22_new) website.The Hong Kong SFC circular: Mutual recognition of cross-border offering of collective investment schemes is available from the [SFC](http://www.sfc.hk/sfcRegulatoryHandbook/EN/displayFileServlet?docno=H504" \t "_new) website.etailed Contents**2.5 Updated guidance on statutory reporting by external administrators**On 1 July  2008, the Australian Securities and investments Commission (ASIC) released a revised version of Regulatory Guide 16 External administrators: Reporting and lodging (RG 16). This publication provides guidance for external administrators reporting to ASIC under s476, s422, s438D and s533 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).Changes have been made to reflect the amendments to the Act made by the [Corporations Amendment (Insolvency) Act 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=98069" \t "Default) and to provide better guidance to external administrators in the schedules to RG 16.A major focus of ASIC's review has been to make sure that it is clearer as to when external administrators need to provide reports and what the content of those reports should be. Changes have been made to Form EX01 to achieve these aims. In particular, ASIC has provided further clarification as to the meaning of common types of possible misconduct and linked these to a series of tables setting out the types of likely evidence that may be available to insolvency practitioners in support of allegations of possible misconduct. ASIC has also provided a detailed sample report to better identify the information sought from external administrators when further reporting to ASIC on possible misconduct. ASIC expects these improvements will provide substantiated information enabling ASIC to investigate and action additional matters. The Regulatory Guide 16: External administrators: Reporting and lodging is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg16.pdf/%24file/rg16.pdf%22%20%5Ct%20%22_new) website.Schedule A is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg16schedA.pdf/%24file/rg16schedA.pdf%22%20%5Ct%20%22_new) website.Schedule B is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg16schedB.pdf/%24file/rg16schedB.pdf%22%20%5Ct%20%22_new) website.Schedule C is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg16schedC.pdf/%24file/rg16schedC.pdf%22%20%5Ct%20%22_new) website.Schedule D is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg16schedD.pdf/%24file/rg16schedD.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.6 Guidance on directors' share trading**On 27 June 2008, the Australian Securities and investments Commission (ASIC) welcomed ASX's release of its findings on a review of disclosure of Directors' Interest Notices including trading by directors during the company's own 'black out period (See item 3.1 of this Bulletin).ASIC confirmed that ASX on 22 May 2008 referred some 70 possible breaches by directors of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) by failing to disclose to the market within 14 calendar days contrary to s205G of the Corporations Act.ASIC is currently examining these and will, as necessary, take enforcement action.To assist directors to better understand their obligations and when ASIC may take enforcement proceedings, ASIC on 27 June 2008 released a new guide. Regulatory Guide 193: Notification of directors' interests in securities - listed companies (RG 193), provides information on how directors of listed companies should comply with the disclosure requirements created by section 205G of the Corporations Act. ASIC regards s205G as an important part of the regulatory regime that, together with the prohibitions on insider trading and market manipulation, helps maintain an informed and orderly market.All market participants, shareholders and other investors are entitled to know the shareholdings, and changes to those share holdings, of directors and their associates.The guide covers the definition of "relevant interests" and "securities", circumstances where notification is not required and the identification of breaches.It also covers the factors ASIC will take into consideration when determining whether to take action against a director by referring the matter to the CDPP. These factors include the amount of a company's shares in question, whether a market announcement was made at or shortly after the time a notice should have been lodged and whether there have been any other instances of late lodgement of a notice by a director.ASX foreshadows in its release that there may be additional breaches that arise from trading during a "blackout" period which it may refer to ASIC. ASIC will immediately investigate any such referrals.**Background**ASIC has worked closely with the ASX to speed up the notification of referrals and minimise the time gap between the alleged misconduct and action. A system has been set up which ensures every referral received from the ASX is immediately reviewed.Between January and May this year, the ASX referred 40 instances of suspicious conduct to ASIC. Of these 11 are being investigated for possible civil, criminal or administrative proceedings, 14 are under surveillance and 11 have been referred to ASIC's licensing unit for other possible action. Only four have been closed for insufficient evidence. In addition, ASIC has one insider trading matter before the courts and six with the Commonwealth Director of Public Prosecutions (CDPP) and two market manipulation matters are with the CDPP.Since ASIC came into being on 1 July 1998, ASIC has brought 15 successful criminal or civil cases against persons and entities for contravening insider trading laws. ASIC has also accepted one enforceable undertaking and made two administrative banning orders.The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg193.pdf/%24file/rg193.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.7 New insolvency statistics**On 26 June 2008, the Australian Securities and Investments Commission (ASIC) released a report covering information gathered from corporate insolvencies between 2004 and 2007.When liquidators, administrators and receivers (external administrators) are appointed to a company they must lodge a report with ASIC as soon as practicable for most corporate insolvencies. External administrators lodge these reports in an electronic format, Notification of information requested in Schedule B to ASIC's Practice Note 50 (Schedule B report) although this format is not mandatory.In June 2002, the first electronically lodged Schedule B report was recorded through the registered liquidator portal created by ASIC. As part of this process, ASIC promised that when sufficient reports were lodged it would collate and publish statistics from electronically lodged Schedule B reports in an aggregate and anonymous form. The financial information in these reports reflects estimates and opinions of the external administrator at a point in time. It is not an account prepared at the end of an external administration. This and other limitations of the statistics are explained in the report. Provided these limitations are understood, the statistics are a useful guide to the overall picture of corporate insolvencies in Australia for ASIC, as well as for academics, the Government, the insolvency profession and other interested stakeholders. **The reports**The number and percentage of reports electronically lodged electronically has become large enough to publish meaningful statistics, with good representation from a wide range of companies. ASIC is now releasing a summary of the information collected, covering Schedule B reports lodged electronically in the 2004/2005, 2005/2006 and 2006/2007 financial years. The data provided in these Schedule B reports will help ASIC to better target its efforts in relation to corporate insolvency. **Summary of main findings for 2006-2007** **(i) Profile of companies** **No of employees affected**82% of reports were about companies with less than 20 employees. **Industries with most lodgements*** Construction (1,396 reports or 20%)
* Services to business (897 reports or 13%)
* Retail trade (860 reports or 13%)

**Assets and liabilities*** 87% of failed companies had estimated assets of $100,000 or less.
* 56% of failed companies had estimated liabilities of $250,000 or less.

**Deficiency**  76% of failed companies had an estimated deficiency of $500,000 or less.**(ii) Causes of company failure** **Top 3 nominated causes of failure*** Poor strategic management of business (2,944 or 43% of reports)
* Inadequate cashflow or high cash use (2,719 or 40% of reports)
* Trading losses (2,352 or 34% of reports)

**(iii) Estimated dividends** **Dividends to unsecured creditors** In 96% of cases, the dividend estimated to be payable to unsecured creditors was 10 cents in the dollar or less. The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_132.pdf/%24file/REP_132.pdf%22%20%5Ct%20%22_new) website. etailed Contents**2.8 Guidance on new insurance requirements for registered liquidators**On 26 June 2008, the Australian Securities and investments Commission (ASIC) released Regulatory Guide 194 Insurance requirements for registered liquidators (RG 194).Under new section 1284 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), registered liquidators must have adequate and appropriate professional indemnity (PI) and fidelity insurance. These legislative requirements have applied to liquidators newly registered since 1 January 2008 and they came into force on 1 July 2008 for all other liquidators. The new insurance requirements replace the previous requirement for registered liquidators to either lodge and maintain a security with ASIC, or hold both PI insurance and a public practice certificate from one of the professional accounting bodies. The insurance requirements aim to maximise the funds that are available to compensate creditors and other claimants who suffer loss as a result of misconduct by the external administrator or their staff in connection with a corporate insolvency.Although registered liquidators will be responsible for ensuring they obtain adequate and appropriate insurance, ASIC's regulatory guide aims to help them comply with their insurance obligations by explaining how ASIC will administer the new requirements. In February 2008 ASIC released a consultation paper, Insurance requirements for registered liquidators (CP 96), seeking industry's views on how the new requirements should be administered. ASIC has taken these views into account when formulating the final policy. ASIC will take a staged approach to the commencement of the insurance requirements, aligned with existing insurance renewal cycles. ASIC has extended the transitional period for liquidators so that complying insurance arrangements must be in place by 31 July 2009 at the latest. Because a number of different forms of fidelity insurance could fulfil the policy objective underlying s1284, the guidance provides flexibility and multiple options for registered liquidators in arranging their fidelity insurance to meet the new requirements. The Regulatory Guide 194: Insurance requirements for registered liquidators guide is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg194.pdf/%24file/rg194.pdf%22%20%5Ct%20%22_new) website. The Report 131: Report on submissions on CP 96 insurance requirements for registered liquidators is available from the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_131.pdf/%24file/REP_131.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.9 ASIC focus for the upcoming reporting period**On 24 June 2008, the Australian Securities and Investments Commission (ASIC) highlighted areas of focus for companies and auditors preparing for the upcoming 30 June financial reporting and auditing cycle. These are:* The use of and disclosure of off balance sheet arrangements - international experience has revealed numerous off balance sheet arrangements where the market turbulence has returned substantially the risks to the initiator;
* Impairment of asset values - there will be more pressure on understanding, measuring and documenting the triggers of impairment;
* Determining fair market values - challenges in valuation practices and disclosures exist with the market turmoil and illiquid markets. There should be a focus on valuation methodologies and processes and the disclosure of key assumptions, risks and uncertainties;
* Going concern - appropriateness of going concern assumption should be assessed and where relevant, disclosure of levels of uncertainty;
* Significant judgments - all significant judgments used in preparing the financial statements and sources of estimation uncertainty should be disclosed;
* Classification of debt - it is essential that the classification of the maturity of debt is accurate and loan covenants are well understood particularly in terms of triggers; and
* Foreign currencies - there may be greater stress on currencies with wider, sharper movements bringing focus to foreign currency management and related hedging activities. Other areas of focus for ASIC when reviewing financial reports will be the reported timing recognition of revenue and deferred expenses.

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| **3.1 Findings from review of trading by directors** On 27 June 2008, the Australian Securities Exchange (ASX) released a review of disclosure of Directors' Interest Notices lodged by listed entities, including for securities trading by directors during the "blackout" period.  The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 January and 31 March 2008.  Of the 4,137 notices lodged during the three-month period, 538 (13%) breached the ASX listing rule requirement to disclose to the market within five business days. Of these 538 breaches, 289 (7%) also breached the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) by failing to disclose to the market within 14 calendar days. Seventy (70) of these were 'active' on market trades and have been referred to ASIC.  ASXMS also reviewed trading by directors during the "blackout" period (between the close of a listed entity's financial period and the release of its half-year or full-year results) for possible contravention of an entity's publicly disclosed trading policy.  There were 795 trades by directors during the "blackout" period deemed to be of potential market concern. Fifty-seven (7%) of the trades may have contravened the trading policies of the entities involved.  To assist listed entities to understand and comply with the listing rule obligations for Directors' Interest Notices, ASX has released a new Companies Update.  ASX also welcomes the publication by ASIC of a new regulatory guide: Notification of directors' interests in securities - listed companies. It provides information on how directors should comply with the disclosure requirements of section 205G of the Corporations Act.  The new Company Update is available from the [ASX](http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20080627_0508_HTML.htm%22%20%5Ct%20%22_new) website. The full review of disclosure of Directors' Interest Notices is available from the [ASX](http://www.asx.com.au/about/pdf/mr270608_directors_trading_review_june08.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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| **4.1 MacarthurCook Limited - Declaration of unacceptable circumstances and orders** On 10 July 2008, the Panel made a declaration of unacceptable circumstances and final orders in relation to an application dated 25 June 2008 by AMP Capital Investors Limited in relation to the affairs of MacarthurCook Limited (TP 08/64).**(a) Background**On 16 April 2008, AMP contacted MacarthurCook to express its interest in making a takeover for MacarthurCook. On 6 June 2008, AMP wrote to MacarthurCook outlining the terms of a proposal to make a takeover offer for MacarthurCook at $1.35 per share. On 13 June 2008, MacarthurCook entered into the following transactions: (a) a strategic investment management and distribution alliance with IOOF Holdings Limited; (b) IOOF became a substantial shareholder of MacarthurCook by subscribing for 3.45 million MacarthurCook shares under a private placement at a price of $1.15 per share, representing approximately 13% of MacarthurCook after completion of the placement; (c) a contractual restriction on IOOF disposing of the MacarthurCook shares acquired under the placement for a period of 24 months, except where a takeover or scheme was recommended by the MacarthurCook board or a third party acquired greater than 50% of the voting rights in MacarthurCook; and (d) an option for IOOF to underwrite MacarthurCook's dividend reinvestment plan until 31 December 2009. MacarthurCook did not seek shareholder approval prior to entering into these transactions. Items (b), (c) and (d) of the transactions listed above, taken together, constituted frustrating action in relation to the proposed AMP offer. The absence of shareholder approval gave rise to unacceptable circumstances. The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).  Further information is available on the [Panel](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**4.2 InterMet Resources Limited - Panel decision**On 25 June 2008, the Panel advised that it had decided not to make a declaration of unacceptable circumstances in response to an application dated 11 June 2008 from InterMet Resources Limited. The application concerned the scrip takeover offer for InterMet by Hillgrove Resources Limited (See [TP08/55](http://www.takeovers.gov.au/display.asp?ContentID=1413" \t "_new)).InterMet had sought a declaration of unacceptable circumstances in relation to disclosure in Hillgrove's bidder's statement. This included issues in relation to the calculation of premiums, Hillgrove's financial position, the disclosure surrounding the Kanmantoo Project (a major asset of Hillgrove), the adequacy of the risk factors, Hillgrove's future intentions and inconsistencies in the conditions to the Hillgrove offer.In summary, the Panel requested the following changes be made to Hillgrove's bidder's statement:1. A more up-to-date share price for both Hillgrove and InterMet. The Panel regarded it as best practice for a scrip offer to include for shareholders the most up-to-date share prices of the bidder and target reasonably available.
2. A clearer explanation of why the valuation methodology chosen by Hillgrove had been adopted.
3. Additional disclosure regarding the Kanmantoo Project, especially in relation the financing and progress of the project.
4. Additional disclosure regarding the risks inherent in Hillgrove's business model, particularly in relation to the Kanmantoo Project.

On the basis of the further disclosure provided by Hillgrove, the Panel decided not to make a declaration of unacceptable circumstances.Further information is available on the [Panel](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents**4.3 Midwest Corporation 02 - Declaration of unacceptable circumstances and orders**  On 23 June 2008, the Takeovers Panel made a declaration of unacceptable circumstances and final orders in relation to an application dated 4 June 2008 by Sinosteel Ocean Capital Pty Limited in relation to the affairs of Midwest Corporation Limited (TP 08/53). **(a) Background** Midwest is the subject of an off-market takeover bid by Sinosteel.  It is also the subject of a proposed merger with Murchison Metals Limited by way of scheme of arrangement.  Murchison has a 9.98% interest in Midwest, which it announced on 26 May 2008.  The Harbinger entities have a 19.98% interest in Murchison.Between 26 and 30 May 2008, the Harbinger entities made on-market purchases of 9.29% of the shares in Midwest.  This included purchases of approximately 4.27% of Midwest shares on 28, 29 and 30 May 2008, without giving notice under the [Foreign Acquisitions and Takeovers Act 1975](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6803" \t "Default) (FATA).  For the purposes of FATA, the interests of the Harbinger entities and Murchison are aggregated as a result of the Harbinger entities having a 19.98% interest in Murchison.  Therefore, 4.27% of the Harbinger entities' acquisitions in Midwest were over the 15% threshold in FATA.**(b) Declaration**The Panel considered that the circumstances were unacceptable having regard to their effect on the control or potential control of Midwest, or the acquisition of a substantial interest in Midwest, or were otherwise unacceptable having regard to the principle in s602(a) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) relating to an efficient, competitive and informed market for corporate control.   Its reasons included:* An aspect of an efficient, competitive and informed market is that market participants comply with Australian laws of general application, particularly those relating to the acquisition of securities.  This promotes a level playing field for all market participants.
* The Harbinger entities' non-compliance gave them an advantage during the Sinosteel takeover bid which they would not otherwise have had.
* Subsequent approval under FATA of any acquisition by the Harbinger entities does not change the situation in relation to the circumstances with which the Panel is concerned.

The purchase of the Midwest shares by the Harbinger entities over the 15% FATA threshold appeared to the Panel to:* have been a material factor in maintaining the Midwest share price at a level above which it would not otherwise have been, if the Harbinger entities had not purchased those Midwest shares, during the relevant period;
* by reason of the effect on the Midwest share price, have influenced the view that market participants would be likely to take regarding the relative merits of the proposed Murchison/Midwest merger and the Sinosteel takeover offer during the period that the Harbinger entities were purchasing the excess Midwest shares; and
* have materially affected Sinosteel's ability to compulsorily acquire Midwest, by allowing the Harbinger entities to acquire very close to a blocking stake in Midwest when they would not otherwise have been able to do so.

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).The Panel did not conduct proceedings on the part of the application by Sinosteel relating to an association for Corporations Act purposes between the Harbinger Entities and Murchison. Sinosteel did not demonstrate a sufficient body of evidence of association to warrant the Panel conducting proceedings on this part of the application.**(c) Orders**The Panel has made orders that the Harbinger entities not vote their 4.27% interest in Midwest while the Sinosteel bid is on foot.  If the Harbinger entities fail to obtain FATA approval from the Treasurer by 11 July 2008, they must divest their 4.27% interest in Midwest within 3 trading days.  Divestment can cease if FATA approval is received during the 3 day period. The Harbinger entities may apply for a variation of the divestment order in the event that the Sinosteel bid is extended.Further information is available on the [Panel](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents |

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| **5.1 Liability of a director for publication of a statement to the ASX which is misleading or deceptive or likely to mislead or deceive** (By Anthea Grace (Senior Associate) & Sarah Shnider (Solicitor), Freehills) ASIC v Narain [2008] FCAFC 120, Full Federal Court, Finkelstein, Jacobson and Gordon JJ, 3 July 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fcafc120.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/july/2008fcafc120.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 concerned with whether there had been a contravention of section 1041H of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act), which prohibits conduct "in relation to" a financial product (including shares) or a financial service which is misleading or deceptive or likely to mislead or deceive.  The Full Federal Court found that the release of an announcement to the ASX can be misleading or deceptive in relation to company shares, even if that announcement does not directly refer to, or deal with the shares themselves. The Court held that the concept of misleading or deceptive conduct is to be given a broad construction, so as to encompass all the circumstances in which the conduct takes place.  Further, a person can engage in the prohibited conduct where they procure that conduct from another, or engage in it in the capacity of an officer of a company. **(b) Facts**  Citrofresh International Ltd (CTF) was the supplier of a disinfectant product called "Citrofresh". In August 2005, CTF received a laboratory report which stated that Citrofresh "exhibited significant virucidal activity" against four viruses, including HIV. With the assistance of others, the CEO of CTF, Mr Narain, assisted in the preparation of a release to the ASX (the Release) containing a number of statements about Citrofresh, including that:* CTF could offer a global solution to reduce and eventually stop the spread of HIV;
* the use of Citrofresh as a postcoital application will act as an 'invisible condom' for the prevention of STDs including HIV; and
* the ability to use Citrofresh as a postcoital application will have significant impact on reducing the transmission of HIV and STDs.

Mr Narain instructed the company secretary to send the Release to the ASX, and the announcement was subsequently published. The publication had an immediate effect on CTF shares which rose from $0.225 to $0.70. CTF requested a trading halt and made a further announcement to the effect that Citrofresh was not a vaccine or a cure for HIV. After the second announcement was made the share price fell back to $0.295.ASIC brought proceedings against CTF and Mr Narain seeking declarations against both of them that they had engaged in misleading or deceptive conduct in contravention of section 1041H of the Act. Relief was also sought against Mr Narain for contravening section 180 of the Act.At first instance, the trial judge (Goldberg J) held that the Release did not contain representations "in relation to" CTF shares. In respect of section 1041H, the trial judge held that the relationship must appear "on the face of the conduct", ie the statements must "deal with shares". In this case, the statements in the Release were not made in relation to shares in CTF but rather were made in relation to CTF itself or to the product manufactured, distributed and sold by it.  Justice Goldberg held that Mr Narain had not engaged in any conduct that could result in a contravention of section 1041H of the Act as he had not personally sent the Release to the ASX; rather it had been sent by CTF and the company secretary.The questions to be determined by the Full Federal Court were:* whether conduct that is constituted by publishing a statement will only be "in relation to a financial product" (ie shares) if the statement refers to those shares; and
* whether an officer of a company infringes section 1041H if he or she prepares a misleading statement and instructs the company secretary to publish it.

**(c) Decision**  **(i) Whether the Release was "in relation" to a financial product** The Full Federal Court did not accept that the connection between misleading conduct and a financial product (ie shares in a company) must necessarily be immediate or direct, or that the conduct must refer to, or deal with the shares. Such a narrow construction would be "contrary to the meaning of the section and to commercial reality".In drawing this conclusion, Jacobson and Gordon JJ referred to section 1041H(2) which lists examples of conduct which is prohibited, including, "carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to" the listed examples (one being the publishing of a notice in relation to a financial product). Their Honours held that section 1041H(2) indicates that it is sufficient that the relationship be "at the lower end of the spectrum so that an indirect or less than substantial connection is sufficient". Justice Finkelstein held that the connection would be made out where there was a publication of a statement on the ASX that a reasonable person would expect to have, or would be likely to have, a material effect on the price or value of shares.Each of the appellate judges found that there was a sufficient connection between the release of the statements and CTF's shares to give rise to a possible contravention of section 1041H.  **(ii) Whether Mr Narain engaged in the conduct** The Full Court held that by participating in the drafting of the Release and directing the company secretary to send the Release to the ASX, Mr Narain had engaged in the conduct, either because the company secretary was acting as his agent, or because the secretary's actions were attributable to Mr Narain as a matter of law.Interestingly, in coming to their respective conclusions on this issue, neither the trial judge nor the appellate judges referred to section 52 of the Act, which provides that "a reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done". Similarly, ASIC did not make any reference to this provision. **(iii) Case remitted back to trial judge** The liability of Mr Narain ultimately depended on a finding that the comments were in fact misleading or deceptive, or likely to mislead or deceive. As no findings had been made by the trial judge or the Full Federal Court as to whether the statements in the announcement were misleading or deceptive, the case was remitted back to the trial judge. The Full Court observed that the evidence was strongly in favour of a finding that the statements were misleading.The case was also sent back to the trial judge to consider the second aspect of ASIC's claim, namely, whether by authorising the publication of the Release, Mr Narain had breached his duties as a director and thereby contravened section 180 of the Act.The case is yet to be set down for hearing before Goldberg J.etailed Contents**5.2 Accessorial liability for the transfer of property in breach of trust**(By Taryn Chua, Freehills) McNally v Harris [2008] NSWSC 659, New South Wales Supreme Court, White J, 30 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc659.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc659.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**A trustee transferred trust property to another party in breach of trust. The court considered whether other parties (including the trustee's director, the transferee, subsequent transferees, the transferee's directors, and the settlor of the trust property who dealt with the trust property as if he were still entitled to deal with it as his own) were aware it was in breach of trust and were liable as accessory for breach of trust. The court also considered whether injurious falsehood was committed in relation to false representations in share transfer and ASIC forms, and the vicarious liability of a partner in a firm. **(b) Facts**A trust deed established Harraw Nominees Pty Ltd (Harraw Nominees) as trustee of a discretionary trust. The directors of Harraw Nominees were Nicholas Harris and Paul Warton. One of the beneficiaries was Walter McNally. The plaintiffs claimed Mr McNally transferred Oxiana shares to Harraw Nominees to be held on trust and Mr Harris dealt with the shares as follows.http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20131%20July%202008_files/clb_20080728.gifThe plaintiffs alleged that: * Mr Harris dishonestly procured Harraw Nominees to breach its trust and was liable as accessory for breach of trust, and HJN, HJP and Mrs Harris were also liable as accessories.
* Mr Harris made false representations in the ASIC form and share transfer form, and committed the tort of injurious falsehood.
* Mr Richard Licardy was liable for Mr Harris' conduct as he represented or knowingly suffered himself to be represented as a partner with Mr Harris in a firm carrying on an advisory business under the name Licardy Harris & Co Pty Ltd, and Mr McNally and Mr Warton gave credit to the apparent firm on the faith of a representation that Mr Harris was a partner with Mr Licardy. Further, that Licardy Harris & Co Pty Ltd was vicariously liable for Mr Harris' conduct as he was acting in the course of that company's business.

Mr Harris claimed there was no breach of trust because the trust was never validly constituted as there was no trust property and, further, the Oxiana shares never became trust property. Mr Harris claimed Mr McNally instructed him to transfer the Oxiana shares to Harraw Nominees (not on trust) and, following this, Mr McNally agreed, under a share swap deed, to swap the Oxiana shares for HJN's shares in Sentinel Properties Ltd.  **(c) Decision**The trust was validly constituted as there was trust property. Mr McNally transferred the Oxiana shares to Harraw Nominees to be held on trust (although consideration for the transfer was not paid). From registration of the shares in Harraw Nominees' name, they were trust property and Mr McNally was not entitled to deal with them. Mr McNally purported to assign the Oxiana shares to HJN under the share swap deed. However, at this stage, it was a breach of trust (Mr Harris and Mr McNally were aware of this) because Mr McNally was no longer entitled to deal with the shares.  **(i) Mr Harris and HJN - liable as accessories for breach of trust**Mr Harris was liable as accessory under the first limb of Barnes v Addy (received and became chargeable with trust property) in respect of the proceeds of sale of the shares paid into the joint bank account which he controlled. He was also liable under the second limb (assisted with knowledge in a dishonest and fraudulent design), assisting Harraw Nominees in a dishonest and fraudulent design in allowing Mr McNally to deal with the shares as if they were his own (Mr Harris' state of mind was attributed to Harraw Nominees). "Dishonest and fraudulent" was determined by reference to equitable principles, not the criminal law; a person may act dishonestly by the standards of ordinary, decent people, without appreciating that it is dishonest.  Mr Harris was liable for injurious falsehood against Harraw Nominees in respect of the share transfer form. Representations in the form were false in respect of Mr Harris being sole director and the authority to transfer the shares. However, the elements of injurious falsehood were not satisfied in respect of the ASIC form (in particular, no damage suffered by Harraw Nominees). (Side issue: the absence of a signed consent to act did not prevent Mr Warton from becoming a director when he gave consent orally and acted in that capacity, despite section 201D of the Corporations Act.) Mr Harris was not liable for exemplary damages. Such an award is exceptional and is made to punish a defendant who engages in conscious wrongdoing in contumelious disregard of the plaintiff's rights. Mr Harris engaged in conscious wrongdoing, but he did not simply steal the Oxiana shares - he agreed that Mr McNally could deal with the shares as if they were his in breach of the trust. Mr Harris showed ordinary, but not contumelious disregard, of the beneficiaries' interests. Mr Harris' mind was attributed to HJN. HJN was liable under the first limb of Barnes v Addy in respect of the Oxiana shares and proceeds of sale. HJN received the shares for value, but was not a bona fide purchaser for value without notice as it knew the shares did not belong to Mr McNally but were to be held on trust. HJN was also liable under the second limb because Mr Harris' mind could be attributed to HJN. The plaintiffs could recover equitable compensation for loss of the Oxiana shares or an account of the proceeds of sale from Mr Harris and HJN. They were also entitled to an inquiry to pursue tracing remedies. **(ii) HJP - liable as accessory for breach of trust** Mr Harris' mind could be attributed to HJP. HJP was liable only under the first limb of Barnes v Addy in respect of the Oxiana shares transferred to it (not liable under the second limb as, when it received the shares, the dishonest and fraudulent design of Harraw Nominees had been completed). HJP was liable to account for the Oxiana shares transferred to it and for the proceeds of sale of those shares. **(iii) Mrs Harris - not liable as accessory for breach of trust** The plaintiffs claimed she was liable under the first limb of Barnes v Addy. Mrs Harris was not liable as an accessory to breach of trust. Although she was a director of HJN and signed the share transfers, she had no knowledge or notice that the shares were held on trust, that they were transferred to HJN in breach of trust or that the proceeds paid into the joint bank account represented proceeds of the breach of trust. The mere fact that moneys were paid into the joint account did not establish Mrs Harris' liability under the first limb of Barnes v Addy. However, although Mrs Harris was not liable to a personal remedy, the money paid in the joint bank account was trust property and the court left open the possibility of a tracing remedy. **(iv) Mr Licardy and Licardy Harris & Co - not vicariously liable for Mr Harris** Mr Licardy did not knowingly suffer himself to be held out as a partner with Mr Harris in a firm carrying on an advisory business. Further, neither Mr McNally nor Mr Warton "gave credit" to the firm on the faith of a representation that Mr Licardy was Mr Harris' partner. For credit to be given, the person giving credit must have relied upon the representation; there was no such reliance here. Licardy Harris & Co was not liable for Mr Harris' transfer of the Oxiana shares from Harraw Nominees to HJN; this was not done in the course of the business of the firm. The firm did not provide any services to Harraw Nominees except holding company records and being its registered office address. In completing the share transfer and ASIC forms, Mr Harris acted only in his capacity as director of Harraw Nominees. **(v) No contribution or indemnity from Mr McNally**If Mr McNally had been sued, he would also have been liable to pay equitable compensation as a constructive trustee. However, where there is a fraudulent breach of trust to which all the trustees are parties, there is no right of contribution between them. The court applied the principle to the situation in this case, where persons were liable as accessories.etailed Contents**5.3 Whether the court can extend the 6 year time limit to enable an action to recover loss for contravention of a civil penalty provision**(By Vince Battaglia, Blake Dawson) Newtronics Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (ACN 061 493 516) v Gjergja & Tescher [2008] VSCA 117, Supreme Court of Victoria, Court of Appeal, 27 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/june/2008vsca117.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/june/2008vsca117.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 issue in this appeal was whether the six year limitation period prescribed by section 1317HD(2) of the former Corporations Law 1989 (Cth) (Corporations Law) for a recovery action under section 1317HD(1) (which provided that a corporation could bring proceedings to recover profits or compensation for loss resulting from the contravention of a civil penalty provision) could be extended pursuant to the general power to extend time in section 1322(4)(d) of the Corporations Law. The court held that section 1322(4)(d) does not apply to extend the limitation period specified in section 1317HD(2), and accordingly the appeal was dismissed. **(b) Facts**The respondents, Giorgio Gjergja and Gary Tescher, were directors of the appellant, Newtronics Pty Ltd (Newtronics).  Newtronics carried on the business of designing, manufacturing and selling electronic controllers.  In late 1994, Newtronics supplied a customer, Seeley International Pty Ltd (Seeley), electronic components. In 1998, Seeley successfully sued Newtronics for negligence in relation to the design and construction of electronic components, which, when incorporated into Seeley's air-conditioners, caused a fire that burnt down three houses.  In February 2002, shortly after Seeley was awarded damages of $8.9 million plus interest, Newtronics was wound up and a liquidator was appointed. In December 2005, Newtronics issued a proceeding in the Victorian Supreme Court against the respondents, alleging that the respondents, as directors, knew or ought to have known that the components it supplied to Seeley were defective or might fail, yet (in contravention of section 232(4) of the Corporations Law, and their general law duty as directors) they took no steps to rectify the position or to withdraw the defective product.  Newtronics alleged that, as a result of the respondents' breach of statutory, common law and equitable duties, it suffered the loss incurred by the judgment for damages.  Newtronics alleged that as the respondents had contravened section 232(4) (a civil penalty provision under Part 9.4B of the Corporations Law), they were liable to pay compensation for the loss under section 1317HD(1) of the Corporations Law.  The former directors contended that the statutory cause of action was barred because the six year time limit imposed by section 1317HD(2) of the Corporations Law for beginning proceedings under section 1317HD(1) had expired.  Newtronics sought, pursuant to section 1322(4)(d), an extension nunc pro tunc of the limitation period prescribed under section 1317HD(2).  The trial judge dismissed Newtronics' application for an extension of time. **(c) Decision** Relevantly, section 1317HD(1) of the Corporations Law, in force from 1 February 1993 to 1 March 2000, provided that where a person contravenes a civil penalty provision in relation to a corporation, the corporation may recover from that person, as a debt due to the corporation, the loss or damage that the corporation has suffered as a result of an act or omission constituting the contravention.  Section 1317HD provided that proceedings "may only be begun within 6 years after the contravention".  Section 1322(4)(d) permitted the court to make an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under the Corporations Law or in relation to a corporation. The Court of Appeal of the Supreme Court of Victoria (per Dodds-Streeton JA, with Maxwell ACJ and Osborn AJA concurring) considered these provisions in the light of authorities raised by the appellant. Adopting the reasoning of the High Court in David Grant & Co Pty Ltd v Westpac Banking Corporation (1995) 184 CLR 265, the court held that the general rule is that the express words in a legislative provision should be given their ordinary import; in the words of the court, "the emphatic prescription of a limitation period in the very provision which confers a right of action will ordinarily establish the jurisdictional character of the unmodified time limit, compliance with which is a pre-condition of the Court's power."  Drawing on Gummow J's analysis in David Grant, the court reasoned that there are a number of factors to consider in determining whether a strict time limit in one provision is to be displaced by a broader remedial provision.  Some of these factors include "the character, goals and intended operation of the statutory scheme, as reflected in the Explanatory Memorandum, together with the interaction of its discrete provisions."  This requires an analysis about whether a provision with a time limit can work effectively when another provision is interpreted as enabling an extension of time, and that this analysis is to be considered in the light of "significant policy goals" associated with the unmodified time limit.  The court was prepared to accept that, as the appellant argued, there could be "a capricious or irrational outcome" that can operate to "displace the view that compliance with the unmodified time limit specified in a section is an integer of a cause of action it confers". In summary, the court took the view that while  "emphatic language (such as the phrase 'may only') is not . decisive in this context, its inclusion in a limitation period attached to the conferral of a right of action is a potent indication that the general remedial power in section 1322(4)(d) may be unavailable to supplement the prescribed period.  A compelling demonstration that the exclusion of section 1322(4)(d) would defeat statutory goals, or subvert the intended operation of the provision within the sub-regime, would nevertheless displace that conclusion." The court considered that the language "may only" in section 1317HD(2) "appears to have been used deliberately" by the legislature, when considered in the context of both the language used in analogous provisions in Part 9.4B and the explanation about the proposed section 1317HD given in the Explanatory Memorandum to the Bill which introduced Part 9.4B into the Corporations Law.  The differences in relation to time periods in the various civil and criminal proceedings under Part 9.4B arise "partly from the inherent differences in the nature of the proceedings".  In addition, the appellant was nevertheless unable to point to any case in which a temporal limitation provision using the words "may only", or similarly emphatic language, was held to be subject to section 1322(4)(d). The court considered the "incidental question" as to whether the absence of a provision for extending the limitation period specified in section 1317HD(2), either within section 1317HD itself or elsewhere within the Part 9.4B, compels the conclusion that section 1322(4)(d) applies.  In the opinion of the court, based on a review of authorities, the absence of an internal provision for extension of time or amelioration, while significant, does not outweigh the considerations which support the exclusion of section 1322(4)(d). In response to Newtronics' claim that the exclusion of the application of section 1322(4)(d) to section 1317HD is inflexible, the court held that the exclusion is "not intolerably harsh".  The court stated that limitation periods which have been held to admit no possibility of extension "are not unknown".  Further, section 1317HD did not prevent the institution of other relevant proceedings, such as those under the general law. Finally, the court held that the omission of the word "only" in section 1317K, which is the current provision analogous to section 1317HD, does not suggest that the word "only" previously had no effect but rather demonstrates a "deliberate shift of policy" on the part of the legislature. As a result, the court held that section 1322(4)(d) does not apply to extend the limitation period specified in section 1317HD(2), and dismissed the appeal.etailed Contents**5.4 Application by liquidator to amend proceedings outside the three year statutory limit and to include further claims** (By Ellie Aitken, Clayton Utz) Jones v Rustic Haven SDN BHD, [2008] WASC 122, Supreme Court of Western Australia, Newnes J, 27 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/june/2008wasc122.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/june/2008wasc122.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 involved an application for leave to amend a statement of claim outside the three year time period permitted under section 588FF of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") and an application to introduce claims under section 588W of the Act.  It was held that an amendment to the statement of claim may be made outside the three year time period required under section 588FF where the rules of the court allow for such an amendment. In this case, order 21 rule 5(5) of the [Rules of the Supreme Court 1971 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=16410" \t "Default) only allows for an amendment where the new cause of action arises out the same facts (or substantially the same facts) as the existing claim. In this case, it was conceded by counsel for the plaintiff that the claims sought to be added by the proposed amendment did not arise out of the same or substantially the same facts as the existing claim. As such, the application was dismissed. In relation to the application to introduce claims under section 588W, it was argued by the defendant that the plaintiff had not pleaded all the facts relied upon for the allegation that relevant companies were in fact insolvent at the time when the alleged debts were incurred. Newnes J adjourned the application to allow the plaintiff to include these matters. **(b) Facts**  **(i) The application under section 588FF** The plaintiff was appointed liquidator of the Ravenswood Resort Pty Ltd ("Ravenswood") on 23 June 2003 following the application to wind up Ravenswood on 4 April 2003.  The liquidator alleged that on 5 June 2003 the then receiver and manager of Ravenswood caused or permitted the transfer of land to the defendant at a substantial discount to its market value. It was pleaded that this was an uncommercial transaction within the meaning of section 588FB of the Act. The plaintiff was seeking a declaration that the agreements concerned were void and, in the alternative to an order that the defendant transfer the land back to Ravenswood, an order to pay compensation to Ravenswood under section 588FF(1)(d) of the Act. The matter involved the plaintiff seeking to make substantial amendments to the statement of claim relating to transactions alleged to have occurred in late 2001 and early 2002. The amendment was sought on 19 June 2007 which was outside the three year period within which claims may be made under section 588FF of the Act.  The plaintiff submitted that, where an application under section 588FF had been instituted within the necessary time period, the three year period does not apply to new claims which are simply added to the existing claim against the defendant in the proceedings. The plaintiff cited Gordon v Tolcher [2006] HCA 62 and Davies v Chicago Boot Co Pty Ltd (No 2) [2007] SASC 12 as authority for that proposition. The defendant contended that an amendment outside the three year period would have been permissible only if it fell within order 21 rule 5 of the Rules of the Supreme Court 1971 (WA). Order 21 rule 5(5) allows the Supreme Court of Western Australia to grant an amendment to a cause of action after any relevant period of limitation only where the new cause of action arises out of the same facts (or substantially the same facts) as a cause of action arising out of the existing claim. **(ii) The application under section 588W** The plaintiff, as liquidator, also sought to introduce insolvent trading claims under section 588W of the Act. The plaintiff pleaded that the defendant was the holding company of Ravenswood. It was alleged that Ravenswood incurred a number of debts from May 2002 and that at this time the defendant knew that Ravenswood was insolvent.  There was no dispute that these claims were brought within the six year period allowed under section 588W. However, the defendant objected to the claim on the basis that the pleadings were inadequate because the plaintiff did not plead the facts relied upon to support the allegation that Ravenswood was in fact insolvent. The plaintiff argued this could be cured by a request for particulars. **(c) Decision**  **(i) The application under section 588FF** Newnes J did not accept the plaintiff's contention that, once an application has been commenced under section 588FF, a new claim can be made against an existing defendant at any time by amendment to the proceedings. A proceeding for relief under section 588FF(1) may be amended outside the three year period to include additional claims only where the amendment is permitted by the applicable rules of the court: Rodgers v Commissioner of Taxation (1998) 88 FCR 61, Star v National Australia Bank Ltd (1999) 150 FLR 119, Rambaldi v Dallbrook Pty Ltd [2003] VSC 163, Tolcher v Capital Finance Australia Ltd [2005] FCA 108, Davies v Chicago Boot Co Pty Ltd (No 2) [2007] SASC 12, Gordon v Tolcher [2006] HCA 62. The relevant rule for the Supreme Court of Western Australia is order 21 rule 5 Supreme Court of Western Australia. In this case, it was conceded by counsel for the plaintiff that the new claim sought as an amendment to the existing proceedings did not arise out of the same or substantially the same facts as the existing claim. As the power to amend is not unlimited, but in fact constrained by O 21 r 5(5), the rules of the court did not allow for the amendment of the statement of claim. The application in so far as it related to section 588FF was therefore dismissed. **(ii) The application under section 588W** The application in relation to section 588W was adjourned to allow the plaintiff to amend the pleadings to include the relevant matters in relation to the insolvency of Ravenswood and RRCM.etailed Contents**5.5 ASIC's power to "begin and carry on" proceedings** (By Marnie O'Brien, Mallesons Stephen Jaques) Carey v Australian Securities and Investments Commission [2008] FCA 963, Federal Court of Australia, Finkelstein J, 26 June 2008. The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca963.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca963.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** In this case the Federal Court held that ASIC was not authorised under section 50 of the [Australian Securities and Investments Commission Act 2001 (Cth](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default)) ("ASIC Act") to "begin and carry on" an existing proceeding.   **(b) Facts** In mid 2007, separate proceedings were commenced by the liquidators of two companies in the Westpoint Group, namely, Ann Street Mezzanine Pty Ltd (in liq) and York Street Mezzanine Pty Ltd (in liq). A number of months after proceedings commenced, ASIC relied on section 50 of the ASIC Act and caused each of the actions to be carried on in the name of the Plaintiff liquidators. Subsequently, the liquidators' solicitors were replaced by the Australian Government Solicitor who assumed the conduct of each action. One of the Defendants, Mr Carey, argued that ASIC was not permitted to do this because it was seeking to take over and carry on actions which it did not begin.  **(c) Main issue** The main issue was whether ASIC's power under section 50 of the ASIC Act extended to permit ASIC to "begin and carry on" proceedings that have already commenced. This issue was determined under Order 29 of the [Federal Court Rules 1979 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "Default).**(d) Decision**His Honour Finkelstein J held that ASIC did not have the statutory power under section 50 of the ASIC Act to carry on a proceeding which it did not commence.  In reaching his decision, his Honour considered the context, purpose and legislative history of section 50 of the ASIC Act. The heading of section 50 of the ASIC Act reads that "ASIC may cause civil proceeding to be begun". ASIC contended that the heading of the provision was irrelevant for the purposes of statutory interpretation.  Finkelstein J disagreed and held that in the construction of a provision, recourse to the heading is permitted to assist in its interpretation.  Section 15AB(1)(b)(i) permits reference to "extrinsic material", which by section 13(3) includes the heading of the relevant provision. With this in mind, his Honour stated that through the use of the word "begin", the legislature intended that ASIC could commence proceedings, but not take over proceedings already commenced.  ASIC has been granted similar powers to bring and carry on proceedings under section 1330 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Finkelstein J considered whether the wording of this provision could give any guidance as to the legislature's intention regarding the scope of ASIC powers under section 50 of the ASIC Act. His Honour held that, under the ASIC Act, the legislature intended that ASIC would have the statutory right to begin a proceeding. However, there was no intention for the provision to extend to permit ASIC to carry on a proceeding that had already commenced.  The ASIC Act contains "powers appendent" provisions under sections 11(4) and 12A(6). ASIC contended that its power to intervene in and carry on already commenced proceedings was "necessary and incidental to its express power to bring proceedings". In response to this submission, Finkelstein J maintained his position adopted in Australian Crime Commission v AA Pty Ltd (2006) 149 FCR 540 at 675.  His Honour stated that, in interpreting the scope of section 50 of the ASIC Act, it is necessary to try to ascertain the legislature's intention and whether the powers appendent provisions extend ASIC's power to intervene in proceedings already on foot.His Honour drew on the legislative history and the explanatory memorandum of the ASIC Act to interpret the scope of the power to bring and carry on proceedings.  It is noted that the main amendment to the power has been to change the language from "brought" to "begun and carried on".  In his Honour's view, despite the amendment to the wording, it was clearly envisaged by the legislature that ASIC would be granted the power to commence proceedings only. The purpose of section 50 of the ASIC Act was identified by the Federal Court in Australian Securities Commission v Deloitte Touche Tohmatsu (1996) 70 FCR 93.  In that case, the Court held that the provision aimed to provide remedial support to persons aggrieved, by commencing proceedings in circumstances where an action would not otherwise begin.  In line with this view, the construction of this power should be done in a manner which upholds this public interest purpose. The Federal Court held in that case that because of the remedial nature of section 50, the power should be construed broadly.  Finkelstein J rejected this submission. His Honour held that a narrow construction of section 50 does not inhibit the ability of ASIC to uphold the purpose of the provision to facilitate proceedings to seek remedial outcomes. In the view of Finkelstein J, there was no clear evidence that the legislature intended that ASIC would have the power to take over an existing proceeding. From a practical standpoint, his Honour considered it would be contrary to the public interest element of the provision if ASIC was granted the power to intervene and take over without any consent from the party which had commenced proceedings.  It appears unlikely that the legislative intention would have been to permit ASIC to carry on proceedings where such proceedings had been brought by privately funded parties.etailed Contents**5.6 Legal professional privilege will not apply to communications to further any abuse or misuse of power or a deliberate breach of legal duty**(By Kathryn Finlayson, Minter Ellison) In the matter of ACN 005 408 462 Pty Ltd (formerly TEAC Australia Pty Ltd) [2008] FCA 964, Federal Court of Australia, Finkelstein J, 26 June 2008 The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca964.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca964.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** Justice Finkelstein found there was a strong prima facie case that Mr Muir had deliberately organised the affairs of his company to ensure that its principal creditor would not recover its debt and had deliberately breached his duties as a director. His Honour held that, in light of this ostensibly illegal conduct, the public interest that supports legal professional privilege gave way and required that communications between Mr Muir, the third party beneficiaries of his conduct and three firms of solicitors be produced for inspection.   Communications between one firm of solicitors and one third party beneficiary remained protected on the basis that there was no evidence to suggest that the third party had any involvement in Mr Muir's scheme.  **(b) Facts** The company formerly known as TEAC Australia Pty Ltd (TEAC) was subject to a Deed of Company Arrangement.  TEAC had been an importer and distributor of electrical equipment manufactured by the TEAC Corporation of Japan.  Its shareholders were TEAC Corporation (50%) and Gavin Muir Pty Ltd (GMPL) (50%). GMPL held its interest as trustee of the Muir family trust.  Mr Muir controlled GMPL and was the managing director of TEAC. In March 2005, TEAC was placed into administration. At that time GMPL was indebted to TEAC in the amount of approximately $3,200,000 under a loan agreement dated 1 April 1998. On 15 July 2005, the administrators wrote to GMPL demanding repayment of the debt.  GMPL did not comply with the demand.   On 19 September 2005, the administrators served a statutory demand on GMPL. GMPL made an application to have the demand set aside. The proceeding was dismissed by consent and the demand was left unsatisfied. During this period, GMPL began to dispose of the trust assets to third parties with the assistance of three separate firms of solicitors. The deed administrators conducted an examination into the company's affairs pursuant to sections 596A and 596B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  On 29 August 2007, the deed administrators obtained orders for the production of documents from the three firms of solicitors.   When the deed administrators sought to inspect the documents, the third parties to whom proceeds from the sale of trust assets had been distributed objected to the inspection of many of the documents on the grounds of legal professional privilege. In response, the deed administrators alleged that, as the solicitors were used to implement a scheme to defraud TEAC's creditors and the documents over which privilege was claimed came into existence in that process, the documents were not privileged and should be made available for inspection. **(c) Decision** Justice Finkelstein noted that the fraud exception includes communications to further any abuse or misuse of power or a deliberate breach of legal duty. His Honour found that there was a strong prima facie case based on admissible evidence that Mr Muir had deliberately organised the affairs of GMPL to ensure that its principal creditor, TEAC, would not recover its debt in circumstances where GMPL was entitled to be indemnified against that liability from the trust assets as it had a charge over those assets. His Honour further found that Mr Muir deliberately breached his duties as a director by allowing GMPL to relinquish such its charge. In light of Mr Muir's ostensibly illegal conduct, his Honour held that the public interest that supported legal professional privilege must give way in respect of the relevant documents.   His Honour specifically identified the categories of documents which were required to be produced for inspection and excluded communications between one firm of solicitors and one third party on the basis that there was no evidence to suggest that that third party had any involvement in Mr Muir's scheme.etailed Contents**5.7 Appealing a liquidator's decision to reject a proof of debt**(By Mark Cessario and Emily Bell, Corrs Chambers Westgarth) Johnston v McGrath [2008] NSWSC 639, New South Wales Supreme Court, Barrett J, 25 June 2008  The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc639.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc639.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** The plaintiff, Mr Johnston, had purchased shares in HIH Insurance Ltd ("HIH"). After HIH had gone into liquidation, Mr Johnston lodged a proof of debt with the liquidators of HIH, alleging misleading or deceptive conduct on the part of HIH as the basis of his claim for the price of the shares he purchased (approximately $10,400). That claim was rejected by the liquidators, and Mr Johnston challenged the liquidator's decision in the Supreme Court and lost ("the 2004 proceedings").  The present proceedings related to proofs of debt lodged by Mr Johnston against six wholly owned subsidiaries of HIH ("the HIH subsidiaries") for $10,400 on the basis of their involvement with the same misleading or deceptive conduct by HIH. Those claims were rejected by the liquidators, and Mr Johnston initiated proceedings to challenge that decision under section 1312 of the Corporations Act. Currently before Barrett J was an application by the plaintiff to file an amended statement of claim, and an application by the defendants to dismiss the proceedings. The defendants submitted that the proceedings should be dismissed on two grounds. First, that the plaintiff's proposed statement of claim was materially different from the proof of debt which he lodged, such that it was not an "appeal" against the liquidator's decision. Second, that the proceedings were an abuse of process because of the prior adjudication in the 2004 proceedings.  In relation to the first ground, Barrett J held that the differences between the plaintiff's proof of debt and proposed statement of claim did not justify dismissal of the proceedings.  In relation to the second ground, Barrett J held that for the plaintiff to successfully establish his claim against the HIH subsidiaries would involve re-litigating an issue determined in the 2004 proceedings. To re-litigate this issue would be manifestly unfair to the liquidators, and would have the potential to undermine the integrity of the 2004 proceedings, thereby threatening the integrity of the administration of justice.  **(b) Facts**    Mr Johnston's substantive claims were made under section 1312 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). He sought to appeal against the decision of the defendants, Mr McGrath and Mr Honey, as liquidators of the HIH subsidiaries to reject certain proofs of debt.  Mr Johnston had purchased ordinary shares in HIH and then in the winding up of each of the HIH subsidiaries sought to prove a claim for damages in the amount of $10,400 for breach of one or more of section 52 of the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) ("TPA"), section 42 of the Fair Trading Act 1987 ("FTA") and section 995 of the Corporations Law (as was in force at the relevant time). Essentially, these claims were based on the contention that the HIH subsidiaries were complicit in the misleading or deceptive conduct of HIH, which was causative of Mr Johnston's decision to buy HIH stock.  The present proceedings concerned an application by the plaintiff for leave to file an amended statement of claim. That application was opposed by the defendant, who also applied to have the proceedings dismissed. The applications were heard together. The defendants' application to have the proceedings dismissed relied, first, on the contention that the claims within the amended statement of claim were materially different from those advanced in the plaintiff's proofs of debt and, second, that the plaintiff's pursuit of the claims represented an abuse of process, on the basis of a prior adjudication by Gzell J in the 2004 proceedings.  **(c) Decision**  **(i) Different claims** The first ground on which the liquidator contended that the proceedings should be dismissed was that the claims sought to be advanced by the plaintiff's proposed amended statement of claim differed materially from those in the proofs of debt.  Barrett J noted that, as an application under section 1312, the plaintiff's statement of claim was not a means by which a case was pleaded to support a claim for an award in damages. Rather, "it is a means by which the plaintiff seeks to make a case in support of the acceptance of his proof of debt, so that the court, acting under section 1312, may direct that the claim in question be admitted to proof".  Barrett J acknowledged the differences between the claims set out in the proposed amended statement of claim and those contained in the proof of debt but rejected the defendants' submission that the plaintiff's departures from the basis on which the proofs of debt were submitted meant that the case advanced by the proposed amended statement of claim was not, in reality, an appeal. Barrett J held that the plaintiff's ultimate contention - that he should be entitled to participate as a creditor for the sum of $10,400 in the winding up of each company - remained the same.  The fact the plaintiff had changed the basis of his alleged right to participate as a creditor was of no consequence. An "appeal" from a liquidator's decision to reject a proof of debt was, in reality, "originating proceedings which the court hears de novo" (Tanning Research Laboratories Inc v O'Brien [1990] 169 CLR 332 at 341). Barrett J held that a plaintiff must clearly identify to the court an alleged debt that corresponds to that originally sought to be conveyed by proof of debt. However, a plaintiff is not strictly confined to each and every allegation or proposition made in the proof of debt, and "some change in the explanation of the way in which it is said to be a true liability of the company enforceable against it is permitted". In the present proceedings, the plaintiff had advanced a claim that each of the HIH subsidiaries was complicit in the making of false or misleading statements by HIH. Whilst there were some differences between that claim and the proof of debt which the plaintiff had lodged, "the basic fact of identity of the claim pursued by the proposed amended statement of claim with the claim advanced by way of proof of debt remains". On this basis, his Honour held that the first ground on which the defendants relied, did not warrant termination of the proceedings. **(ii) Abuse of process - Prior adjudication** The second ground on which the defendants contended that the proceedings should be terminated was that of prior adjudication by way of the 2004 proceedings before Gzell J. The parties to those proceedings were Mr Johnston, the liquidators of HIH, and HIH. Mr Johnston had lodged proofs of debt with the liquidators in respect of his purchase of 40,000 shares, relying on breach of section 52 of the TPA and section 995 of the Corporations Law. The liquidators rejected that proof and Mr Johnston appealed to the court.  In the 2004 proceedings, it was accepted that HIH had engaged in misleading or deceptive conduct within the meaning of section 52. The issue was whether HIH's conduct was a materially contributing cause of the plaintiff's decision to purchase the shares, such that the plaintiff was entitled to damages under section 82. Gzell J held that it was not, and the plaintiff's action failed. Leave to appeal the decision of Gzell J was refused, and a subsequent application for special leave to appeal to the High Court was dismissed.  Barrett J outlined the authorities on the issue of prior adjudication before going on to apply those principles to the facts at hand. Barrett J noted that, as the plaintiff's cause of action in 2004 was an appeal under section 1312 for rejection of a proof of debt lodged against HIH, it was not open to him in those proceedings to include the question of whether the HIH subsidiaries had been complicit in the alleged misleading or deceptive conduct by HIH. The authorities relating to unreasonable failure by a plaintiff to join a defendant to an earlier action were therefore not applicable. In relation to the plaintiff's current claim against the HIH subsidiaries, Barrett J held that with regard to the plaintiff's contention that the HIH subsidiaries were involved in HIH's statutory breach, the plaintiff would be seeking to uphold the findings of Gzell J in the 2004 proceedings that HIH had engaged in misleading or deceptive conduct. Thus, there was no potential for inconsistent judgments on the issue of breach by HIH.  However, in his claim against the HIH subsidiaries the plaintiff would also have to prove his reliance on HIH's conduct (as distinct from his reliance on the HIH subsidiaries conduct). This was an issue which was fully litigated in the 2004 proceedings and that the plaintiff had then failed to establish. Barrett J held that the plaintiff could not be allowed to attempt again to establish the issue of causation and reliance, as such an opportunity would be manifestly unfair to the liquidators of the HIH subsidiaries, would have the potential to undermine the integrity of Gzell J's 2004 judgment and would threaten the integrity of the administration of justice. On this basis, Barrett J permanently stayed the proceedings.etailed Contents**5.8 Should a court approve a members' scheme of arrangement where new information is discovered after the members have voted?**(By Justin Fox and Olivia Draudins, Corrs Chambers Westgarth)  In the matter of Uranium King Limited [2008] FCA 975, Federal Court of Australia, Siopis J, 24 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca975.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca975.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 involved an application by Uranium King Limited (UKL) for final orders under section 411 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) approving a scheme of arrangement between UKL and its members (the Scheme). Under the Scheme, UKL would become a wholly owned subsidiary of Monaro Mining NL (Monaro) and UKL shareholders would acquire shares in Monaro. The Scheme had already received approval from the requisite number of UKL members at the time this application was made. On the morning of the application, UKL was advised that aspects of an earlier transaction undertaken by UKL may have breached US securities laws.  UKL submitted that the Court should approve the scheme, notwithstanding that new information. Siopis J adjourned UKL's application for court approval of the Scheme and ordered UKL to write to members disclosing this new information.  As this information potentially affected the risk assessment that members would make in determining whether to vote for the Scheme, members should be given the opportunity to formally oppose court approval of the Scheme should they wish to do so. **(b) Facts** The members of UKL approved the Scheme by the necessary majority at a meeting held for those purposes on 12 June 2008.  On 16 June 2008, UKL applied to the court for final approval of the Scheme under section 411. On the morning of the application, UKL was informed that the US Securities and Exchange Commission (SEC) had advised Monaro's lawyers that UKL may have breached the Securities Exchange Act of 1934 (the Exchange Act), by issuing shares without being registered as a foreign private issuer.  The alleged breach arose in connection with an earlier transaction in which UKL issued shares to Mineral Energy and Technology Company (METCO) in exchange for exploration tenements in the United States owned by METCO. UKL submitted that this information posed no impediment to the Court approving the Scheme.  Nevertheless, Siopis J adjourned the hearing to give UKL an opportunity to bring further evidence about the ramifications of the new information on the Scheme. At the adjourned hearing, UKL relied on the affidavit of Mr John E Schmeltzer, a partner in a New York law firm, who deposed that, while SEC had the power to impose substantial penalties for a wilful violation of the Exchange Act, it was unlikely that UKL would be found to have wilfully breached the Exchange Act in the circumstances.  Mr Schmeltzer also expressed the view that any penalty imposed on UKL would not be significant. On that basis, UKL submitted that the Court should approve the Scheme. **(c) Decision** Siopis J was of the view that the possible violation of the Exchange Act was not such a trivial consequence to the implementation and operation of the Scheme that it should be approved by the court without this information first being disclosed to UKL members.   Siopis J therefore adjourned the hearing and ordered UKL to write to its members informing them of the new information and noting that they had rights to appear at the adjourned hearing, should any member wish to oppose the court making an order to approve the Scheme. Siopis J thought that the view expressed by SEC that UKL may have breached the Exchange Act could affect the risk assessment that UKL members may make of the Scheme in a number of ways. First, Siopis J thought it relevant that the scheme booklet made reference to a possible listing by Monaro of American Depository Receipts once the merger had been completed.  The scheme booklet had suggested that funding raised from the listing would be vital in advancing a project based on the tenements formerly owned by METCO.  Against this background, Siopis J was of the view that the new information was relevant, as the SEC had some control over whether the proposed listing occurred.  The fact that SEC had formed a view that UKL had not complied with securities legislation in the past may affect the attitude of the SEC towards the listing application.  Siopis J thought that UKL members should be advised of this information, considering that it was relevant to whether a key advantage of the Scheme would be achievable. Second, Siopis J found this new information was relevant to litigation that had been commenced in New Mexico by a former minority shareholder in METCO, challenging the transfer of exploration licences to UKL.  The relief sought was detailed in the Scheme booklet and included rescission of the 2006 transaction between UKL and METCO on the grounds of failure to comply with the regulatory requirements. Finally, Siopis J held there was a risk of a penalty being imposed on UKL due to the possible breach of the Exchange Act.  This could result in a diminution in the value of the assets of UKL and the value of the merged entity. Siopis J ordered UKL to write to all its members and disclose the new information.  UKL's application for court approval of the Scheme was adjourned until 24 July 2008 to allow this to occur.   Siopis J held that the letter should inform members that they had the option to appear at the hearing on 24 July 2008 if they opposed the court making a final order approving the Scheme.  Members should be told in order to do this, they should write to UKL advising of their intention to oppose and stating the grounds of opposition. etailed Contents**5.9 Access to share registers at a reasonable cost** (By Kylie Shedden, Clayton Utz) Direct Share Purchasing Corporation Pty Ltd v AXA Asia Pacific Holdings Ltd [2008] FCA 935, Federal Court of Australia, Finkelstein J, 19 June 2008 The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca935.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca935.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** AXA Asia Pacific Holdings Limited, the defendant, is a publicly listed company whose register of members is kept and maintained by Computershare Investor Services Pty Ltd (Computershare). In early 2008, the plaintiff requested a copy of the register on CD Rom. The defendant provided a copy of the register for a fee of $17,195.39. The primary issue before Finkelstein J was whether the fee charged by the defendant was reasonable, having regard to the provisions contained in the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) and the [Corporations Regulations 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) (the Regulations) that regulate the maintenance of and access to registers. Finkelstein J expressed concern about the state of the current regulation of the quantum of the fee that can be charged for a copy of a company's register, particularly in the use of the concept of "marginal cost". Due to the absence of market price and production cost evidence, his Honour could only rely upon the evidence of an economist and an information technology expert in determining  a reasonable amount for a copy of a company register. Finkelstein J concluded that a reasonable fee to charge for the CD ROM supplied to the plaintiff was $250. **(b) Facts** It is well established that when copies of a company's register of members are requested, they must be provided in exchange for a fee. The maintenance of and access to registers is found in Chapter 2 of the Corporations Act 2001 (Cth). Finkelstein J referred to the Second Reading Speech of the First Corporate Law Simplification Bill 1994 (Cth) in the House of Representatives. There, the Attorney-General described these provisions as being intended to facilitate "rapid and easy" access by the public to a company's register "at reasonable cost". The ability of a company to maintain all registers in digital form and provide a copy on CD ROM is also well established.  Finkelstein J noted section 1306(4) which provides that, where there is a duty to provide copies and a company's records are stored in an electronic form, the duty is "to be construed as a duty to . provide a document containing a clear reproduction in writing of the whole or part of them." Section 173(3) provides that "if the register is kept on a computer and the person asks for the data on floppy disk, the company . must give the data to the person on floppy disk. The data must be readable but . need not be formatted for the person's preferred operating system."   Section 173(3) also provides that the register must be provided if a person requests it and "pays any fee (up to the prescribed amount) required by the company."  The [Corporations Regulations 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "Default) (the Regulations) specify that the fee charged for a register kept on a computer can be "a reasonable amount that does not exceed the marginal cost to the company of providing a copy": regulation 1.1.01 and schedule 4, item 3(b).   In January 2008, the plaintiff wrote to AXA requesting a copy of its register and enclosing a cheque for $20,000.  The cheque was intended to exceed the maximum prescribed amount under the Act and the plaintiff requested a refund of the difference.  The plaintiff withdrew its request and made another request nine days later for the register to be provided "on floppy disk (or CD ROM), in Microsoft Excel format, comma delineated."  AXA gave the plaintiff a CD ROM containing a copy of the register in PDF form. It deducted a fee of $17,195.39 from the $20,000 already received, and refunded the difference to the plaintiff.  The plaintiff then apparently applied for an order that the $17,195.39 was not "reasonable" within the meaning of the regulation. **(c) Decision** **(i) Calculating the marginal cost to the company** The fee charged pursuant to regulation 1.1.01 must satisfy two conditions. It must:* be a reasonable amount; and
* not exceed the marginal cost to the company of providing a copy of the register.

His Honour first dealt with the second condition of regulation 1.1.01 and was assisted by Dr Williams, an economist called by AXA.   Dr Williams believed that the term "marginal cost" was a technical term of economics, and described it to mean the "cost of producing or supplying one more unit of output, whether the output is a good or service." Although marginal cost is easily defined, its application is difficult. The concept of cost alone is difficult to apply as it can be split into two categories: fixed costs or variable costs.  In order to determine marginal cost, it would be necessary to decide which costs are fixed, which costs are variable and how joint or common costs should be accounted for when multiple products are supplied.   The evidence in this case indicated that the marginal cost to Computershare of providing a copy of the register was not great as the work involved "keying instructions into a computer, waiting for the report to run, downloading the information onto a CD ROM and sending the CD Rom to AXA".  His Honour held that the variable costs incurred by Computershare would be the cost of an administrative staff member operating the computer, the cost of the CD ROM and cost of delivery. Computershare's State Manager for Victoria gave evidence that the cost was likely to be no more than $100-150. In comparison, the evidence suggested that the marginal cost to AXA was much higher and included the cost of acquiring the copy of the register on the CD ROM plus the cost of making the arrangements to obtain the copy and send it to the plaintiff. The cost of the CD ROM was regulated by theservices agreement between AXA and Computershare pursuant to which Computershare provides the share register and other services to AXA.  That agreement entitled Computershare to charge $17,195.39 for supplying the CD ROM.   In summary, the marginal cost to Computershare was less than $100 and in comparison, the marginal cost to AXA was in excess of $17,195.39 which included not only the price paid to Computershare, but also smaller costs including sending the CD to the plaintiff. This highlighted the problem of the practical application of marginal cost to the facts before the court. **(ii) Reasonable amount** In assessing whether the fee charged by AXA was a reasonable amount, Finkelstein J relied upon evidence of Mr Farrelly, an information technology expert called by the plaintiff who had considerable experience in managing document databases of similar size to AXA's register of members.  Other methods of determining whether the amount was reasonable, such as the market price for CD ROMs, cost of production plus a reasonable return on capital and the price paid by a supplier, were unavailable to his Honour as there was no evidence in the facts to support such methods. Mr Farrelly calculated that:* a typical fee charged to supply a CD Rom copy of data is $50 - $300;
* it would cost Computershare approximately $480 (if work was done by an employee) to produce a copy of the CD Rom; and
* if the work was undertaken by an external consultant, the consultant's fee would be between $1500 and $2200, regardless of how long the task took.

Finkelstein J held that "a reasonable (if somewhat generous) fee to charge for the CD Rom supplied to the plaintiff [was] $250." His Honour accepted that this amount involved judicial guesswork and had regard to the fact that the CD Rom was in PDF format and difficult to use.  AXA was ordered to refund to the plaintiff the sum of $16,945.39 and to pay the costs of the action.  **(iii) Form of the data** The plaintiff had requested that the data be provided in a form which was capable of being relatively easy to use and manipulate. AXA had supplied the data in PDF format, which was not as easy to use.  In obiter, Finkelstein J said that the legislation had permitted AXA to supply the data in this form. His Honour recognised that there are many circumstances in which a company may not want a person to have easy use of the register.  However, Finkelstein J was of the view that it is unsatisfactory and inconsistent with the purpose of having a register that the legislation allows a company to provide the register in a difficult to use format.etailed Contents**5.10 Section 237 of the Corporations Act 2001 (allowing derivative actions) does not apply to companies in liquidation** (By Justin Tilley, DLA Phillips Fox) Pearl Coast Divers Pty Ltd v Cossack Pearls Pty Ltd [2008] FCA 927, Federal Court of Australia, Gilmour J, 19 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca927.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/june/2008fca927.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** Part 2F.1A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") does not apply to a company in liquidation: Chahwan v Euphoric Pty Ltd [2008] NSWCA 52. However, the Court does retain an inherent power to permit a derivative action if the plaintiff demonstrates an arguable case for the relief sought in the litigation (which has been interpreted to mean that the claim has a solid foundation and would give rise to a serious dispute).  **(b) Facts** Pearl Coast Divers Pty Ltd (in Liq) ("Pearl") and Liquid Investments (WA) Pty Ltd ("Liquid") (the Plaintiffs) each seek relief from alleged misleading and deceptive conduct under the [Trade Practices Act 1974 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) ("TPA") and [Fair Trading Act 1987 (WA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15168" \t "Default) ("FTA") ("Alleged Statutory Breaches"). In addition Pearl also seeks relief based on breach of contract and wrongful repudiation of contract.  This case involved an interlocutory application for Mr Colin Andrew Sharp ("Mr Sharp"), a shareholder and director of Pearl, to be substituted in place of Pearl and Liquid as the first and second plaintiff respectively and that Mr Sharp be allowed to bring proceedings in relation to the Alleged Statutory Breaches. In relation to Pearl, the application for substitution was based on a statutory derivative action under the Act as well as the Court's inherent power. In relation to Liquid, the application for substitution was based on Order 13 r2(6) of the Federal Court Rules.   **(c) Decision** **Substitution of Pearl****(i) Deed of Assignment** Pearl, in liquidation, had no realised or realisable assets and no funds to pursue the claims in relation to the alleged breaches. For this reason Pearl, through its liquidators, entered into a Deed of Assignment dated 9 June 2005 to establish the right of Mr Sharp to be substituted in place of Pearl.  The deed was however ineffective in assigning the causes of action arising under the Alleged Statutory Breaches: Salfinger v Niugini Mining (Australia) Pty Ltd (No. 3) [2007] FCA 1532.  **(ii) Section 237 Corporations Act** Pearl, recognising that the Deed of Assignment was not capable of assigning the Alleged Statutory Breaches, sought leave for Mr Sharp to bring  proceedings relating to the Alleged Statutory Breaches on behalf of Pearl as a derivative action pursuant to section 237 of Part 2F.1A of the Act. This Part allows eligible applicants to bring legal proceedings on behalf of a company where the company is unwilling or unable to do so itself.  Gilmour J acknowledged that there have been differences in judicial opinion as to whether Part 2F.1A has application to companies in liquidation.  His Honour confirmed as correct the New South Wales Court of Appeal decision in Chahwan v Euphoric Pty Ltd [2008] NSWCA 52 where Tobias JA concluded that Part 2F.1A of the Act does not apply to a company in liquidation.  **(iii) Court's inherent powers** In the alternative, the plaintiffs submitted that the Court should determine the application through the inherent power of the Court.  His Honour accepted this submission and in doing so acknowledged the approaches taken in Aliprandi v Griffith Vintners Pty Ltd (in Liq) (1991) 6 ACSR 250 and Vagrand Pty Ltd (in Liq) v Fielding (1993) 41 FCR 550.   In each of these cases respectively it was decided that the plaintiff must demonstrate an 'arguable case for relief' and that the claim has a 'solid foundation which would give rise to a serious dispute'.  In this case, Gilmour J acknowledged that there was very little to distinguish between these two approaches and that being so, it was necessary to proceed by considering the merits of the Alleged Statutory Breaches.  **(iv) Position of the liquidator**Gilmour J noted that the liquidator is normally the appropriate person to decide whether the company should commence proceedings. His Honour noted in the affidavit of Mr Rumsley, counsel for the plaintiff, that Mr Jones, one of the liquidators, had not been able to obtain any funding to enable the claims to be pursued. His Honour inferred from this statement that the liquidator considered that the claims were arguable and noted the decision in Scarel Pty Ltd and City Loan & Credit Corporation Pty Limited (1998) 12 ACLR 730 at 733 that where a liquidator cannot pursue a soundly based claim because of an absence of funds, the court will be more disposed to permit proceedings by a contributory in the company's name.  Furthermore, Gilmour J concluded that via a series of correspondence in November 2007, Mr Jones indicated that the Liquidators did not oppose the application so long as neither they nor Pearl would become liable for any adverse costs order.  **(v) Affidavit evidence**Similarly, Gilmour J referred to the affidavit of Mr Sharp sworn 23 January 2008. He noted that as a director of Pearl, Mr Sharp was in a position to depose to the truth and as no other affidavits on the merits were filed in opposition, he was satisfied that there was a serious claim under real dispute in respect of the statutory claims made against each of the defendants.  His Honour held that that Mr Sharp be substituted in Pearl's place subject to:* an order that Mr Sharp indemnify Pearl against costs and expenses incurred, including costs orders; and
* an order that Mr Sharp indemnify the defendants and provide security in respect of any costs ordered as against Pearl.

**(vi) Substitution of liquid**  Mr Sharp also applied under O 13 r2(6) of the Federal Court Rules to be substituted for Liquid as Trustee for the Sharp Family Trust. This Order permits an amendment to alter the capacity in which a party sues if the new capacity is one which that party had at the date of the commencement of the proceedings or has since acquired.  Liquid commenced these proceedings by application dated 31 August 2004. As Mr Sharp was appointed as the trustee of the Sharp Family Trust in place of Liquid on 8 September 2005 Liquid submitted that Mr Sharp could be substituted.  However, the defendants argued that this proceeding was not brought by Liquid, in its capacity as trustee and that therefore, before the question of substitution could be decided, Mr Sharp must first establish that Liquid has or had a claim against the defendants in its capacity as trustee.  Gilmour J was satisfied that Liquid was acting in the capacity as trustee of the Sharp Family Trust at all relevant times. His Honour acknowledged the affidavit of Mr Sharp which stated that the sole purpose of the incorporation of Liquid in or around 1998 was so that it could act as trustee for the Sharp Family Trust and that it only ever acted in that capacity. His Honour further noted that there was no cross-examination upon Mr Sharp's affidavit and concluded that it was by some oversight that the proceedings were not brought by Liquid in its capacity as trustee.  His Honour made an order that Mr Sharp, as trustee for the Sharp Family Trust, be substituted as the second plaintiff.etailed Contents**5.11 Application to bring statutory derivative action under the Corporations Act**(By Joshua Morris, DLA Phillips Fox) Showtime Management Australia Pty Ltd v Showtime Presents Pty Ltd [2008] NSWSC 618, New South Wales Supreme Court, Austin J, 17 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc618.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc618.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 circumstances in which a court will grant leave under section 237 of Part 2F.1A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") to bring proceedings on behalf of a company. **(b) Facts**Mr Anderson and Mr Van Grinsven formed a joint venture company called Showtime Presents Pty Ltd ("the Company") for the purpose of conducting and promoting entertainment events in Australia and overseas, with a particular focus on "Queen" tribute concerts.  Over time the relationship between Mr Van Grinsven and Mr Anderson deteriorated. This resulted in proceedings for the winding up of the Company being initiated by Mr Van Grinsven and his management company Showtime Management Australia Pty Ltd ("SMA") on the 'just and equitable' ground. Mr Anderson and his management company, RockCity Event Management ("REM") brought a cross-claim against Mr Anderson and SMA, seeking relief on grounds including those relating to oppression under the Corporations Act, misappropriation of intellectual property, breach of fiduciary duty, breach of statutory provisions reflecting the general law fiduciary duties of company directors and officers and accessory liability for breach of fiduciary duty. The present proceedings concerned an interlocutory application by Mr Anderson for leave to bring proceedings on behalf of the Company against Mr Van Grinsven and SMA for breach of fiduciary and statutory duties and accessory liability. **(c) Decision** Austin J found that Mr Anderson was qualified to bring proceedings on behalf of the Company both as a member and an officer of the Company for the purposes of section 236 of the Act. Austin J was also satisfied that Mr Anderson had established each of the five components of section 237(2) in relation to where the court may grant leave, as set out below.**(i) It is probable that the company itself will not bring proceedings, or take responsibility for them, or for the steps in them**As Mr Van Grinsven and Mr Anderson were equal shareholders and co-directors of the Company and were at a deadlock, Austin J found that it was probable that the Company would not itself bring the proceedings, or properly take responsibility for them, or for the steps in them under section 237(2)(a). **(ii) Good faith**Mr Anderson bore the onus of establishing good faith, per Chahwan v Euphoric Pty Ltd [2008] NSWCA 52 at [69]. Although Mr Anderson did not directly give evidence about his motives or purposes, Austin J found that good faith was clearly established on the evidence presented. Reference was made to the fact that Mr Anderson's complaints were partly about wrongs said to have been done (a) to him as a joint venturer with Mr Van Grinsven and (b) to the Company. Austin J made the comment "that such claims by or on behalf of the Company emerge rationally from an analysis of the relationship of the parties and the ingredients of their dispute points to the conclusion that an applicant who seeks to assert those claims is likely to be acting in good faith". Counsel for Mr Van Grinsven suggested that Mr Anderson was seeking to further his own personal interests rather than the interests of the Company as a whole. Austin J determined that unless there is some evidence that recovery of a shareholder's or director's debt is the predominant consideration, the court will be likely to conclude that the derivative action will be directed towards obtaining the advantage to the company for which the litigation was designed even though success in the action may put the company in funds to pay the applicant's claim, and success by the applicant in concurrent proceedings will establish entitlement to the debt. Consideration was also given to the fact that Mr Anderson was pursuing oppression proceedings, and seeking orders that his interest in the Company be purchased by Mr Van Grinsven and SMA. Austin J found that a claim for remedy under the oppression provisions is not incompatible with pursuing a derivative action in the interests of the Company as a whole. Austin J noted, however, that this is qualified by the fact that success in one claim might affect the remedial outcome in the other. **(iii) Best interests of the Company**Austin J used the test in Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR at [55] that the requirement of section 237(2)(c) is for the court to be satisfied, not that the proposed derivative action may be, or appears to be, or is likely to be, in the best interests of the company but, rather, that it is in the best interests of the company. In that decision, Palmer J set out some matters to which an applicant would normally be required to adduce evidence: the character of the company; the business of the company; whether the substance of the redress which the applicant seeks to achieve is available by a means which does not require the company to be brought into litigation against its will; and the ability of the defendant to meet at least a substantial part of any judgment in favour of the company, so the court may ascertain whether action would be of any practical benefit to the company. **(iv) The character of the Company** In Swansson v Pratt, at [57], Palmer J commented that in situations where there is a joint venture and the venturers are deadlocked, a proposed derivative action may be for the purpose of vindicating one party's position rather than for the company's benefit. Despite the fact that success in the derivative action would vindicate Mr Anderson's position against Mr Van Grinsven, Austin J found that the immediate purpose of the action was to assert rights of the Company with respect to goodwill and intellectual property, and to recover the unauthorised profits of exploitation of the Company's business opportunities. **(v) The business of the Company** As to the effects of the proposed derivative action on the proper conduct of the Company's business, Austin J found that, on balance, it was more likely than not that the Company's interest would be best served by "establishing its rights and putting it in a position to negotiate a favourable outcome, one-way or another, for itself as a separate entity". **(vi) Whether the substance of the redress is available by means other than litigation** Austin J considered whether a satisfactory resolution might be achieved without a derivative action, but concluded that if the application were denied "some very substantial components of the overall dispute between the parties would be excluded from the purview of the litigation". **(vii) Practical benefit to the Company** In terms of benefit to the Company, Austin J found that the derivative action would assert the Company's claim to goodwill and intellectual property, and seek to recover profits made in exploiting business opportunities of the Company. In balancing the potential profits to the Company against the cost of it bringing derivative proceedings Austin J relied on an undertaking given by Mr Anderson to indemnify the Company for any costs incurred by it in bringing the litigation. **(viii) Serious question to be tried** Austin J found that there was a serious question to be tried, for the purposes of interlocutory relief, because a fiduciary relationship existed between Mr Van Grinsven and Mr Anderson, and the cross-claim alleged a breach of those duties by Mr Van Grinsven and SMA. Austin J remarked that the evidence that Mr Van Grinsven and Mr Anderson entered into a commercial enterprise with a view to profit, the profits were to be shared, the policy of the joint enterprise was a matter for joint decision, and in other respects the relationship was very like a partnership, suggested a fiduciary relationship: United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1 at 10-12 per Mason, Brennan and Deane JJ.  In finding that a serious question arose, Austin J followed the proposition from Chan v Zacharia (1984) 154 CLR 178 that a fiduciary cannot take advantage of an opportunity which has come to him in the course of or as a result of the fiduciary relationship, even after the business relationship between the parties that has given rise to fiduciary obligations has been terminated, so long as the affairs of the business relationship have not been wound up. Austin J also expressed the view that there may still be some room for debate as to the precise meaning of the 'serious question to be tried', but found it unnecessary to explore the issue further in the present case. **(ix) Notice** The serving of the amended interlocutory process and amended cross-claim were deemed to be adequate written notice to the Company of Mr Anderson's intention to apply for leave and the reasons for applying under section 237(2)(e), given that the Company comprised only Mr Anderson and Mr Van Grinsven. Leave was granted to bring proceedings on behalf of the Company, nunc pro tunc (ie now for then, meaning that the order applies from a date earlier than the date on which it was actually made).etailed Contents**5.12 Section 289 Co-operatives Act 1992 (NSW): What factors will the court consider when determining whether a co-operative has altered the maximum percentage of issued capital that can be held by any one member?**(By Xanthe Ranger, Mallesons Stephen Jaques) Dairy Farmers Milk Co-operative Ltd v Australian Co-operative Foods Ltd [2008] NSWCA 126, New South Wales Court of Appeal, Young CJ, McColl and Basten JJA, 4 June 2008, The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswca126.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswca126.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 considered the operation of section 289 of the [Co-operatives Act 1992 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3882" \t "Default) (the Co-operatives Act), and what may be required to alter the maximum percentage of issued capital held by any one member in the co-operative.   In particular, the court considered the operation of two provisions:* section 289(3) of the Co-operatives Act and what language may evince an intention; and
* section 1322 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act) and whether procedural deficiencies in resolutions are capable of being cured.

The decision of Young CJ, McColl and Basten JJA indicates that the court will not easily infer that a co-operative intended to alter the mechanism of section 289 unless such an intention is made expressly clear in the language of the required resolutions or through other external factors. **(b) Facts****(i) Restructuring of Australian Co-operative Foods Ltd (ACFL)**In June 2004, ACFL underwent a restructuring arrangement (the Scheme).  The intention of the restructure was to insert a co-operative, Dairy Farmers Milk Co-operative Ltd (DFMC), between the members of ACFL and the restructured ACFL.  The proposal was designed to facilitate the raising of capital and allow for the floating of ACFL as a public company.   The Scheme involved a number of stages.  First, DFMC was issued 5 shares in ACFL of $1 each.  Second, all shares held by original members in ACFL were cancelled in exchange for shares issued to the members by DFMC.  At this stage, DFMC held 100% of the share capital in ACFL.  Finally, following a further cancellation of shares in ACFL and an issue of new ACFL shares to existing members, DFMC held 20% of the shares in ACFL. A Scheme Booklet was sent to members of ACFL outlining the proposal.  It was accompanied by a voting guide containing notice of postal ballot and a postal ballot paper.  A number of resolutions were put to the members to allow the Scheme to be implemented.  These included a special resolution to approve the Scheme (Resolution 1) and a special resolution to approve amendments to the ACFL Rules (Resolution 2) (together, the Resolutions).  The Scheme had overwhelming support from the members of ACFL. Following the implementation of the Scheme, DFMC held 20% of the shares in ACFL.  However, this was not a fixed percentage.  Certain variables existed which could alter the proportion of shares held by DFMC. For example, if ACFL were to be listed, the percentage of shares held by DFMC would likely decrease. Further, if members withdrew from the industry, their shares in ACFL would be cancelled and consequentially increase the percentage of issued shares held by DFMC.  An option of a dividend reinvestment plan also existed which, if taken up by DFMC, would result in the issue of further shares to DFMC and would increase its percentage of issued share capital.   These variables did eventuate and, by 31 July 2007, DFMC held 27.13% of the nominal value of the issued share capital of ACFL. **(ii) Relevant provisions of the Co-operatives Act**Section 289(1) of the Co-operatives Act states that no person is entitled to hold more than 20% of the nominal value of the issued share capital of a co-operative. Pursuant to section 290(1) of the Co-operatives Act, if such a situation should arise, the board of the co-operative must immediately declare the shares in excess of the prescribed cap to be forfeited. Section 289(3) of the Co-operatives Act allows the 20% limit to be increased in respect of a particular person by special resolution of the co-operative concerned passed by means of a special postal ballot, and unless the person concerned is another co-operative entity, approved by Council.   **(iii) Declarations sought in the Supreme Court**In August 2007, ACFL sought declarations that it was obliged to cancel the shares held by DFMC as it held more than 20% of the nominal issued share capital. The issue put to Hammerschlag J in the NSW SC was whether members of ACFL had approved an increase to the maximum limit prescribed when they passed the Resolutions.   His Honour concluded that no Resolution had been passed that supported this proposition.  As a result, the excess interest held by DFMC was in contravention of section 289(1) of the Co-operatives Act, and his Honour made the declarations to forfeit the shares and ordered DFMC to pay costs.   **(iv) Appeal to the Court of Appeal**DFMC submitted a notice of appeal that the declarations were incorrect and sought an alternative declaration in the NSW CA.  DFMC asserted that it was not liable to forfeit its excess interest in ACFL and requested answers to the following:* whether the Resolutions approved by members of ACFL had effected a variation in the maximum proportion of share capital held by any one member; and
* in the alternative, whether any failure in the necessary Resolutions was a technical failure and could be waived under section 1322 of the Corporations Act 2001 (Cth) (the Corporations Act).

**(c) Decision** The essential question on appeal was whether the members of ACFL had approved an increase in accordance with section 289 of the Co-operatives Act. Their Honours looked at the procedural and substantive effect of these Resolutions to determine whether section 289(3) had been satisfied. **(i) Procedural effect of the Resolutions**The court was concerned with the procedural validity of Resolution 1. This Resolution had been presented as a special resolution, considered in a special postal ballot and had obtained the necessary 75% approval. Their Honours held that Resolution 1 had been validly made in accordance with the relevant provisions of the Co-operatives Act and was not a barrier to the operation of section 289(3) of the Co-operatives Act.   **(ii) The language of the Resolutions**The Judges were unanimous in their decision that the Resolutions did not provide for any increase in the maximum number of shares to be held in respect of DFMC, or any person at all.  McColl and Basten JJA looked to the wording of the Resolutions in order to determine the intention of the members of ACFL.   The wording of Resolution 1 was broad and concerned "approval of the Scheme". Their Honours emphasised that even though a change to section 289(1) of the Co-operatives Act had not been expressly referenced in the Resolution, this would not be fatal on its own. Their Honours considered the Scheme and in particular the conditions precedent.  Resolution 1 was identified as being a condition precedent itself and had it not passed, the Scheme would have lapsed.  Their Honours concluded that since the conditions precedent had been defined by reference to the passing of various Resolutions, and in particular Resolution 1, that Resolution did not purport to approve the rule change. Further, since there was a certain ambiguity in the language of the Resolution, their Honours were not willing to read an intention to alter the mechanisms of the Co-operative Act. Resolution 2 sought approval of amendments made to the ACFL Rules in relation to the Scheme. In particular, it sought to alter the fixed number of shares able to be held by any one member of the co-operative from a nominal value of $2 million to $50 million. McColl and Basten JJA were not inclined to read this language as sufficient to displace the operation of section 289(1). Their Honours stated that a resolution expressed in terms of nominal share value would not involve a fixed percentage where the value of issued shares may vary. As a result, the change proposed in relation to DFMC had a different operation to that prescribed by section 289(1) of the Co-operatives Act. **(iii) Other factors to determine the intention of the Resolutions**McColl and Basten JJA acknowledged that the particular nature of this restructure meant that Resolution 1 may have been effective to approve the temporary holding by DFMC of 100% of the shares in ACFL as part of the first stage in the Scheme. However, this situation was only intended as a temporary measure and as such, their Honours thought it unlikely that the Resolution was intended to entitle DFMC to hold this percentage on a permanent basis. The court did not find any further evidence in the Scheme Booklet to suggest that the intention of the Resolutions was to alter the operation of section 289(1) of the Co-operatives Act. Young CJ acknowledged that, even though a wide view has been taken for Schemes of Arrangement under the Corporations Act, this was not necessarily the case under the Co-operatives Act.  In particular, the way the restructure had been devised meant that the total number of shares in ACFL would be in a continuous state of flux.  His Honour believed that "placing the ceiling as a fixed number of shares is as useful as having a fraction with a numerator but no denominator." For this reason, his Honour did not find that the Resolutions altered the maximum of 20% referred to in section 289 of the Co-operatives Act. **(iv) Ambiguity of the Resolutions**DFMC also contended that if the Resolutions were not to be construed as it proposed, they were at the very least ambiguous and the court should prefer a construction that would avoid an unreasonable outcome. Their Honours did not agree with this and stated that no injustice would be caused if the excess shares held by DFMC in ACFL were forfeited. Further, it was not that the Resolutions were necessarily ambiguous, but they simply did not address the topic. **(v) Section 1322 Corporations Act**DFMC raised in the alternative that section 1322 of the Corporations Act could be applied to cure any procedural defect in the Resolutions.  Section 1322 of the Corporations Act applies to co-operatives by virtue of sections 9 and 10 of the Co-operatives Act. Young CJ accepted that the extremely wide ambit of section 1322 was well recognised. However, section 1322 would not assist DFMC in this instance as the problems principally concerned the substantive effects of the Resolutions. **(d) Conclusion** DFMC asserted that it was not liable to forfeit its excess interest in ACFL as Resolutions had been passed that increased the maximum limit prescribed by statute and section 289(1) of the Co-operatives Act no longer applied.   The court considered both the language of the relevant Resolutions and surrounding circumstances of the Scheme to determine the intention of ACFL.  It was found that the language was not sufficiently clear and there was no surrounding evidence to suggest that ACFL wished to preclude the operation of section 289(1) and allow DFMC to hold a greater percentage of shares. Further, as the problems were substantive, section 1322 of the Corporations Act could not be invoked to remedy any procedural defects in the Resolutions. **(e) Result**The appeal was dismissed with costs.etailed Contents**5.13 Challenge to statutory demand at winding up hearing where failure to update registered address** (By Eliza Blandford, Blake Dawson) Nick Scali Ltd v JSK Logistics Pty Ltd [2008] NSWSC 597, New South Wales Supreme Court, Rein J, 3 June 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc597.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/june/2008nswsc597.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The plaintiff sought to wind up the defendant after the defendant failed to meet a statutory demand based upon a judgment debt obtained in October 2007. The defendant sought to advance a cross-claim for monies owing at the winding up hearing. The plaintiff claimed that section 459S(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) prevented the defendant, without the court's leave, from opposing the winding up application on a ground that it could have relied on in applying to set aside the statutory demand. The defendant argued that leave should be granted on the basis that it had never received notice of the court claim or the statutory demand due to its accountants no longer occupying the registered address where the statement of claim and demand were served. Rein J found that in limited circumstances, non-receipt of a validly served demand could be a sufficient basis for permitting leave under section 459S. However, leave would not be granted where there was a failure to act reasonably in respect of superintendence of the collection of mail from a company's registered office and/or failure to take steps to ensure ASIC were advised of a change to the defendant's registered office.  Rein J found that the defendant had not taken any steps to ensure that its registered address was correct and denied the grant of leave. **(b) Facts**  In October 2007, the plaintiff obtained a judgment debt for $62,916.53 against the defendant in Sutherland Local Court (Local Court).  In January 2008, the plaintiff served a statutory demand on the defendant seeking payment of $52,375.83, an amount reduced by the plaintiff to take into account monies it owed to the defendant.  The defendant did not pay the statutory demand, nor did it take any action to have it set aside.   The plaintiff sought to wind up the defendant.  The defendant resisted the winding up on the basis that it had never received notice of the court claim or the statutory demand due to its accountants no longer occupying the registered address where the demand was served.  The defendant also argued that it had a cross-claim for monies owed to it by the plaintiff that would yield damages in excess of the plaintiff's claim. The plaintiff argued that the defendant could not oppose the winding up application on the basis of the cross-claim, as section 459S of the Corporations Act 2001 (Cth) applied.  Section 459S(1) states that where an application for a company to be wound up relies on a failure by that company to comply with a statutory demand, the company may not, without the leave of the court, oppose a winding up application on a ground: * already relied on in an application for the demand to be set aside; or
* that could have been relied on, even if no such an application was made.

The court may only grant leave under section 459S(1) if it is satisfied that the ground to be relied on at the winding up hearing is material to proving that the company is solvent. **(c) Decision**  Rein J found that prima facie, the materials the defendant sought to rely on in support of the cross-claim "could and should have been advanced in answer to the statutory demand and were not". The defendant was therefore prevented under section 459S from relying on these materials during the winding up hearing, unless leave was granted by the court. Rein J referred to Chief Commissioner of Stamp Duties v Paliflex Pty Ltd (1999) 149 FLR 179, in which Austin J set out three considerations relating to the Court's discretion to grant leave:* a preliminary consideration of the defendant's basis for disputing the debt which was the subject of the demand;
* an examination of the reason why the issue of indebtedness was not raised in an application to set aside the demand, and the reasonableness of the party's conduct at that time; and
* an investigation of whether the dispute about the debt is material to proving that the company is solvent.

The defendant argued that the reason that it had not advanced the cross-claim evidence before was that it had not received the statutory demand and had only become aware of it in May 2008.  Rein J considered Perpetual Nominees v Masri Apartments; Perpetual Nominees v Aus Constructions [2004] NSWSC 551 (Masri), in which Austin J stated that the policy behind section 449S "assumes the debtor company has the opportunity to make an application, within the prescribed time limit, to set the demand aside." In Masri, the company had sent a change of address notice to ASIC at the same time as the demand was posted to the former registered address. Austin J asserted that in some circumstances, fairness may require that a company be permitted to raise arguments at the winding up hearing where the directors had not become aware of the existence of the statutory demand despite acting reasonably with respect to superintendence of the collection of mail from the company's registered office.   Rein J agreed that while non-receipt of a validly served demand could be a sufficient basis for permitting leave under section 459S, it could only be allowed in very limited circumstances of the type present in Masri. Leave would not be granted where there was a failure to act reasonably in respect of superintendence of the collection of mail from a company's registered office and/or failure to take steps to ensure ASIC were advised of a change to the registered office.   Rein J found therefore that in the current circumstances, the defendant should not be granted leave, as:* the affidavits of the defendant's director said nothing about non-receipt of the statutory demand;
* the defendant knew about the proceedings in the Local Court by early September 2007 and about the judgment in December 2007, but had not taken any action to set aside the judgment until May 2008;
* the defendant had done nothing to ensure that the registered office was changed, even after it became aware that judgment had been entered against it in the Local Court; and
* the amount of time which had passed was sufficient for the defendant to have taken action to ensure that its address was corrected.

Also of importance to Rein J was the fact that the defendant had failed to provide evidence to establish that it was solvent, which meant the court had no means of determining whether the debt owed to the plaintiff was material in proving the company was insolvent. Therefore section 459S(2) precluded Rein J from granting leave. The originating process erroneously referred to the amount of the judgment debt, rather than the reduced amount of the statutory demand. The defendant argued that this created confusion and should be a ground for dismissal of the application. Rein J rejected this argument by virtue of section 457A, as the error had caused no prejudice or substantial injustice to the defendant. The defendant also sought a stay under section 467(7) to permit an application to bring the cross claim. However, section 467(7) only allows the court to restrain further civil proceedings against a company, and there were no proceedings against the defendant pending in another court. Rein J found that even if an application had been made under section 467(7), which allows a court to dismiss a winding up application, this could not be allowed as it would circumvent the effect of section 459S and would provide a means to avoid section 459S(2).etailed Contents |

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