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[Recent Corporate Law Decisions](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm#h5) 6. [Contributions](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm#7) 7. [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | [odify My Newsfeed](http://my.lawlex.com.au/default.asp?goto=news_sub) [earch Newsfeed Archive](http://my.lawlex.com.au/default.asp?goto=news) [iew user guide](http://my.lawlex.com.au/content/static/LawlexGeneralUserGuide.pdf) [earch the law](http://my.lawlex.com.au/default.asp?goto=search_leg) [bout legislative alert](http://www.lawlex.com.au/content/view/69/0) [bout SH&E Monitor](http://www.lawlex.com.au/content/view/94/146/)[bout SAI Global](http://www.saiglobal.com/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%231) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008_files/spacer%281%29.gif | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%232) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008_files/spacer%281%29.gif | | |  | | --- | | **1.1 Banning short selling - international developments**  In recent days, a number of countries have introduced temporary prohibitions on short selling. Some of these developments are:   * On 21 September 2008, the Australian Securities and Investments Commission temporarily banned short selling of the shares of all listed companies. There are approximately 2,200 entities listed on the Australian Securities Exchange. This reversed a decision of 19 September 2008 to ban only naked short selling. Further details are in Item 2.1 of this Bulletin (in the section dealing with ASIC developments). * On 19 September 2008, the US Securities and Exchange Commission temporarily banned short selling of the securities of 799 financial institutions. Further details are in Item 1.3 of this Bulletin. * On 18 September 2008, the UK Financial Services Authority temporarily banned short selling of the securities of 32 publicly listed financial institutions. Further details are in Item 1.4 of this Bulletin.   [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.2 SEC expands investigation of market manipulation**   On 19 September 2008, the US Securities and Exchange Commission (SEC) announced a major expansion of its ongoing investigation into possible market manipulation in the securities of certain financial institutions. The expanded investigation will include obtaining statements under oath from market participants.   Hedge fund managers, broker-dealers, and institutional investors with significant trading activity in financial issuers or positions in credit default swaps will be required, under oath, to disclose those positions to the Commission and provide certain other information.   The Commission also approved a formal order of investigation that will allow SEC enforcement staff to obtain additional documents and testimony by subpoena. Investigators from NYSE Regulation and FINRA will be conducting a separate, parallel inquiry in coordination with the SEC by making on-site visits to various broker-dealers to address concerns about recent short selling activity.   The Commission's actions follow recent reports of trading irregularities and allegations of false rumour mongering, abusive short selling and possible manipulation of financial stocks.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.3 SEC halts short selling of financial stocks**   **(a) Temporary ban on short selling financial companies**   On 19 September 2008, the US Securities and Exchange Commission (SEC), acting in concert with the UK Financial Services Authority, took temporary emergency action to prohibit short selling in financial companies to protect the integrity and quality of the securities market and strengthen investor confidence. The UK FSA took similar action. The Commission's action will apply to the securities of 799 financial companies. The action is immediately effective.   According to the SEC, under normal market conditions, short selling contributes to price efficiency and adds liquidity to the markets. At present, it appears that unbridled short selling is contributing to the recent, sudden price declines in the securities of financial institutions unrelated to true price valuation. Financial institutions are particularly vulnerable to this crisis of confidence and panic selling because they depend on the confidence of their trading counterparties in the conduct of their core business.    Given the importance of confidence in financial markets, the SEC's action halts short selling in 799 financial institutions. The SEC's emergency order, pursuant to its authority in s12(k)(2) of the Securities Exchange Act of 1934, will be immediately effective and will terminate at 11:59 p.m. ET on 2 October 2008.    The Commission may extend the order beyond 10 business days if it deems an extension necessary in the public interest and for the protection of investors, but will not extend the order for more than 30 calendar days in total duration.   The Commission notes the similar announcement by the UK FSA. The SEC and FSA are consulting on an ongoing basis with regard to short selling matters and will continue to cooperate in carrying out regulatory actions.   The Commission also has taken the following steps to address the recent market conditions:   * Temporarily requiring that institutional money managers report their new short sales of certain publicly traded securities. These money managers are already required to report their long positions in these securities. * Temporarily easing restrictions on the ability of securities issuers to re-purchase their securities. This change will give issuers more flexibility to buy back their securities, and help restore liquidity during this period of unusual and extraordinary market volatility.   The Commission may consider additional steps as necessary to protect the integrity and quality of the securities markets and strengthen investor confidence.    SEC Order Halting Short Selling in Financial Stocks is available on the [SEC website](http://www.sec.gov/rules/other/2008/34-58592.pdf" \t "_new).   SEC Order Requiring Institutional Money Managers to Report New Short Sales is available on the [SEC website](http://www.sec.gov/rules/other/2008/34-58591.pdf" \t "_new).   SEC Order Easing Restrictions on Issuers to Re-Purchase Their Securities is available on the [SEC website](http://www.sec.gov/rules/other/2008/34-58588.pdf" \t "_new).   Form SH is available on the [SEC website](http://www.sec.gov/about/forms/formsh.pdf" \t "_new).  Form SH Instructions is available on the [SEC website](http://www.sec.gov/about/forms/formsh_instructions.pdf" \t "_new).    **(b) SEC issues new rules to protect investors against naked short selling abuses**  On 17 September 2008, the US Securities and Exchange Commission (SEC) took several coordinated actions to strengthen investor protections against "naked" short selling. The Commission's actions apply to the securities of all public companies, including all companies in the financial sector. The actions became effective on 18 September 2008.   In an ordinary short sale, the short seller borrows a stock and sells it, with the understanding that the loan must be repaid by buying the stock in the market (hopefully at a lower price). But in an abusive naked short transaction, the seller doesn't actually borrow the stock, and fails to deliver it to the buyer. For this reason, naked shorting can allow manipulators to force prices down far lower than would be possible in legitimate short-selling conditions.   The Commission actions, which are the result of rulemaking under the Administrative Procedure Act, go beyond its previously issued emergency order, which was limited to the securities of financial firms with access to the Federal Reserve's Primary Dealer Credit Facility. Because the agency's exercise of its emergency authority is limited to 30 days, the previous order under s12(k)(2) of the Securities Exchange Act of 1934 expired on 12 August 2008.   The Commission's actions were as follows:  **(i) Hard T+3 close-out requirement; penalties for violation include prohibition of further short sales, mandatory pre-borrow**   The Commission adopted, on an interim final basis, a new rule requiring that short sellers and their broker-dealers deliver securities by the close of business on the settlement date (three days after the sale transaction date, or T+3) and imposing penalties for failure to do so.  If a short sale violates this close-out requirement, then any broker-dealer acting on the short seller's behalf will be prohibited from further short sales in the same security unless the shares are not only located but also pre-borrowed. The prohibition on the broker-dealer's activity applies not only to short sales for the particular naked short seller, but to all short sales for any customer.  Although the rule will be effective immediately, the Commission is seeking comment during a period of 30 days on all aspects of the rule. The Commission expects to follow further rulemaking procedures at the expiration of the comment period.   **(ii) Exception for options market makers from short selling close-out provisions in Reg SHO repealed**   The Commission approved a final rule to eliminate the options market maker exception from the close-out requirement of Rule 203(b)(3) in Regulation SHO. This rule change also became effective on 18 September 2008.   As a result, options market makers will be treated in the same way as all other market participants, and required to abide by the hard T+3 closeout requirements that effectively ban naked short selling.   **(iii) Rule 10b-21 short selling anti-fraud rule**   The Commission adopted Rule 10b-21, which expressly targets fraudulent short selling transactions. The new rule covers short sellers who deceive broker-dealers or any other market participants. Specifically, the new rule makes clear that those who lie about their intention or ability to deliver securities in time for settlement are violating the law when they fail to deliver. This rule became effective at 12:01 am ET on 18 September 2008.   The new short selling rules are available on the [SEC website](http://www.sec.gov/rules/other/2008/34-58572.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.4 FSA announces temporary ban on short positions in financial stocks**  On 18 September 2008, the Board of the UK Financial Services Authority (FSA) agreed to introduce new provisions to the Code of Market Conduct to prohibit the active creation or increase of net short positions in publicly quoted financial companies from 18 September.   In addition, the FSA requires from 23 September daily disclosure of all net short positions in excess of 0.25% of the ordinary share capital of the relevant companies held at market close on the previous working day.   The FSA states it will extend this approach to other sectors if it judges it to be necessary.  These provisions will remain in force until 16 January 2009, although they will be reviewed after 30 days. A comprehensive review of the rules on short selling will be published in January.   Further information is available on the [FSA website](http://www.fsa.gov.uk/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.5 CEBS's technical advice on liquidity risk management**  On 18 September 2008, the Committee of European Banking Supervisors (CEBS) published the second part of its advice on liquidity risk management, including 30 recommendations on liquidity risk management and supervision.  This advice, which has been sent to the European Commission, has been prepared in response to the Commission's Call for Technical Advice No 8. The first part of CEBS's advice was published in August 2007.   CEBS's 30 recommendations on liquidity risk management are principles-based and subject to an overarching principle of proportionality. The first 18 recommendations are targeted at credit institutions and investment firms established in the European Union to ensure that adequate liquidity risk management for both normal and stressed times is in place. In particular this should build on diversification of funding sources, appropriate liquidity buffers, robust stress tests and regularly tested contingency funding plans.  CEBS's last 12 recommendations target liquidity risk supervision. Supervisors should consider whether their requirements could be supplemented or replaced by internal methodologies developed by institutions, based on a thorough prior supervisory assessment. Enhanced coordination between supervisors should be pursued, notably through active use of colleges or through delegation of tasks.  CEBS encourages dialogue between credit institutions and investment firms and their respective supervisors when implementing its 30 recommendations, especially in the light of possible changes to domestic liquidity regimes.   Further information is available on the [CEBS website](http://www.c-ebs.org/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.6 IOSCO urges greater international coordination in the oversight of credit rating agencies**    On 17 September 2008, the International Organization of Securities Commissions (IOSCO) Technical Committee completed its assessment of methods for checking compliance with the Code of Conduct Fundamentals for Credit Rating Agencies (IOSCO Code of Conduct).    IOSCO has identified 4 measures which it believes will contribute to improved international monitoring of credit rating agencies (CRA) and serve to address the issues that have contributed to the failures in the structured finance products market:   * IOSCO favours a consistent global regulatory approach to monitoring the activities of CRAs. It urges legislators to consider the regulatory consensus represented by the IOSCO Code of Conduct when framing legislation as any fragmentation runs the risk of a reoccurrence of problems with product ratings; * while global legislative efforts run their course, IOSCO's Task Force on Credit Rating Agencies (TFCRA) will work towards developing mechanisms by which national regulators can coordinate their monitoring of CRAs with the substance of the IOSCO Code of Conduct. The TFCRA will explore a common monitoring module and set the terms and conditions of information exchange and cooperation by January 2009; * the TFCRA will also conduct a review of CRAs adoption of codes of conduct based on the revised IOSCO Code of Conduct and will publish its findings in January 2009; and * events in the last 12 months have clearly shown the need for greater interaction between CRAs and regulators and the TFCRA will examine the possibility of developing an international monitoring body to discuss issues with CRAs and to advance the expectations of the international regulatory community. It is envisaged the body would be similar in structure and purpose to the auditing standards oversight body, the Public Interest Oversight Board.   The Role of Credit Rating Agencies in Structured Finance Markets - Final Report of the Technical Committee of the IOSCO is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD270.pdf" \t "_new).   The revised Code of Conduct Fundamentals for Credit Rating Agencies is available on the [IOSCO website](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.7 Board composition and non-executive director pay in the Top 100 Australian companies**  On 16 September 2008, the Australian Council of Super Investors published the results of an empirical analysis of several key corporate governance features in the Top 100 listed Australian companies for the 2007 financial year. The study was conducted by ISS Australia.    The study drew on data contained in S&P/ASX 100 companies' most recent annual reports. For the majority of companies, this was the annual report for the financial year ended 30 June 2007. For the remaining companies, the annual reports are mostly for the year ended 31 March 2007, September 2007 or 31 December 2007.    The study revisits issues researched for ACSI over the period 2001 to 2006 and for the Conference of Major Superannuation Funds for the 2000 financial year. Comparative statistics are provided.    The two major conclusions that can be drawn from the 2007 study are firstly that 'appointments from within' continue to dominate new director appointments at S&P/ASX 100 companies post-2005 and that the proportion of board seats held by women at the Top 100 companies remains stuck at around 11 to 12% of the total.    In 2007, 106 individuals were appointed non-executive directors of an S&P/ASX 100 company; of these, 58 already held or had in the past held an S&P/ASX 100 company directorship. This is down slightly from 2006, when 94 of the 134 new appointees were past or present S&P/ASX 100 company directors and 2005, when past or present S&P/ASX 100 directors made up 85 of the 134 new appointees. In 2004, 25 of the 94 new appointees were past or present S&P/ASX 100 company directors.    In 2007, women accounted for 12.4 % of all directorships at S&P/ASX 100 companies and 10.4 % of all directors, down from 12.6 % and 22 % in 2006. The proportion of board seats held by women has remained largely unchanged since 2003, while the proportion of non-executive directors who are women has also remained largely unchanged since 2002 (between 9 and 11% of all directors of S&P/ASX 100 companies). In the S&P/ASX 100, 22 companies had no women on the board in 2007.    The continuation of boards' propensity to 'appoint from within' the pool of existing directors was also reflected in the number of S&P/ASX 100 company directors holding multiple board seats within the Top 100. This trend has grown steadily since 2001, when 72 professional NEDs held 164 board seats (30.6 % of all S&P/ASX 100 company board seats). In 2007, 114 professional NEDs held 262 board seats (43.4 % of all non-executive board seats), a 1.6% decrease from 2006, when 123 professional NEDs accounted for 45.1% of all Top 100 non-executive board seats. The average female director remains more likely than the average male director to hold two or more S&P/ASX 100 board seats. Of the 62 women on S&P/ASX 100 company boards, 38 (61.3%) held more than one board seat at an ASX-listed company, compared to 42.2% of male S&P/ASX 100 directors.    The study also reiterates that boards remain elderly and male: The most common age band for non-executive directors is 60 to 69. This reflects the fact that retired former executives make up the largest proportion of non-executive directors serving on S&P/ASX 100 boards. Separate research by ISS found that in 2006, 50% of S&P/ASX 200 non-executive directors were retired former corporate executives (the vast majority had not held an executive position at the company on whose board they now sit as a non-executive director; their executive careers were with other companies). In 2007, male non-executive directors were on average 7 years older than their female counterparts, and male executive directors were on average 0.3 years older than their female counterparts.  The relative age of non-executive directors is not however matched by long tenure in many cases. The average tenure of a non-executive director in the sample was 5.1 years and the median 3.6, compared with an average tenure of 6.9 years (and a median of 5.1 years) for executive directors. This raises potential issues about the ability of non-executive directors to adequately oversee long serving and established executives.    This year's study revealed continuing stability in the proportion of board seats held in S&P/ASX 100 companies by independent directors. In 2006, independent directors accounted for 64.5% of all Top 100 directorships; in 2007, this figure has increased marginally to 65.5% of all directorships. The proportion of non-executive directorships (compared to executive positions) increased insubstantially from 80.2% in 2006 to 81.2% in 2007.    Non-executive director pay continued to increase, although seemingly at less rapid levels than recent increases in CEO pay (the ACSI Longitudinal Study for CEO pay for the 2006 year found CEO fixed pay at S&P/ASX 100 companies has more than doubled over the past five years). In 2007, the average non-executive director (excluding the chairperson) received $174,296, an increase of 7.4% from 2006 (NED pay grew by 7.1 % between 2004 and 2005). Non-executive chairperson remuneration has also continued to increase, although at more modest levels: The average S&P/ASX 100 non-executive chairperson saw their remuneration increase 4.6% in 2007 to $390,142, which was 2.5% higher than in 2006. The rate of increase in remuneration for non-executive directors however again outstripped inflation, which rose by 2.1% over the 12 months to 30 June 2007, and growth in average weekly adult earnings, which grew by 4.5 % between May 2006 and May 2007.   The full report is available on the [ACSI website](http://www.acsi.org.au/documents/Board%20Comp%20and%20Non-Exec%20Director%20Pay%20in%20Top%20100%20Companies%202007.Aug%2008.pdf" \t "_New).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.8 International working group of sovereign wealth funds publishes survey of institutional and operational practices**  On 15 September 2008, the International Working Group of Sovereign Wealth Funds (IWG) published a summary of the first-ever survey of their institutional and operational practices.   The survey was undertaken as a voluntary exercise by the IWG members and carried out by the IWG Secretariat.    The survey is based on responses provided by 20 IWG members. The respondents constitute a diverse group representing countries from four continents, have a range of annual per capita incomes, and have operated for various lengths of time. A majority of the respondents are SWFs funded out of mineral royalties, principally oil.  The survey covers three broad areas: (i) the legal framework, objectives and macroeconomic linkages; (ii) the institutional framework and governance structure; and (iii) investment policies and risk management framework.  Some of the findings of the survey conducted by the IWG are:   * On the legal framework, objectives and macroeconomic linkages of SWFs - Half of the respondents are established as legal entities separate from the state or central bank, whereas the other half are established as a pool of assets not legally separate from the state. Typically, their constitutive legislation is publicly available. Their policy objectives are partly tied to the nature of their liabilities and the majority aim to provide savings for future generations or fiscal stabilization. * On the institutional framework and governance structure of SWFs - The institutional framework of many SWFs aims to provide it with operational independence, while ensuring its accountability to the government and the public. All respondents prepare and present their financial statements according to a prescribed set of accounting standards. Legislation governing SWFs usually requires public disclosure of information about their institutional structure and operations. * On investment policies and risk management frameworks - A majority of SWFs have specific investment objectives, with half of them indicating that they disclose them publicly. Their investment strategies vary from traditional to more advanced, with risk objectives typically determined by the owner or the governing body of the fund. SWFs generally observe constraints on investment classes and instruments. Most funds noted that they were not allowed to borrow or use leverage, while many funds indicated that they have established limits on stakes that they can hold on companies, the types of investments they can hold, and/or on other characteristics of their portfolio.   The survey is available on the [IWG website](http://iwg-swf.org/pubs/swfsurvey.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.9 Performance benchmarking of business regulation**   On 12 September 2008, the Australian Productivity Commission released two companion draft reports benchmarking business regulation across jurisdictions: one on the "Quantity and quality of regulation", the other on the "Cost of business registrations".   The first report provides indicators of the stock and flow of regulation and regulatory activities, and quality indicators for a range of regulatory processes, across all levels of government. The indicators provide some baseline information for each jurisdiction, against which trends in the quantity and quality of regulation might be assessed in the future.   The second report provides estimates of compliance costs for business in obtaining a range of registrations required by Australian, state, territory and selected local governments. The registrations include generic requirements for incorporation, taxation and business name registrations. In addition, the Commission benchmarked specific registration costs incurred for five types of business (a café, builder, long day child care, real estate agent and winery).   These reports are the first instalment of a series of studies benchmarking Australian business regulation across jurisdictions. They have also served to test the usefulness of different survey techniques and benchmarking indicators and provided lessons for future exercises.   The reports should facilitate a more informed discussion about comparative performance and help jurisdictions identify where they might improve their regulatory performance.   The Performance Benchmarking of Australian Business Regulation: Quantity and Quality draft research report is available on the [Productivity Commission website](http://www.pc.gov.au/projects/study/regulationbenchmarking/stage2/quantity-quality-draft" \t "_new).    The Performance Benchmarking of Australian Business Regulations: Cost of Business Registrations draft research report is available on the [Productivity Commission website](http://www.pc.gov.au/projects/study/regulationbenchmarking/stage2/cost-registration-draft" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.10 Subprime mortgage litigation filings**  On 11 September 2008, Navigant Consulting Inc, a global consulting firm released a report showing that the number of subprime related cases filed in US federal courts through the second quarter of 2008 has topped the 559 savings-and-loan (S&L) lawsuits of the early 1990s, until now viewed by many as the high-water mark in terms of litigation fallout from a major financial crisis.  According to the report, of the 607 subprime-related cases filed in US federal courts over the 18 months ended 30 June 2008, 310 were filed in just the first six months of 2008 - more than the 297 filed during all of 2007.  The report notes that in the second quarter of 2008 more than three new cases were filed for every one that was disposed (most of which were filed in earlier quarters). Still, the report notes that certain categories of filings are beginning to slow. Borrower class action lawsuits, for example, which have led all case types tracked by Navigant to date, declined more than 60% from the prior quarter. In the March 2008 quarter, new filings outnumbered dispositions by almost five to one.  Securities cases overtook borrower class actions for only the second time in the six quarters tracked by Navigant to date, accounting for 41% of total filings. The second quarter's securities filings received a boost from 11 new lawsuits related to the collapse of the auction-rate securities (ARS) market, bringing the total number of ARS cases to 22 through June 2008. The rest of the second quarter filings were comprised of borrower class actions (26%) and commercial contract disputes (16%), among other case types.  Further information is available on the [Navigant Consulting Inc website](http://www.navigantconsulting.com/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.11 Calls for legislation to improve financial market supervision**   On 11 September 2008, two formal requests for the European Commission to introduce legislation to improve the supervisory framework for financial markets were adopted in the Commission's Economics Committee. This first relates specifically to hedge funds and private equity, while the second is concerned with the future architecture of market supervision in general.  **(a) Hedge funds and private equity**   The committee has requested a series of legislative measures on issues related to hedge funds and private equity.   Regarding financial stability, capital and regulatory coverage, it says, amongst other points, that capital requirements should apply to investment firms on the basis of risk rather than the particular type of entity. The interests of investors and loan originators should be aligned, either by obliging originators to retain a portion of securitised loans on their own books or by measures with equivalent effect. The committee requests principles based legislation on the valuation of illiquid financial instruments and better transparency requirements on prime brokers. There should be a harmonised EU-wide framework for venture capital and private equity, especially to ensure cross-border access to capital for SMEs.  **(b) Transparency requirements**   Regarding transparency, the committee wants to see a European Private Placement Regime which would allow for the cross boarder distribution of investment products, including alternative investment vehicles, to eligible groups of sophisticated investors. This would involve disclosure of their general investment strategy, leverage, risk-management and portfolio valuation methods, the source and amount of funds raised, rules for transparency on top executives remuneration and registration of shareholders beyond a certain proportion.    **(c) Takeovers: information for employees, no 'asset stripping"**   Employees of companies which are taken over should always have the same rights to information and consultation under EU law, including when private equity investors or hedge funds are involved. The committee says measures should be introduced where needed to avoid unreasonable asset stripping of companies taken over by private investors. Capital rules should ensure the level of leverage is sustainable for both the private equity firms and the target company and there should be no unfair discrimination between different types of fund using similar strategies.   **(d) Conflicts of interest and market concentration**   Measures are also needed to tackle conflicts of interest within financial institutions. Credit rating agencies should separate their rating business from any other services they offer, such as advising on structuring transactions. The effects of market concentration in the financial services industry should be given a General review by the Commission's Competition Directorate General, and assess among other things, whether there is legislation favouring incumbents which needs to be removed.   The committee asks the Commission to review all existing financial market legislation to identify any gaps regarding hedge funds and private equity and propose any legislation needed for better regulation of these or other actors.   **(e) Future structure of financial market supervision**   The committee also adopted a report on the future structure of financial supervision. The report formally calls on the European Commission to develop significant proposals to improve the supervisory architecture for financial services.   The report, the main provisions of which received broad support in the committee, includes recommendations on the structure of "Level 3" Committees of national financial regulators (CESR for securities, CEIOPS for pensions and insurance, and CEBS for banking) and on the present mechanisms for managing systematic risk.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.12 Doing Business 2009 - latest World Bank study**   Regulatory reforms are gaining momentum worldwide, reaching record numbers this year, finds "Doing Business 2009", the sixth in a series of annual reports published by IFC and the World Bank on 10 September 2008. The new report identifies 239 reforms between June 2007 and June 2008 that make it easier to do business in 113 economies.   For the fifth year in a row, Eastern Europe and Central Asia led the world's regions, with more than 90% of its countries making reforms. And the trend is moving eastward as newcomers join the list of economies making the most reforms. Azerbaijan is the world's leading reformer of business regulations this year, with improvements in seven of the 10 areas studied by the report.   Africa also had a record year for regulatory reforms, with 28 countries completing 58 reforms that make it easier to do business - more than in any other year. And three of the world's top 10 economies that reformed their business regulations are from the region.  The top 10 are, in order, Azerbaijan, Albania, the Kyrgyz Republic, Belarus, Senegal, Burkina Faso, Botswana, Colombia, the Dominican Republic, and Egypt.    Doing Business ranks economies based on 10 indicators of business regulation that record the time and cost to meet government requirements in starting and operating a business, trading across borders, paying taxes, and closing a business. The rankings do not reflect such areas as macroeconomic policy, quality of infrastructure, currency volatility, investor perceptions, or crime rates.    Singapore leads the global rankings on the overall regulatory ease of doing business for a third consecutive year. New Zealand is runner-up, and the United States third. Bahrain and Mauritius join the ranks of the top 25 this year.   In Africa, other economies making the most reforms of business regulations include two post conflict countries, Liberia and Sierra Leone, along with Rwanda. Half the economies in Latin America made such reforms, while in the Middle East and North Africa and in East Asia nearly two-thirds did.    Seven OECD high-income economies, including Canada, Greece, Hungary, and Portugal, made regulatory reforms this year. Among the large emerging markets, China led the way-reforms there make it easier to access credit, pay taxes, and enforce contracts. South Africa has made it easier to start a business and pay taxes. Brazil and India both eased trade processes.    Doing Business ranks 181 economies on the overall ease of doing business. The top 25 are, in order, Singapore, New Zealand, the United States, Hong Kong (China), Denmark, the United Kingdom, Ireland, Canada, Australia, Norway, Iceland, Japan, Thailand, Finland, Georgia, Saudi Arabia, Sweden, Bahrain, Belgium, Malaysia, Switzerland, Estonia, Korea, Mauritius and Germany.    Further information is available on the [Doing Business website](http://www.doingbusiness.org/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.13 New working papers on pension/superannuation supervisory practices**   On 8 September 2008, the International Organisation of Pension Supervisors (IOPS) released a further 4 reports as part of its Working Paper series, which provide additions to the study of pension supervisory practices worldwide.    The following reports were released as part of the IOPS Working Paper series:  **(a) Working Paper 5: Information for members of DC pension plans: conceptual framework and international trends**  In recent years, the shift towards defined contribution (DC) pension plans has been a key trend in the field of private pension provision. In this context, where a wide range of options may potentially be available to individual plan members, it is crucial to ensure that they have the information necessary to make appropriate choices. Based on the findings of an IOPS survey, this paper offers a conceptual framework for considering information provision within the context of the pension system and related factors (such as the range of choices offered to individuals, the use of default options, the level of financial literacy, etc).   **(b) Working Paper 6: Comparison of costs and fees in countries with private defined contribution pension systems**    The fees and charges imposed upon pension funds are of great interest and importance to pension supervisory authorities as they have a significant impact on the amount of retirement income delivered to individuals, particularly in the case of DC pension schemes. Yet administrative fees are charged for services in different ways, with the diversity of charges and the specific details involved in each case making it impossible to directly compare administrative charges nationally and internationally. This paper therefore attempts to model such charges on a unified basis to allow for a standardized international comparison, known as the charge ratio. Explanations for the difference in charge ratios between countries are then proposed.    **(c) Working Paper 7: Transparency and competition in the choice of pension products: The Chilean and UK experience**    This paper discusses two countries building centralized information and quotation systems for annuity products to help individuals select the right retirement product at the right price. The SCOMP system in Chile is examined and developments around the Open Market Option (OMO) in the UK are discussed, with lessons drawn for other pension supervisory authorities contemplating introducing such centralized systems.    **(d) Working Paper 8: Supervisory oversight of pension fund governance**    This working paper mainly analyses the responses of IOPS members to a survey on supervisory oversight of pension fund governance. The survey and responses cover the current focus, issues and problems as well as future developments. A few case studies are also included in the paper to illustrate the different types of issues that pension fund systems may face and the means that may be adopted by the relevant supervisory authorities to resolve these issues.    The papers are available on the [IOPS website](http://www.iopsweb.org/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.14 Asia-Pacific sovereign pension funds among the fastest growing**   Asia-Pacific sovereign pension funds grew by around 20% to US$1.8 trillion during 2007, according to Pensions & Investments and Watson Wyatt research published on 3 September 2008.    Sovereign funds continue to feature strongly in the rankings, having grown 24% during the past five years. Now these 26 funds constitute 23% of assets of the top 300 funds, of which 11 are from Asia Pacific and total US$2.8 trillion, up around 16% from the previous year.   The fastest growing -Australia's Future Fund with assets of US$44 billion at the start of the year -jumped up 122 places to take the position of 66 in the rankings. This is largely a result of receiving capital contributions from the Australian government, sourced from budget surpluses.   Among the sovereign pension funds in Asia ex Japan, China's National Social Security Fund has grown significantly, moving up to position 38 (from 69). India's Employees Provident Fund to position 68 (from 88), Singapore's Central Provident Fund to position 22 (from 32) and Thailand's Government Pension Fund to position 241 (from 285). Each of these funds enjoys strong growth of more than 30 % from the previous year's figure.   Total assets of the world's largest 300 pension funds grew by over 14% in 2007 to around US$12 trillion, adding around US$1.5 trillion to the previous year's figure   According to the survey, the US remains the country with the largest market share of pension funds assets accounting for 43%, although its share has been eroded (54% in 2002) due to a weak dollar and various significant developments around sovereign pension funds elsewhere. Japan has the second largest market share on 14%, largely because of the Government Pension Investment Fund of Japan which is still at the top of the ranking, a position it has held for the past five years, with assets of over US$1 trillion. The UK, Netherlands and Canada all have the third largest market share of 6%.   In terms of asset size, North American and European funds have grown steadily in the past five years, at compound annual growth rates (CAGR) of 13% and 21% respectively. In contrast, funds in Asia-Pacific showed notable growth for the first time in three years, but growth of 21% since 2002 is significant.   The survey shows that assets in Australia have grown at the fastest rate over a five-year period - 27% in US$ terms and 17% in local currency terms - contributing to greater representation in the top 300: 11 funds compared with 4 in 2002. During the same period, Canadian, Swedish and Dutch funds in the survey grew at 22%, 19% and 18% respectively, in US$ terms.   The report is available on the [Watson Wyatt website](http://www.watsonwyatt.com/research/resrender.asp?id=PI_300_Analysis_2007_YE&page=1" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.15 Delegation of banking supervision - study**   On 3 September 2008, the Committee of European Banking Supervisors (CEBS) published a paper presenting an analysis of delegation of supervisory tasks. The Financial Services Committee in its Francq report recommended that supervisors develop a framework for delegation of supervisory tasks in the banking sector. Supervisors have been requested to explore the preconditions for the use of delegation mechanisms, especially through the use of guidelines, and where appropriate to test these arrangements.  CEBS has identified two areas in which delegation of tasks currently takes place: (i) on-site examinations, including model validation, and (ii) liquidity concession models. A liquidity concession model may be described as an intensive form of cooperation involving the delegation of a bundle of tasks from the host authority to the home authority, and by granting conditionally an exemption or waiver of liquidity requirements to the branch.  The paper elaborates on: (i) the definition of delegation of tasks, (ii) current legal framework and cases for delegation, (iii) possible trends for the future, and (iv) general criteria for the processes of delegation. Two reports fleshing out the current practices with respect to the two areas are annexed to the paper.  Regarding delegation of on-site examinations including model validation no legal or practical impediments were identified. For liquidity concessions (or delegations that include waivers of quantitative liquidity requirements) national legal or regulatory frameworks have established the conditions for such waivers. CEBS recommends that the CEBS members propose these steps to their national legislators where relevant.  The outcome of this work is to be regarded as work in progress. It is intended to provide information about the current situation and further possible progress regarding the delegation of tasks in banking supervision, and as input to the work being performed on delegation by the Level 3 Committees which will commence its work in the second half of 2008. In addition, the paper is also intended to facilitate the use of delegation in banking supervision by e.g. containing guidance on the process of delegation and clarifying legal obstacles.    Further information is available on the [CEBS website](http://www.c-ebs.org/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.16 Oversight report on the Australian Securities and Investments Commission**   On 2 September 2008, the Australian Parliament's Corporations and Financial Services Committee issued its report on the statutory oversight of ASIC.  The issues discussed in the report include:   * regulation of financial markets; * ASIC's recent strategic review; * response to property investment scheme collapses; * financial planner issues; and * banking and credit regulation.   The report is available on the Corporations and [Financial Services Committee website](http://www.aph.gov.au/senate/committee/corporations_ctte/index.htm" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.17 International working group of sovereign wealth funds reaches preliminary agreement on draft generally accepted principles and practices**   On 2 September 2008, the members of the International Working Group of Sovereign Wealth Funds (IWG) reached a preliminary agreement on a draft set of principles and practices for recommendation to their respective governments.    "The Generally Accepted Principles and Practices for Sovereign Wealth Funds" (GAPP) is a voluntary framework that would guide the appropriate governance and accountability arrangements, as well as the conduct of appropriate investment practices by SWFs. In response to the call from the International Monetary Fund's policy-guiding International Monetary and Financial Committee (IMFC), the IWG expects to present the GAPP to the IMFC at its 11 October 2008 meeting in Washington DC. The IWG intends to publish the GAPP thereafter.   The IWG members also decided to explore the establishment of a standing group of sovereign wealth funds (SWFs). This is in recognition of the need to carry forward the work relating to the GAPP, as necessary, and to facilitate dialogue with official institutions and recipient countries on developments that impact SWF operations.   Further information is available on the [IWG website](http://www.iwg-swf.org/" \t "_New).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.18 'Creeping acquisitions' and competition law - discussion paper**  On 1 September 2008, the Australian Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, Chris Bowen MP, released a discussion paper entitled 'Creeping Acquisitions'.  The purpose of the discussion paper is to serve as a basis for consultation in relation to the Government's stated intention to consider the need for reform in relation to creeping acquisitions. The term creeping acquisitions refers to the acquisition of a number of individual assets or businesses over time that may collectively raise competition concerns, but which individually are unlikely to contravene section 50 of the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default).  The discussion paper is available on the [Treasury website](http://www.treasury.gov.au/documents/1409/PDF/Discussion%20Paper%20-%20Creeping%20Acquisitions.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.19 New Zealand Securities Commission to review issuers' responses to reporting challenges**   On 4 September 2008, the New Zealand Securities Commission announced it will review how well issuers respond to significant reporting challenges in the current market as part of its surveillance program.   The Commission will begin this work by reviewing 30 June 2008 balance date financial reports as part of Cycle 8 of its Financial Reporting Surveillance Program.    Current market conditions highlight the importance of the new accounting standard on financial instruments disclosures (NZ IFRS 7). This requires detailed information on the risks arising from financial instruments and how these risks are being managed.    The Commission expects issuers to pay particular attention to:   * Impairment of asset values - there should be more focus on understanding, measuring and documenting the triggers of impairment; * Determining fair market values - challenges in valuation practices and disclosures exist with the tight credit 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 the 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 * Goodwill disclosures - in the current market, particular regard should be given to the extensive disclosures relating to the recoverable amounts of each significant cash-generating unit containing goodwill or intangible assets with indefinite useful lives.   Other areas of focus for the Securities Commission when reviewing financial reports will be related party disclosures, and the use of and disclosure of off balance sheet arrangements.    The Commission urges issuers to further improve the quality of their financial reporting. This includes making transparent disclosures, ensuring that the 'basics' of NZ IFRS are complied with, avoiding 'boiler plate' accounting policies and notes and ensuring that any 'common industry practice' also complies with New Zealand Generally Accepted Accounting Practice (NZ GAAP). If disclosures beg a further question, the Commission considers that transparency has not been achieved.   Further information on areas that the Securities Commission has an interest in is outlined in the Review of Financial Reporting by Issuers Cycle 7 available on the [New Zealand Securities Commission website](http://www.seccom.govt.nz/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.20 US institutional investors boost ownership of US corporations to new highs**  Institutional investors have, once again, topped their previous record ownership levels in the largest 1,000 US corporations, according to research published on 2 September 2008 by the US Conference Board.  Data on institutional investor ownership in the largest 1,000 US corporations show that institutions have substantially and consistently increased their holdings from 1987 with an average of 46.6% of total stock to an average of 61.4% of total stock by 2000 and then rising to an unprecedented 76.4% of corporations by year-end 2007. Concentration of ownership in the largest 25 companies also tops all previous data when measured by the numbers of companies which have the largest institutional ownership. For example, in 1985, no company had institutional ownership of 60% or above, whereas, by 2007, 17 companies had institutional ownership of 60% or above, including six with institutional ownership of 70% or above.  Latest available year-end 2006 data show that total institutional investors - defined as pension funds, investment companies, insurance companies, banks and foundations controlled assets totalling US$27.1 trillion, up from US$24.4 trillion in 2005. Their 2006 level represents a ten-fold increase from US$2.7 trillion in 1980. The equity market value of total institutional equity holdings increased from US$571.2 billion in 1980 (or 37.2% of total US equity markets) to US$12.9 trillion (or 66.3% of total US equity markets) in 2006.  Pension funds continue to account for the largest block of institutional investor assets, with US$10.4 trillion or 38.3% of total 2006 assets under management. Within the pension fund category, state and local pension funds - which tend to be the most activist in terms of exerting corporate governance pressures on companies - have grown more rapidly than other types of pension funds such as corporate pension funds.  Moreover, these state and local pension funds have also been growing more rapidly in the amount of assets they allocate to equities from bonds and other types of investments. For example, public pension funds have increased their share of equity markets from 2.9% in 1980 to 10% in 2006. By comparison, private trusteed pensions (generally corporate funds) represent a smaller share of equity markets in 2006 than they did in 1980; their share declined from 15.1% in 1980 to 13.6% in 2006.    Historically, US pension funds put very little of their assets into international equities. This amount grew, however, and the largest 25 internationally invested US pension funds put a total of 18.0% of their 1999 assets into international equities. By 2005, this amount had declined to 13.5% of their assets, although the number has risen to 15.3% for 2007.  The report tracks hedge fund investments generally and investments by pension funds into hedge funds. As of September 2007, some US$1.8 trillion in assets was estimated to have been managed by about 10,000 hedge funds worldwide. This represents an increase of 23.6% in hedge fund assets and 5.8% growth in the number of funds since 2006. Of these, more than half are domiciled in the United States.   Pension funds have been increasing the investments they make in hedge funds during the past three years. The report shows the largest 200 US employee retirement plans with defined benefit assets in hedge funds. The amounts invested in hedge funds by these pension funds rose from an insignificant amount in prior years to US$29.9 billion for the year ended 30 September 2005, to $50.5 billion for the year ended 30 September 2006, and then to US$76.3 billion for the year ended 30 September 2007. This actually represents a fairly small percentage of total assets for these pension funds - 0.7% in 2005, 1.0% in 2006 and 1.4% in 2007. Thus, while increasing rapidly, hedge fund investments remain a small portion of the total defined benefit plan assets invested by these pension funds.    Based on an analysis of data from Pensions & Investments, the report also finds more and more pension funds are investing in hedge funds. As of 30 September 2007, 62 out of the largest 200 defined benefit pension plans invested in hedge funds compared with only 48 the year before. The majority are "public" state and local funds; of the 62 funds investing in hedge funds in 2007, 37 are state and local or "public" pension funds (which invested US$59.6 billion out of a total US$76.3 billion for all funds) while 25 are corporate pension funds (which invested US$16.7 billion out of a total US$76.3 billion for all funds).    Further information is available on the [US Conference Board website](http://www.conference-board.org/publications/describe.cfm?id=1548" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.21 FRC publishes consultation paper setting out its proposals to revise the guidance for directors on going concern and financial reporting**  On 29 August 2008, the UK Financial Reporting Council (FRC) published a Consultation Paper setting out its proposals to revise the "Guidance for Directors of Listed Companies on Going Concern and Financial Reporting".   The Listing Rules of the Financial Services Authority and the Irish Stock Exchange require the annual reports of listed companies to include a statement by the directors on the going concern status of the company. In making their statement, directors are required to consider the guidance contained in 'Going Concern and Financial Reporting: Guidance for directors of listed companies registered in the United Kingdom', which was published in 1994.   The Consultation Paper has been produced on the assumption that the Guidance for Directors, and in particular the disclosure requirements should continue to exist. However the FRC acknowledges that developments in accounting standards and markets may mean that the guidance needs to be refreshed. Accordingly, the Consultation Paper contains a proposed updated version of the existing Guidance for Directors.     The Consultation Paper is available on the [FRC website](http://www.frc.org.uk/images/uploaded/documents/Going%20concern%20draft%204%20vs1.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.22 Personal property securities reform**   On 29 August 2008, the Australian Attorney-General, the Hon Robert McClelland MP, released for public comment a discussion paper on the proposed regulations to be made under the proposed Personal Property Securities Act. The discussion paper details the content and policy rationale for each regulation that it is proposed would be made under the Personal Property Securities Act.     Copies of the discussion paper can be downloaded from the [Attorney-General's Department website](http://www.ag.gov.au/pps" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.23 Profit reporting - discussion paper**    New principles on profit reporting have been opened up for debate by the Financial Services Institute of Australasia (FINSIA) and the Australian Institute of Company Directors (AICD) in a discussion paper published on 29 August 2008.  The aim of the discussion paper, titled "Underlying Profit", is to encourage listed companies to adopt a transparent and consistent approach when reporting profit results to the investment community in a non-statutory manner.   The initiative is in response to research that indicates the use and presentation of non-statutory measures of incomes, such as underlying profit, is widespread.   Finsia and AICD established a working group to address the challenges posed by non-standard company reporting of 'underlying' or 'normalised' profits and have developed principles to assist companies when reporting.  While the discussion paper acknowledges the value of the 'underlying profit' figure to the investment community, it does not diminish the importance of companies preparing financial statements according to accounting standards (statutory profit).    Key draft principles in the discussion paper include:   * Companies should report on the 'underlying profit' where relevant in addition to the statutory profit figure. The market is better informed by the reporting of a profit figure that reflects the result of on-going business activities and provides a reliable foundation for predicting the future operating result of the enterprise. * Reconcile the 'underlying profit' figure with the statutory profit figure and present the relevant adjustments in tabular form. * Do not discriminate between positive or negative 'underlying profit' adjustments to statutory profit figure. * Maintain consistent adjustments to the statutory profit figure between reporting periods.   Further information is available on the [FINSIA website](http://www.finsia.com/Home/AM/ContentManagerNet/HomePages/FINSIA_1505_Custom_HomePage.aspx?Section=Home" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.24 Economic capital paper released by the Basel Committee for comment**   On 29 August 2008, the Basel Committee on Banking Supervision published for comment its findings and recommendations on the "Range of practices and issues in economic capital modelling". This work focuses on the use of economic capital measures, governance processes, risk measurement and aggregation, and the validation of economic capital models.  Comments on the paper are invited and should be forwarded by email to the [Basel Committee Secretariat](mailto:baselcommittee@bis.org) by 28 November 2008.  Further information is available on the [Bank for International Settlements website](http://www.bis.org/publ/bcbs143.htm" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.25 Corporate governance practices in the Top 300 Australian companies - study**   More than half of the ASX 300 are still not fully observing the ASX Governance Principles, with the ASX 201-300 showing particular drift from best practice standards, according to research published on 29 August 2008 by Grant Thorton.   Grant Thornton's 2008 Corporate Governance Reporting review tracks what it refers to as a clear gulf opening up between businesses at the top end of town, and smaller listed firms. High-profile disclosure issues dividing the ASX include the structure of the Board and the question of executive pay:   * 39% of the 201-300 segment did not have a majority of Independent Directors on the Board, compared to 17% of the Top 100. * 43% of the 201-300 companies did not have an Independent Director as Chairperson. In comparison, 85% of the Top 100 firms were led by an Independent Chair. * 21% of the 201-300 did not follow shareholder-approved thresholds when finalising equity-based executive remuneration. Only 6% of the Top 100 did not pay in accordance with shareholder-set ceilings.   Even where the ASX's principles have been met, the report states that many compliance statements lack commercial bite, with companies signing up to recommendations in principle rather than practice. One area of particular concern is risk management: only three quarters (73%) of the ASX 201-300 businesses assessed were able to verify that their financial statements were founded on a sound and effective system of risk management and internal compliance.    Grant Thornton analysed the 2007 annual report disclosures made by 290 of the ASX top 300 companies, against the Principles of Good Corporate Governance and Best Practice Recommendations ('The Governance Principles") used by the ASX Corporate Governance Council, to assess corporate governance levels and trends across the largest listed Australian firms.  According to the Grant Thornton 2008 Corporate Governance reporting review, only 45% of companies in the top 300 implemented all of the Governance Principles in their 2007 annual report disclosures.   The survey is available on the [Grant Thornton website](http://www.grantthornton.com.au/files/gt_corporate_governance_2008v7final.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.26 SEC votes to modernize disclosure requirements to help US investors in foreign companies**  On 27 August 2008, the US Securities and Exchange Commission (SEC) voted unanimously to update and modernize the disclosure requirements for foreign companies offering securities in US markets, making it easier for US investors to gain access to timely financial information that can help them make better informed investment decisions.   The rule amendments approved by the Commission reflect advances in technology and other recent global changes. The rule amendments eliminate requirements for foreign companies without SEC-registered securities to submit paper disclosures, and instead give investors instant electronic access to foreign company disclosure documents, in English, on the Internet. After a period of transition, foreign reporting companies also will be required to file their annual reports with the SEC two months earlier, making those submissions more timely and therefore more useful to investors. The rule amendments also facilitate the ability of US investors to participate in cross-border tender offers and other business combinations.   Specifically, the Commission adopted three sets of rule amendments. One set of amendments, called Foreign Issuer Reporting Enhancements, will update Securities Exchange Act filing requirements and enhance disclosure required by foreign private issuers in response to changes in foreign filing requirements, market practices, and other areas of SEC regulation. The rule amendments shorten the deadline for annual reports filed by foreign private issuers from six months to four months. The rule amendments also enable foreign issuers to test their eligibility to use the special forms and rules available to foreign private issuers once a year, rather than continuously; enhance the disclosures a foreign private issuer provides to investors regarding any changes in and disagreements with its certifying accountant in its annual reports and registration statements; and revise the annual report and registration statement forms used by foreign private issuers to improve certain disclosures provided in these forms.   A second set of amendments concerns Exchange Act Rule 12g3-2(b), which exempts a foreign private issuer from registering a class of equity securities based on submission to the SEC of certain information published outside the US The exemption allows a foreign private issuer to have its equity securities traded in the US over-the-counter (OTC) market without registration under section 12(g). The adopted rule amendments will eliminate the current written application and paper submission requirements under Rule 12g3-2(b) by automatically exempting a foreign private issuer from section 12(g) provided they meet specified conditions. As is currently the case, issuers must continue registering their securities under the Exchange Act to have them listed on a national securities exchange or traded on the OTC Bulletin Board.   The Commission also voted to adopt changes to its cross-border exemptions. These amendments are intended to expand and enhance the utility of the exemptions for business combination transactions, tender offers, and rights offerings and to encourage offerors and issuers to permit US security holders to participate in these transactions on the same terms as other security holders. Among the amendments are codifications of existing interpretive positions and exceptive orders in the cross-border area, as well as amendments to allow specified foreign institutions to report beneficial ownership on Schedule 13G to the same extent as their US institutional counterparts. The Commission also voted to provide interpretive guidance on several topics that come up frequently for practitioners in the cross-border area.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1)  **1.27 SEC proposes roadmap toward global accounting standards to help investors compare financial information more easily**   On 27 August 2008, the US Securities and Exchange Commission voted to publish for public comment a proposed Roadmap that could lead to the use of International Financial Reporting Standards (IFRS) by US issuers beginning in 2014. Currently, US issuers use US Generally Accepted Accounting Principles (US GAAP). The Commission would make a decision in 2011 on whether adoption of IFRS is in the public interest and would benefit investors. The proposed multi-year plan sets out several milestones that, if achieved, could lead to the use of IFRS by US issuers in their filings with the Commission.   According to the SEC, the increasing integration of the world's capital markets, which has resulted in two-thirds of US investors owning securities issued by foreign companies that report their financial information using IFRS, has made the establishment of a single set of high quality accounting standards a matter of growing importance. A common accounting language around the world could give investors greater comparability and greater confidence in the transparency of financial reporting worldwide.  Almost one year ago, the Commission issued a concept release on allowing US issuers to prepare financial statements using IFRS.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%233) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008_files/spacer%281%29.gif | | |  | | --- | | **2.1 Short selling prohibitions**  **(a) 21 September 2008 announcement - temporary ban on short selling of shares of listed companies**   On 21 September 2008, the Australian Securities and Investments Commission (ASIC) announced that from the opening of the market on Monday, 22 September 2008 until the implementation of the Government's proposed short selling legislation:   * contrary to ASIC's announcement of 19 September 2008, covered short sales for all listed stocks will now not be permitted (subject to a limited authorised market-maker exception); and * ASIC will reassess and advise the market in 30 days, whether or not it will at that time, or at a later date, reopen covered short sales for non-financial stocks.   The following is a summary of ASIC's new position on short selling until the implementation of the Government's proposed short selling legislation:   * naked short selling banned; * covered short selling banned (subject to limited authorised market-maker exemption); and * ASIC will reassess and advise the market in 30 days, whether or not it will at that time, or at a later date, reopen covered short sales for non-financial stocks.   In announcing ASIC's decision, ASIC's Chairman Mr Tony D'Aloisio said 'These measures are necessary to maintain fair and orderly markets in these exceptional times of global crises of confidence in financial markets. Because of the relatively small size and the structure of the Australian market, it is necessary to extend the prohibition to all stocks. To limit the prohibition to financial stocks, as has been done in the UK, could subject our other stocks to unwarranted attack given the unknown amount of global money which may be looking for short sell plays'.  ASIC emphasised that it sees a legitimate place for short selling in markets (eg to assist with price discovery). Mr D'Aloisio went onto say: 'However, in the current climate and, in light of the actions taken by other regulators, we need a circuit breaker to assist in maintaining and restoring confidence. Our measures do that as they will operate for a limited time and in the case of non-financial stocks, will be reviewed in 30 days. In the case of financial stocks, the review will be in line with the time limits imposed by other international regulators such as the US and UK'.   ASIC will work with industry on transitional issues affecting bona fide market transactions.   ASIC has given effect to these changes by an instrument of modification to the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).    The instrument is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-751.pdf/$file/co08-751.pdf" \t "_new).   **(b) 19 September announcement - naked short selling not permitted and covered short selling to be disclosed**  On 19 September 2008 ASIC announced a package of interim measures relating to short selling. As noted above, this announcement has been superceded by the announcement of 21 September.  This package achieves three things:  1. from the opening of the market on Monday 22 September 2008, naked short sales on ASX's approved list in the cash equity market are  not permitted;  2. ASIC has issued clarification of what are the covered short sales which will continue to be permitted; and 3. for covered short sales which continue to be permitted, ASIC has introduced reporting requirements through the ASX.  **(i) Naked short sales - ASX approved product list**  ASX has decided (and ASIC agrees) that from Monday 22 September 2008, all securities will be removed from the ASX Approved Product List for naked short sales, until such time as the Government's foreshadowed legislation amendment in relation to short selling activity takes effect.  The practical effect of this action is to require most short sales to be covered.  **(ii) What is a naked short sale**  ASIC released a Regulatory Guide on Short Selling that clarifies what constitutes a naked short sale.  The guide identifies that a naked short sale occurs unless the seller has 'a presently exercisable and unconditional right to vest'. ASIC has also clarified through the guide that this means a legally binding commitment is required from another party such as a stock lender before the sale is entered into. ASIC will not accept an informal promise to locate stock before settlement day as sufficient for this purpose. Day traders, for example, will need stock to sell, before any sale.  **(iii) What is covered short selling**  ASIC has clarified the meaning of covered short sales. That is the seller must have a 'presently exercisable and unconditional right to vest'. Put simply, for example, a short seller must have a binding stock lending agreement for specific stock in place.   **(iv) What disclosure is required for covered short selling?**  ASIC has exercised its power under s1020F of the Corporations Act to require disclosure of covered short selling effected by reliance on stock lending agreements for specific stocks. This means a customer will be obliged to inform the broker that a transaction is a covered short sale of this type and the broker then must inform the ASX. The broker must ask the client if it is a covered short sale before taking the order.  ASX advises that it will report each morning on short sales that are reported to it for the previous day, consistent with its present reporting of naked short sales.  The instrument is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-751.pdf/$file/co08-751.pdf" \t "_new).  Regulatory guide is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg196.pdf/$file/rg196.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2)  **2.2 Conditional relief for operators of collective investment schemes authorised by Hong Kong SFC**  On 18 September 2008, the Australian Securities and Investments Commission (ASIC) issued Class Order (08/506) "Hong Kong collective investment schemes" providing operators of collective investment schemes authorised by the Hong Kong Securities and Futures Commission (SFC) conditional relief from scheme registration and certain licensing, product disclosure and fundraising requirements under the Corporations Act.  CO 08/506 is part of ASIC's implementation of the "Declaration on Mutual Recognition of Cross-Border Offering of Collective Investment Schemes" entered into between ASIC and the SFC on 7 July 2008. This agreement concerns the mutual recognition by ASIC and the SFC of schemes offered to retail investors on the basis of broad equivalence between the Australian and Hong Kong regulatory regimes.  SFC-authorised collective investment schemes and SFC-licensed managers seeking to rely on the relief must be primarily regulated by the SFC and not subject to material regulatory concessions by virtue of their regulation outside Hong Kong.   Hong Kong authorised CIS can be structured as either a unit trust or a mutual fund corporation. The Class Order has been drafted to take into account the differences in structure, in particular that a mutual fund corporation is a separate legal entity whereas a unit trust is not. Notwithstanding such differences, the relief provided under the Class Order is available to Hong Kong authorised unit trusts and mutual fund corporations.  The Class Order (08/506) 'Hong Kong collective investment schemes' is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-506.pdf/$file/co08-506.pdf" \t "_new).  The Regulatory Guide 178 'Foreign collective investment schemes' is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg178.pdf/$file/rg178.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2)  **2.3 Enquiries into market manipulation**  On 17 September 2008, the Australian Securities and Investments Commission (ASIC) announced it has extended its enquiries launched in March this year into market manipulation.  Recent volatility in the market has seen an increase in the number of complaints about false rumours and market manipulation. ASIC is looking into alleged false rumours about a number of companies, including Macquarie Group Limited.  Pushing false rumours designed to harm a company, such as by forcing a share price down, is illegal.   In March this year, ASIC launched Project Mint, an investigation into the integrity of the Australian markets and the impact of false rumours and collusion. (Refer ASIC Media Release 08-047 "False and misleading rumours" and Media Release 08-048 "ASIC seeks information on trading activities in heavily sold securities").  If a person spreads a false rumour without properly investigating its truth, the person risks breaching section 1041E of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The maximum penalty for an individual breaching this section of the Act is five years imprisonment and/or a fine of $220,000.  This section sits alongside the prohibitions on market manipulation and engaging in dishonest conduct in relation to a financial product, which carry equivalent penalties.    Further information is available on the [ASIC website](http://www.asic.gov.au/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2)  **2.4 ASIC proposes new financial services EDR claim limit of $280,000**  On 8 September 2008, the Australian Securities and Investments Commission (ASIC) released a consultation paper proposing improvements to the way financial services businesses resolve disputes with consumers.   A key proposal of ASIC's "Consultation Paper 102: Dispute Resolution - update of RG 139 & RG 165" is to increase the cap on compensation that can be awarded by an external dispute resolution scheme approved by ASIC (EDR scheme) to $280,000.  This consultation follows the creation of the new Financial Ombudsman Scheme, the amalgamation of three dispute resolution bodies, to make it easier for consumers to know where to go if they have a dispute.  The proposals take into account the recommendations made by the Productivity Commission in its final report into Australia's consumer policy framework dated 30 April 2008.  The closing date for submissions is 7 November 2008.  Under section 912A of the Corporations Act, financial services businesses that do business with retail clients are required to have a dispute resolution system that consists of an internal dispute resolution process and membership of one or more external dispute resolution schemes approved by ASIC.   "Regulatory Guide 139 Approval of external complaints resolution schemes" (RG 139) sets out ASIC's approval guidelines for external dispute resolution schemes.  "Regulatory Guide 165 Licensing: Internal and external dispute resolution" (RG 165) sets out how ASIC administers the dispute resolution requirements for Australian financial services licensees and unlicensed secondary sellers.  To date, ASIC has approved the following EDR schemes:   * Financial Ombudsman Service * Banking and Financial Services Ombudsman * Insurance Ombudsman Service * Financial Industry Complaints Service (FICS) * Insurance Brokers Disputes * Financial Cooperative Dispute Resolution Service * Credit Union Dispute Resolution Centre * Credit Ombudsman Service.   Consultation Paper 102: Dispute Resolution - update of RG 139 & RG 165 is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Consultation_paper_102_Dispute_resolution.pdf/$file/Consultation_paper_102_Dispute_resolution.pdf" \t "_new).   Regulatory Guide 139: Licensing: Internal and external dispute resolution is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps139.pdf/$file/ps139.pdf" \t "_new).  Regulatory Guide 165: Approval of external complaints resolution schemes is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/PS165.pdf/$file/PS165.pdf" \t "_New).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2)  **2.5 Final guidance to improve disclosure by unlisted mortgage and property schemes**  On 2 September 2008, the Australian Securities and Investments Commission (ASIC) released final regulatory guides aimed at improving disclosure to retail investors by unlisted mortgage schemes and unlisted property schemes.   As with its work in the unlisted and unrated debentures, ASIC has produced companion investor guides for both sectors to assist investors in understanding the enhanced disclosure and make better informed investment decisions.   Mortgage and property fund managers, industry and consumer groups, advisers, valuers, auditors, ratings agencies and financial planners together made over 50 submissions in response to ASIC's consultation papers released on 7 July 2008.  In response to the submissions it received, ASIC has:   * modified certain aspects of the benchmarks and disclosure principles and advertising guidance in the regulatory guides; * clarified the method of communication of the information to retail investors; and * modified the implementation timetables.   ASIC encourages responsible entities to communicate the enhanced disclosure information to investors in the most efficient and effective way possible and using existing investor communication channels (e.g. by the scheme's website and regular investor reports) where possible.  ASIC also encourages responsible entities, compliance committees and compliance plan auditors to engage with this guidance in a timely manner.  Accompanying the regulatory guides is:   * a report outlining the submissions received together with reasons why ASIC may have followed or not followed certain suggestions; and * a Regulation Impact Statement demonstrating that the benefits outweigh the cost of compliance in this exercise.   ASIC's team will continue to work with unlisted property and mortgage fund responsible entities to assist them in practically implementing the enhanced disclosure in line with the modified implementation timetable.  The $42 billion under management in the unlisted retail mortgage scheme sector and the $28 billion unlisted retail property scheme sector are part of the $1.6 trillion total unconsolidated funds under management.  **Benchmarks for unlisted mortgage schemes**   1. Liquidity - This addresses the scheme's ability to satisfy withdrawal requests and other operational commitments.  2. Scheme borrowing - This addresses the scheme's policy on borrowing. 3. Portfolio diversification - This addresses the scheme's lending practices and portfolio risk. 4. Related party transactions - This addresses the risks associated with related-party lending, investments and transactions. 5. Valuation policy - This addresses the scheme's valuation practices. 6. Lending principles - loan-to-valuation ratios - This addresses the scheme's properly-related lending practices 7. Distribution practices - This addresses the transparency of the scheme's distribution practices. 8. Withdrawal arrangements - This addresses the transparency of the responsible entity's approach to withdrawals of investments.  **Disclosure principles for unlisted property schemes**   1. Gearing ratio - This indicates the extent to which a scheme's assets are funded by external liabilities. 2. Interest cover - This indicates the scheme's ability to meet interest payments from earnings. 3. Scheme borrowing - This requires information on the scheme's borrowing maturity and credit facility expiry and any associated risks, including loan covenant information. 4. Portfolio diversification - This addresses the scheme's investment practices and portfolio risk. 5. Valuation policy - This addresses the scheme's valuation practices. 6. Related party transactions - This addresses the risks associated with related-party lending, investments and transactions. 7. Distribution practices - This addresses the transparency of the scheme's distribution practices. 8. Withdrawal rights - This requires information where a scheme gives investors withdrawal rights.  Regulatory Guide 45, Mortgage schemes-improving disclosure for retails investors is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg45.pdf/$file/rg45.pdf" \t "_New).  Regulatory Guide 46, Unlisted property schemes-improving disclosure for retails investors is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg46.pdf/$file/rg46.pdf" \t "_new).  Report 139, Report on submissions for CP 100 Unlisted property schemes-improving disclosure for retail investors is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_139.pdf/$file/REP_139.pdf" \t "_new).   Report 138, Report on submissions for CP 99 Mortgage schemes-improving disclosure for retail investors is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_138.pdf/$file/REP_138.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2)  **2.6 ASIC's new structure**  On 1 September 2008, the Australian Securities and Investments Commission (ASIC) formally moved to a new structure, allowing it to work more closely with its stakeholders.  ASIC states that this new structure will result in it being able to move more quickly as trends emerge as well as being more responsive to needs of market participants.   The key changes ASIC has made include:   * additional investment in market research and analysis; * moving to appoint an experienced External Advisory Panel drawn from a variety of sectors of the economy in order to advise ASIC's Commission on market developments and potential systemic issues (being finalised); * replacing the four previous "silo" directorates with 18 outwardly-focused stakeholder teams covering the financial economy (e.g. teams for retail investors and consumers, investment managers, investment banks, superannuation funds and financial advisers); * additional resources directed to the supervision of brokers and intermediaries and to operators of exchange-traded products and to surveillance of exchange-traded markets; and * introducing a better balance between national and regional initiatives.   Further information on the new structure is available on the [ASIC website](http://www.asic.gov.au/asic/asic.nsf/byHeadline/Our%20new%20structure?opendocument" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2)  **2.7 Unit pricing guide update**  On 28 August 2008, the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) released a newly updated 'Unit pricing - guide to good practice for the life insurance, superannuation and funds management industries'.  The joint APRA/ASIC guide has been amended so that scheme operators can elect not to make payments to exited members for unit pricing errors where the compensation due is less than $20.  Both regulators understand there are significant costs involved for scheme operators in writing cheques for very small amounts and think drawing the line at the $20 level is reasonable. The goal is to reduce the costs of doing business, without compromising the interests of members.  The amendment does not affect the legal rights of members - this remains a matter for scheme operators to assess. However, the regulators will be satisfied if scheme operators adopt this amendment when determining compensation to individual members.  The $20 minimum would only apply to payments made to exited members; those members still in the fund should expect to be compensated regardless of the amount involved. The aim of the rectification process is to restore all parties to the position they would have been in had the unit pricing error not occurred. At the end of that process, any net cost is to be met by the scheme operator. However, if there is a net benefit from amounts not paid to exited members, that benefit is to remain in the fund - the scheme operator must not benefit from the process. The scheme operator also remains responsible for all administrative rectification costs.  APRA and ASIC reiterated that unit pricing issues can be complex and providers need to remain vigilant in applying robust risk management practices, as well as meeting their trustee and responsible entity obligations.   APRA and ASIC will continue to review aspects of unit pricing practice and generally expect that product providers will follow the 'good practices' described in the guide. That said, APRA and ASIC understand that alternative practices are sometimes appropriate but expect product providers to have a reasonable and well-documented justification for adopting them.  The guide is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg94.pdf/$file/rg94.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2)  **2.8 ASIC further clarifies guidance for unlisted and unrated debentures**  On 29 August 2008, the Australian Securities and Investments Commission (ASIC) released the updated 'Regulatory Guide 69: Debentures-improving disclosure for retail investors'.  The guide clarifies existing obligations to make them simpler for issuers to implement but does not change ASIC's policy on improved disclosure for retail investors.   The original guide, released on 31 October 2007, set out a series of benchmarks which debenture issuers should disclose against on an 'if not, why not' basis. The benchmarks are designed to ensure the risks associated with debentures are better disclosed to retail investors.  Since the guide was released, ASIC has been working with debenture issuers, trustees, and auditors to ensure that the benchmarks, disclosure, and auditor obligations are understood.   As a result of this feedback, ASIC has refined some aspects of the practical implementation in the regulatory guide by clarifying:   * the disclosure benchmarks for: equity capital, liquidity, loan portfolio, valuations, and lending principles; * the disclosure obligations for issuers who on-lend funds indirectly through a related party; * that the guide does not apply to debentures that are to be quoted on a financial market, or to debentures that are convertible into listed securities at the discretion of the investors; and * the auditors' report on the benchmarks.   When auditing the annual financial report of the issuer, ASIC expects issuers to engage their auditors to provide a separate report in relation to the benchmarks.   ASIC has been monitoring debenture issuers to check that this benchmarking information is adequately disclosed to investors on an 'if not, why not' basis.  ASIC intends to continue working with debenture issuers, trustees, auditors, and valuers to ensure retail investors are better informed when making choices about their investments and assessing the risk of capital return.  Regulatory Guide 69: Debentures-improving disclosure for retail investors is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg69v1.pdf/$file/rg69v1.pdf" \t "_new).   Pro forma 223 Interim auditor's benchmark report is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/pf223.pdf/$file/pf223.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%234) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008_files/spacer%281%29.gif | | |  | | --- | | **3.1 Proposed listing rule amendments**   On 11 September 2008, ASX released details of listing rule amendments expected to take effect by year-end 2008. The proposed ASX Listing Rule Amendments deal with:   * Appendix 5B: Mining exploration entity quarterly report; * Listed investment company annual reporting; * Appendix 7A and definitions: security purchase plans; and * Non-executive director fee pool.   **(a) Appendix 5B: Mining exploration entity quarterly report**   Listing rule 5.3 says a mining exploration entity must complete Appendix 5B: Mining Exploration Entity Quarterly Report, and give it to ASX within 1 month after the end of each quarter of its financial year. Appendix 5B contains a consolidated statement of cash flows, including operating activities cash flows in respect of four payments for exploration and evaluation; development; production; and administration.    The Appendix also requires disclosure of estimated cash outflows for the next quarter. Currently an entity is required to disclose estimates of forward cash outflows in relation to exploration and evaluation, and development. For the sake of presenting a complete picture of the company's likely cash flows for the forthcoming quarter, it is proposed to amend Appendix 5B and to include production and administration (as well as exploration and evaluation and development) in the fourth section of the Appendix relating to estimates of cash outflows for the next quarter. This information will help investors understand the entity's likely 'cash burn' for the next quarter.   The change will provide more meaningful disclosure to investors and will enhance the role of the Appendix 5B as a cash forecast mechanism. In particular, ASX notes that administration costs may account for over 50% of a mining exploration company's net operating cash flows for the quarter and that administrative costs vary considerably from quarter to quarter. The changes will mean that a company must estimate its administrative and production costs for the next quarter.   ASX anticipates this change will take effect for the quarter commencing 1 January 2009.   **(b) Listed investment company annual reporting**   ASX proposes amendments to Listing Rules 4.10 and 4.10.20 which will have the effect of enabling Listed Investment Companies (LICs) to disclose in their annual report a list of all investments held by the LIC and its child entities as at the balance date.   A LIC is required under listing rule 4.10.20(a) to disclose in its annual report a list of all investments held by it and its child entities. The rule says the information must be current at a date no more than 6 weeks before the annual report is sent to security holders. Rule 4.10.20 was introduced in 1999.   The pre-curser to the current rule was an investment company guidance note. It required a LIC to provide a list of investments as at the company's balance date. In 1999 an Exposure Draft proposed to delete most of the limitations placed on investment companies by the guidance note, but also proposed to retain annual reporting of the list of investments. In the process of transferring this requirement from the investment company guidance note to listing rule 4.10, the nexus with the balance date was lost.   ASX has become aware that the current wording of the rule presents timing issues for several LICs, and proposes to restore the nexus to the balance date. This amendment will not have any materially adverse affects on the timeliness or quality of information disclosed to shareholders, but will mean that affected LICs are not in technical breach of this listing rule.   **(c) Appendix 7A and definitions: security purchase plans**    ASX has previously consulted on these listing rule amendments. A new requirement will be introduced to ensure that companies which offer a Security Purchase Plan (SPP) must ensure that it is open to all shareholders on the register the business day before the SPP is announced. The response to this proposal has been generally favourable and it is proposed to implement the proposed amendments as set out below.   The proposal will remove the incentive and ability for sellers to manipulate the delivery of entitled securities to the detriment of purchasers. However, it will not add to the length of time it will take a company to conduct an SPP and will not detract from the underlying principle of the SPP, of providing long-term shareholders the opportunity to purchase shares at no brokerage, and possibly at a discount to the market price, as a reward for their loyalty.   The rule is not intended to prevent a company from foreshadowing that a SPP will occur; however the effect of the rule will be that on the day a company releases full details of the SPP, only those shareholders on the register the day before the SPP is announced are eligible to take part.   **(d) Non-executive director fee pool**    Listing rule 10.17 says that shareholders must determine the total maximum amount of directors' fees payable to non-executive directors. A company cannot increase the total fee pool for non-executive directors without shareholder approval.   ASX has received feedback which suggests there is some uncertainty in the market as to whether superannuation, including any salary sacrificed amounts contributed by non-executive directors, should be included in the fee pool. In ASX's view these payments should be included in the fee pool, thus resulting in consistent treatment of superannuation payments across all listed entities.   ASX proposes to amend this listing rule so it is clear that all payments, including superannuation payments, must be included by the company when calculating the total amount of directors' fees payable. In other words, a company which pays non-executive directors' superannuation in excess of the total amount of fees approved by shareholders will be in breach of the listing rule.  Further details of the listing rule amendments are available on the [ASX website](http://www.asx.com.au/about/pdf/notification_rule_amendments.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%235) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008_files/spacer%281%29.gif | | |  | | --- | | **4.1 Origin Energy Limited - Panel decision**  On 11 September 2008, the Takeovers Panel (Panel) decided not to make a declaration of unacceptable circumstances in response to an application from BG International (AUS) Investments 1 Pty Limited in relation to the affairs of Origin Energy Limited.   BG's application related to disclosure in Origin's target statement. Origin announced on 8 September 2008 its proposed CSG-LNG joint venture with ConocoPhillips and the conclusions of its independent expert's report. BG announced on 9 September 2008 that it would not increase or extend its offer for Origin, or waive any of the conditions to the offer. BG's offer is scheduled to close on 26 September 2008.   Origin has stated that it will provide its shareholders with an independent expert's report prior to the close of BG's offer. The Panel considered that the following matters require further disclosure but considered that they could be adequately dealt with by Origin through supplementary disclosure that included the independent expert's report.   1. The target's statement stated that BG's offer undervalued Origin. The Panel considered that the target's statement did not provide sufficient disclosure of the bases on which Origin's directors considered the bid undervalued Origin and considered that the information which was provided was inadequate insofar as some of the information sourced from third parties was not adopted as the Origin directors' own views.  2. There was insufficient disclosure of why Origin considered the use of the selected broker valuations to be relevant and Origin gave insufficient prominence to disclosure that the valuations were published after the announcement of BG's offer and not adopted by the directors. This had the effect of overstating the importance of the broker valuations. A footnote, given the context, was not sufficiently prominent or otherwise adequate.  3. The use of an expert's report in relation to Origin's gas reserves without disclosing the whole report or alternatively disclosing the qualifications and assumptions underlying the valuation was potentially misleading to shareholders.    Further information is available on the [Panel website](http://www.takeovers.gov.au/" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%236) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008_files/spacer%281%29.gif | | |  | | --- | | **5.1 Proceeds of fraud received by a third party**   (By Anna Mahony and Mark Cessario, Corrs Chambers Westgarth)   MBF Australia Limited v Samuel John Malouf [2008] NSWCA 214, New South Wales Court of Appeal, Hodgson, Ipp and Basten JJA, 5 September 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/september/2008nswca214.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/september/2008nswca214.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_New)    **(a) Summary**   Mr Hill was an agent who obtained a bank cheque provided by Mr Malouf.  The cheque for $165,000 was provided by Mr Malouf to enable Mr Hill to obtain insurance for a business loan of $5 million.  Instead, Mr Hill used the bank cheque to fulfil a requirement for rent in advance under a lease being negotiated between his company, SRL Technology Pty Ltd ("SRL"), and MBF Australia Limited ("MBF"). Upon receipt of the cheque, but prior to presenting it, MBF allowed SRL to move in to the premises as putative tenant.     The promised loan to Mr Malouf never eventuated and he reported the matter to the NSW Police claiming that Mr Hill had committed a fraud on him. Mr Malouf also advised an employee of MBF, Mr Hartley, that the cheque provided to MBF by Mr Hill had been fraudulently obtained. Mr Hartley did not tell anyone else in MBF what he had been told by Malouf, nor did he investigate the claims further.     The issue for the court was whether Mr Malouf was entitled to recover the $165,000 from MBF.   Hodgson JA, with whom Ipp JA agreed, held that the fraud committed by Mr Hill on Mr Malouf created a resulting trust in favour of Mr Malouf. Upon receiving notice of Mr Malouf's rights, MBF was no longer a bona fide purchaser for value without notice, and as such unreasonably failed to investigate Mr Malouf's rights. As a result, the whole of the cheque proceeds were held on trust for Mr Malouf.     By different reasoning, but also finding in favour of Mr Malouf, Basten JA decided that on the basis of the [Cheques Act 1986 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6689" \t "Default), the cheque provided by Mr Hill to MBF was void because it was obtained by fraud. As such MBF did not acquire title to the cheque or its proceeds, and accordingly Mr Malouf was entitled to recover the funds.   **(b) Facts**    Mr Hill represented to the respondent, Mr Malouf, that he could arrange a $US 5 million business loan. Mr Hill said the loan would be protected by an insurance policy, which Mr Hill would obtain for Mr Malouf at a cost of $165,000, upon Mr Malouf's payment to him of that sum. Mr Hill directed Mr Malouf to make the bank cheque he provided payable to MBF.    Concurrently, Mr Hill was negotiating a lease by his company (SRL) of premises owned by MBF. The lease required SRL to provide rent in advance and a bank guarantee as security.  SRL executed the lease and returned it to MBF with the $165,000 bank cheque from Mr Malouf to fulfil the obligation to provide 6 months rent in advance. Upon receipt of the cheque, MBF allowed SRL to take occupation of the premises as a putative tenant. MBF did not execute the lease at this point because the necessary security had not been provided by SRL.   Upon realisation that the loan had not eventuated, Mr Malouf reported the matter to the NSW Police and spoke to an employee of MBF, Mr Hartley. Mr Malouf informed Mr Hartley that he had been "conned" by Mr Hill and that funds provided by Mr Hill to MBF had been dishonestly obtained.   Mr Hartley did not investigate Mr Hill's claims, and did not refer the matter to anyone else at MBF.   Mr Malouf commenced proceedings against MBF for the return of the $165,000. At first instance Mr Malouf was successful. MBF appealed that decision.   **(c) Decision**    **(i) Hodgson JA, with whom Ipp JA agreed**   Hodgson J found that Mr Hill's fraud was equivalent to theft and that, as a result, a trust arose immediately in favour of Mr Malouf.   His Honour held that the cheque was provided so it could be held in escrow pending the execution by MBF of a lease. That is, the cheque was provided and received on the understanding it was to be used in the satisfaction of SRL's obligations under the lease.     Whilst the lease was not complete at this time, MBF did give consideration in allowing SRL into possession. As a result, MBF was a purchaser for value of the rights in relation to the cheque provided by SRL/Mr Hill.   The rights acquired by MBF in receiving the cheque from SRL/Mr Hill were limited to the following:   * to pay the cheque into its bank account; * to hold the proceeds until the lease was finalised; and * to apply the proceeds in discharge of obligations of SRL under the lease upon execution of the lease.   In respect of these rights MBF was a bona fide purchaser for value.   Hodgson J held that where "the question is whether a person receiving trust property was a bona fide purchaser for value without notice, the onus of excluding notice lies squarely on that person".     The evidence established that Mr Hartley did not make any enquiries regarding Mr Malouf's complaint that he had been "conned" by Mr Hill and that the funds provided by Mr Hill to MBF had been dishonestly obtained.     His Honour held that, in circumstances where MBF only had the limited rights to the cheque referred to above, that it was not reasonable for Mr Hartley to make no further investigation of the matter so as to reach a reasonable belief as to whether or not there was a trust affecting the proceeds of the cheque.     Hodgson J did not make a positive finding that MBF did have sufficient notice of the fraud to satisfy the first limb in Barnes v Addy. However, His Honour did conclude that MBF failed to discharge its onus of proving that they had no notice of the fraud. As a result Malouf was entitled to recover the proceeds of the cheque.   Hodgson J noted that MBF could have resisted Mr Malouf's claim to the extent of the rights it acquired without notice. However, MBF did not identify, quantify and value the rights which it was assigned at the time it acquired the cheque. As such, Mr Malouf succeeded in recovering the full $165,000 from MBF.   **(ii) Basten JA**   Mr Hill obtained the cheque from Mr Malouf by fraud, making it "defective" under section 3(3) of the Cheques Act. As a result, Mr Hill's title was either void or voidable. Ultimately, Basten JA found that the cheque was void and, given section 55 of the Cheques Act, Mr Hill could give no better title than this to MBF.     His Honour therefore held that, in collecting and appropriating the funds received, MBF converted the cheque which was still owned by Mr Malouf. As such, MBF was unjustly enriched and owed $165,000 to Mr Malouf.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.2 Statutory demands don't wait for the AAT**  (By Stephen Magee)   Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd [2008] HCA 41, High Court of Australia, Gummow ACJ, Kirby, Heydon, Crennan and Kiefel JJ, 3 September 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2008/september/2008hca41.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2008/september/2008hca41.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   An application for a formal AAT review of a tax assessment does not mean that there is a genuine dispute about the existence or the amount of the debt created by the assessment. Accordingly, the existence of the review does not provide grounds for setting aside a statutory demand based on that debt.   **(b) Facts**    The Deputy Commissioner of Taxation issued statutory demands to three companies. These demands related to unpaid tax assessments and declarations.    The companies applied to the Administrative Appeals Tribunal for a review of the assessments (under Part IVC of the Taxation Administration Act 1936).   The companies then applied to have the statutory demands set aside under section 459G of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), on the grounds that the tax debts claimed in the demands were genuinely disputed (section 459H(1)(a)).   At first instance and on appeal, it was held that the demands should be set aside. The Queensland Court of Appeal held that the existence of a Part IVC review did raise a genuine dispute about the tax debt claimed in a statutory demand. The court of Appeal also appeared to hold that the existence of a Part IVC review provided grounds for setting aside a demand under section 459J(1)(b).   The Commissioner appealed both holdings to the High Court; although the Commissioner did concede that there should be some variation to the statutory demands to take account of a genuine dispute about the application of interest charges to some portions of the claimed debts.   **(c) Decision**    The Commissioner's appeal was allowed.   **(i) Genuine dispute**   A "tax-related liability" was a debt due to the Commonwealth. The legislative scheme covering income tax and GST drew a distinction between the conclusiveness of the existence and quantum of a (tax) debt and the issues in, and outcome of, a Part IVC proceeding.    The pendency of a Part IVC review application did not impede the Commissioner's ability to recover that debt (section 14ZZM of the Administration Act).    The phrase "may be recovered" in sections 14ZZM and 14ZZR of the Administration Act applied to the statutory demand procedure. It followed that the use by the Commissioner of the statutory demand procedure in aid of a winding up application was in the course of recovery of the relevant indebtedness to the Commonwealth by a permissible legal avenue.    The existence of a Part IVC application did not, therefore, constitute a dispute about the amount or existence of the tax debt under section 459H.    **(ii) "Some other reason"**   The existence of a Part IVC application did not provide "some other reason for setting aside a demand under section 459J(1)(b).   That was because the Corporations Act contemplated that debts which could be the subject of statutory demands included tax debts. For that reason, when a court was considering section 459J(1)(b), one of the factors to be taken into consideration was the fact that section 14ZZM allowed the Commissioner to serve a demand for a conclusively-established tax debt unimpeded by the existence of a Part IVC application. It would, therefore, be a miscarriage of the court's discretion to hold that the Part IV C application was a reason for setting aside a demand based on the debt the subject of the application.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.3 Scheme of arrangement break fee not payable where scheme abandoned**   (By Steven Rice, Freehills)   Healthscope Ltd v Symbion Health Ltd [2008] NSWSC 893, Supreme Court of New South Wales, Hammerschlag J, 1 September 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/september/2008nswsc893.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/september/2008nswsc893.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This decision relates to the interpretation of transaction documents which provided for a "break fee" to be payable in certain circumstances. Although the decision is specific to the construction of the documents in question, in explaining why the break fee was not payable here the judgment sets out some helpful factors to bear in mind in the drafting and interpretation of these types of documents and commercial contracts generally.   **(b) Facts**   **(i) Background**   On 8 October 2007, Symbion agreed to sell parts of its business to Healthscope. Under a "Transaction Implementation Deed" ("Deed") executed on that date, shares of the Symbion subsidiary which owned Symbion's pathology, medical centre and diagnostic imaging businesses would be sold to Healthscope ("Diagnostics Sale") in exchange for shares in Healthscope. The Healthscope shares would be distributed to Symbion shareholders and the capital of Symbion would be reduced accordingly. This transaction would occur concurrently with a scheme of arrangement in relation to Symbion, which was to effect the sale of the other parts of Symbion's business. The Deed was subject to a number of conditions precedent.   There were two particularly important features of these arrangements. Firstly, approval for the Diagnostics Sale was required by resolution passed at a general meeting ("General Meeting") of Symbion shareholders. The General Meeting was to be held on 30 November 2007. Secondly, a break fee of $19.75 million ("Break Fee") was payable by Symbion if the Diagnostics Sale did not proceed in certain circumstances. Critically, one such circumstance was if a competing control transaction was announced by a third party before the date of the General Meeting, and that control transaction resulted in the third party acquiring control of Symbion within 12 months.   On 8 November 2007 a third party, Primary Healthcare Limited, announced a cash, off-market, conditional takeover bid for Symbion. Primary already held 20% of Symbion shares at the time its proposal was announced.   Following execution of the Deed, confirmatory rulings from the Australian Taxation Office ("ATO") were requested. This was because capital gains tax ("CGT") rollover relief for both Symbion and its shareholders were essential to the successful implementation of the Deed. However, on 27 November 2007 Symbion announced the ATO had ruled Symbion could not benefit from scrip-for-scrip CGT rollover relief.    The ATO's refusal to issue the CGT rulings had an immediate impact. The refusal meant that a condition of the Deed was not met, and both parties could then terminate it. Symbion and Healthscope did indeed agree to terminate the Deed, but the Break Fee provisions survived this termination.    On 27 November, three days before its scheduled date, the General Meeting was cancelled.   Primary's competing proposal led to Symbion gaining control of Symbion. Primary completed compulsory acquisition on 28 April 2008.   Healthscope demanded payment of the Break Fee. Symbion did not pay it, and Healthscope commenced these proceedings.   **(ii) Arguments of Healthscope and Symbion in the proceedings**   The meaning of "the date of" the General Meeting in the Deed was critical to the proceedings. The arguments of Healthscope and Symbion centred around whether the proper construction of the term "the date of" meant the date when the General Meeting actually did take place or when the General Meeting would have taken place but for its cancellation.   In seeking payment of the Break Fee, Healthscope argued that "the date of" the General Meeting meant the date set for the General Meeting, and pointed to various provisions of the Deed to support this contention. Healthscope said the purpose of the Deed would be frustrated if Healthscope had no right to the Break Fee where the General Meeting did not take place and a competing proposal had been successful.   Denying liability to pay the Break Fee, Symbion contended that "the date of" the General Meeting should be interpreted according to its ordinary grammatical construction. Symbion said the commercial purpose of the Break Fee would be frustrated if it was payable where the Healthscope proposal was withdrawn before a competing proposal was successful.  **(c) Decision**   The court decided that Symbion was not liable to pay the Break Fee to Healthscope and awarded costs to Symbion. The Court interpreted "the date of" the General Meeting to be intended to mean the date that the General Meeting actually did occur. Given that the General Meeting did not occur because it was cancelled, the competing control transaction of Primary was not announced before the "date of" the General Meeting.   The reasons that the court preferred the arguments of Symbion are worthwhile to bear in mind when drafting contractual documents of this nature. In this regard, Hammerschlag J stated at [2008] NSWSC 893 at [90]:   "[Symbion's] construction is the correct one because: a) it, rather than [Healthscope's] construction, accords with the plain meaning of the words [used in the relevant Break Fee clause]; b) it is supported by a consideration of the words used in other relevant provisions of the Deed; c) on it [the relevant Break Fee clause] operates sensibly and congruently with other provisions of the Deed; and d) it better accords with the commercial objects the Deed was intended to secure."  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.4 Applications for examination summons under section 596B of the Corporations Act**   (By NT Vijayalingam, Blake Dawson)   McGrath as Liquidators of HIH Insurance Ltd [2008] NSWSC 881, Supreme Court of New South Wales, Barrett J, 26 August 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/august/2008nswsc881.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/august/2008nswsc881.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Anthony McGrath and Christopher Honey, as liquidators of HIH Insurance Ltd, applied to the Court to summon two persons residing in England for examination about HIH's examinable affairs under section 596B of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The liquidators claimed that HIH's takeover of FAI Insurance Ltd caused HIH loss due to the misconduct of certain persons within FAI. The application to summon the proposed examinees was intended to provide information in relation to this claim.   The matter came before Barrett J ex parte. His Honour found the application turned on three considerations. First, whether the application fell within the ambit of section 596B(1) of the Corporations Act and related to the examinable affairs of HIH. Second, whether leave should be granted to file the summons under the Court Rules in the [Uniform Civil Procedure Rules 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default). Third, whether the court should send a letter to the High Court of Justice of England and Wales requesting its assistance in conducting the proposed examinations under section 581(4) of the Corporations Act.   His Honour granted the application.    **(b) Facts**    The liquidators submitted that FAI Insurance Ltd issued allegedly false and misleading information relevant to the losses incurred by HIH during its takeover of FAI. In that connection, the liquidators pointed to the conduct of certain directors of FAI during 1998 and 1999.    The application for a summons under section 596B of the Corporations Act was filed in relation to two persons residing in England. It was similar to a recent application by the liquidators summoning a person resident in Hong Kong under the same provision and with respect to the same claim (McGrath and anor as liquidators of HIH Insurance Ltd [2008] Supreme Court of New South Wales, Barrett J, 31 July 2008: [2008] NSWSC 780 - referred to as the Hong Kong application). This earlier judgment is discussed in Item 4.1 of Corporate Law Bulletin No 132 (August 2008). His Honour relied on those reasons to grant the application to summon the persons resident in England.    **(c) Decision**   His Honour's decision turned on three relevant provisions.         **(i) Section 596B(1) of the Corporations Act**   Section 596B(1) of the Corporations Act permits a court to summon a person for examination about a corporation's examinable affairs if, among other things, the court is satisfied that the person may be able to give information about those affairs and the application is filed by an eligible applicant - such as the liquidators of the relevant corporation.   His Honour referred to the liquidators' submission in the Hong Kong application that the claim they considered HIH to have, due to the alleged misconduct within FAI, was an examinable affair for the purposes of section 596B(1). If the proposed examinees in the present application could provide information related to that claim, then that would amount to an examinable affair of HIH within the scope of section 596B(1)(b)(ii).  **(ii) Leave to file summons under the Uniform Civil Procedure Rules 2005**   Barrett J also relied on his reasons in the Hong Kong application to conclude leave should be granted under the Court Rules. Two considerations were relevant to the exercise of this discretion.  The first related to whether the proposed examinees would be precluded from divulging relevant information due to any duties of confidentiality. However, his Honour noted any duty of confidentiality owed by the proposed examinees should not be addressed during the present application for an examination summons, unless, it can be said that, without further inquiry, the duty is so strong as to prevent the persons from giving any information.   The second relevant consideration related to the enforceability of issuing any summons under section 596B. If a summons is issued under that section, the proposed examinees are obliged to attend the examination under section 597(6) of the Corporations Act. Accordingly, leave to issue the summons could not be granted if the English Courts would not enforce the summons and compel the proposed examinees to attend an examination. In this respect, this second consideration relevant to granting leave to issue the summons became dependent on the third provision relevant to the application in general.   **(iii) Request for assistance from a foreign court under section 581(4) of the Corporations Act**   Section 581(4) of the Corporations Act permits the court to request a foreign court, 'with jurisdiction in external administration matters to act in aid of, and be auxiliary to it, in an external administration matter.'  Three factors are relevant to a consideration of this provision. First, the request for assistance from the English Courts must relate to an external administration matter and fall within the ambit of section 581(4). Second, there must be a 'good substantive reason' for the request. Third, the English Courts should be likely to ensure compliance with the request and enforce an appropriate examination of the persons residing in England.     The first two considerations were satisfied due to the same reasons in the Hong Kong application.  In the first instance, the request related to the ultimate liquidation of HIH, which amounted to an external administration matter for the purposes of section 581(4). With respect to the second consideration, the foreign residence of the two proposed examinees, and the same reasons for granting an application for an examination summons under section 596B of the Corporations Act, constituted a 'good substantive reason' for the request: namely, the possibility that the proposed examinees would provide information on the losses incurred by HIH in its takeover of FAI Insurance.   The third consideration was easier to determine in this case, as opposed to the Hong Kong application, because English domestic law provided for express jurisdiction over external administration affairs of foreign corporations. It was sufficiently likely that an English Court would act in aid of, and be auxiliary to, the New South Wales Supreme Court in the examination of the proposed persons.     Furthermore, since the English Courts were likely to enforce and compel the proposed examinees to attend the examination, this also constituted a relevant consideration to granting leave to issue the summons.   His Honour also noted the UNCITRAL Model Law on Cross Border Insolvency applies in England, as it does in Australia since 1 July 2008 under the [Cross-Border Insolvency Act 2008 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=101816" \t "Default). Under this regime, the liquidators could apply to English Courts exercising an independent jurisdiction over the external administration affairs of HIH, rather than an auxiliary one. However, the liquidators preferred not to rely on this approach in light of their previous applications for assistance from foreign courts under section 581(4) of the Corporations Act.  The Court permitted the liquidators to pursue their preference.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.5 The council, the constitution and the 'corporation' question**  (By Kristian Imbesi, Mallesons Stephen Jaques)   Australian Workers' Union of Employees, Queensland v Etheridge Shire Council [2008] FCA 1268, Federal Court of Australia, Spender J, 20 August 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/august/2008fca1268.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/august/2008fca1268.htm" \t "_new)   or   [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The court held that the Etheridge Shire Council ("Council") was not a trading or financial corporation within the meaning of section 51(xx) of the Constitution, and as such was not an "employer" under section 6 of the [Workplace Relations Act 1996 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6125" \t "Default) ("WRA"). Justice Spender held that it would be 'inconceivable' that the power in section 51(xx) could have been intended to apply in respect of local government, and stated that the constitutional framework 'emphatically denies' such an application. His Honour stated that it would be 'impossible' to properly define the Council as a trading corporation.   Spender J concluded by stating that if the Commonwealth government did have the power to regulate the activities, functions, rights, privileges, obligations and conduct of the Etheridge Shire Council, 'such power would annihilate any concept in the Constitution of a federal balance, and in a very significant way, [would] permit the Commonwealth to nullify the right of the State to govern in its local government areas'.   The decision does not, however, represent any great watershed in judicial consideration of the corporations power in the Constitution, as the question as to whether a particular local council is a corporation for the purposes of section 51(xx) is one that will turn on the factual and circumstantial matrix in each case.   **(b) Facts**   The Council, as an employer, attempted to lodge a workplace agreement under the WRA. Under section 6 of that Act, 'employer' is defined as meaning a constitutional corporation to which section 51(xx) applies. The Queensland arm of the Australian Worker's Union of Employees asserted that the Council was not an employer within the meaning of the WRA provision, particularly because it was not a trading or financial corporation within section 51(xx), and sought declarations to this effect. This case thus turned on whether the Council was either a 'trading corporation' or a 'financial corporation' within section 51(xx) of the Constitution.   **(c) Decision**    **(i) Background: Work Choices**   Spender J began his decision with reference to the High Court judgment delivered in New South Wales v Commonwealth [2006] HCA 52 ("Work Choices Case"), which considered the constitutional basis of the WRA. His Honour referred to numerous segments of reasoning in the 5:2 majority judgment and stated that the decision essentially concluded that the WRA was substantially an exercise of the corporations power under section 51(xx) of the Constitution, and was valid in its application to constitutional corporations. The question remaining for the present proceeding was whether the Council was such a corporation.   **(ii) The authority of St George County Council**   His Honour considered that there was no High Court authority, and very little superior court authority, which could answer the question of whether the Council was or could be a financial or trading corporation within the Constitutional meaning. His Honour thus turned to the High Court decision of R v Trade Practices Tribunal; Ex Parte St George County Council (1974) 130 CLR 533 ("St George"), which Spender J considered was 'not directly on point', but which assisted in the inquiry into the activities of a trading or financial corporation in comparison with the activities of the Council in the present case.   The majority decision in St George (Barwick CJ dissenting) found that the St George City Council was not a 'trading corporation', notwithstanding that it carried on a certain amount of trading activities. That Council's legislative empowerment, under the [Local Government Act 1919 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4058" \t "Default), was to supply electricity and to supply and install electrical fitting and appliances, and these were its only activities.    Interestingly, Spender J focused his analysis of St George on the reasoning in the dissenting judgment of Barwick CJ, whose judgment stated that the characterisation of an entity as a 'trading corporation' referred 'not to the purpose of incorporation but to the activities of the corporation at the relevant time', and that 'a corporation whose predominant and characteristic activity is trading whether in goods or services will, in my opinion, satisfy the description'. Barwick CJ continued on to state that the extent and relative significance of such activities to the affairs of the corporation was also of significant importance.   This 'activities' test was referred to by Spender J as receiving subsequent approval by the High Court in R v Federal Court of Australia; Ex parte WA National Football League (1979) 143 CLR 190 ("Adamson"). In that judgment, the purposive method of characterisation employed by the St George majority was seen as overtaken by Barwick CJ's 'activities' method. Spender J therefore felt that the activities test was the proper test to apply.   **(iii) Application of the 'activities' test to Etheridge Shire Council**   His Honour noted that the mere existence of some trading activity on the part of the Etheridge Shire Council was not significant or sufficient in terms of drawing conclusions about the overall character of the Council, and stated that the Council's extensive legislative and executive functions in the local government area appeared to be the Council's 'raison d'être'. His Honour thus proceeded to enquire whether, on the evidence, the predominant and characteristic activity of the Council was trading or financial.   Despite rejecting the purposive method, Spender J nevertheless engaged in a review of the establishment of the Council under the [Local Government Act 1993 (Qld)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12759" \t "Default) ("LGA") - including the intention behind the creation of the Council as well as the purposive construction of the LGA - in the interests of indicating that the Council had 'extensive legislative and executive functions of a governmental kind', a finding which would colour his eventual conclusion.   In examining the trading activities of the Council, his Honour considered a significant volume of evidence and submissions presented to him, including details of the Council's main activities, revenue policy, borrowing policy, its Annual Report, as well as historical evidence relating to the Council's fundamental functions. His Honour's conclusion was that the Council's trading activities were 'quite insignificant', and could in many cases only be considered to be of a trading nature if defined broadly.    **(d) Conclusion**   After examining such evidence at length, it was held by his Honour to be 'impossible' to conclude that the Council was a trading corporation. His Honour stated that the purported trading activities of the Council 'entirely lacked the essential quality of trade', noting that almost all of the Council's activities ran at a loss, and that they were all directed to public benefit objectives within the shire.    Spender J further concluded that the scale of these activities was 'so inconsequential and incidental to the primary activity and function of the Council' that the Council could not possibly be properly characterised as a trading or financial corporation. His Honour stated that, if the Council were a trading corporation, the powers of the Commonwealth to make laws in relation to the Council 'would annihilate any concept in the Constitution of a federal balance, and in a very significant way, [would] permit the Commonwealth to nullify the right of the State to govern in its local government areas'.   Spender J thus concluded that the Etheridge Shire Council was not a trading or financial corporation within the meaning of section 51(xx). It therefore could not be held to be an "employer" by way of being a constitutional corporation within the meaning of section 6 of the WRA. The Council was thus not entitled to lodge a workplace relations agreement with the Employment Advocate, and thus the workplace relations agreement had no force or effect as a Workplace Agreement under the WRA.   It should be noted that, according to this judgment, the question as to whether a particular local council is a corporation for the purposes of section 51(xx) is one that will turn on the factual and circumstantial matrix in each case, or as Barwick CJ more squarely stated in St George, 'the case is to be answered in relation to the applicant and not as to all county councils'.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.6 Payments to the parents of a company director voidable as an unfair preference and an unfair director related transaction**  (By Justin Fox and Thomas Barry, Corrs Chambers Westgarth)   Woodgate v Fawcett [2008] NSWSC 868, Supreme Court of New South Wales, Hammerschlag J, 15 August 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/august/2008nswsc868.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/august/2008nswsc868.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This case dealt with an application by a liquidator for orders directing the Defendant to refund payments made to the Defendant on the basis that those payments constituted a voidable transaction. The court determined that the relevant transaction was voidable as an unfair preference given by the Company to the Defendant within the meaning of section 588FA(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act"). The court also determined that the transaction was voidable as an unreasonable director related transaction within the meaning of section 588FDA(1) of the Act.   **(b) Facts**  Woodgate, liquidator for NGB Chadd Pty Limited (the "Company"), sought an order under section 588FF(1) of the Act directing the Defendant to pay the sum of $2,593,295.44 to the Company on the basis that a payment of that sum made by the Company to the Defendant and her deceased husband on 17 March 2006 (the "Transaction") was voidable pursuant to section 588FE of the Act. The liquidator contended that the Transaction was voidable on two bases:  1. the Transaction was an unfair preference given by the Company to the Defendant within the meaning of section 588FA(1) of the Act (the "Unfair Preference Claim"); and 2. the Transaction was an unreasonable director related transaction within the meaning of section 588FDA(1) of the Act (the "Unreasonable Director-Related Transaction Claim").   The Defendant was party to the proceeding in her personal capacity and in the capacity of trustee for the estate of her deceased husband. The Defendant and her deceased husband were the parents of the sole Director of the Company.   Over a period of some years from 2002, the Defendant borrowed money from Challenger Managed Investments Ltd (the "Lender") and on lent the borrowed money to the Company.  In early 2006, the Company sold properties held in its name for approximately $6 million and ceased trading. The proceeds were used to discharge the loans owed to the Defendant and her deceased husband. The proceeds were also used to discharge other loans that the Company held directly with the Lender.  **(c) Decision**   **(i) The unfair preference claim**   With respect to the Unfair Preference Claim pursuant to section 588FA(1) of the Act, it was not put in issue that the Company and the Defendant were parties to the Transaction and that the Transaction resulted in the Defendant and her deceased husband receiving, in respect of their unsecured debt, more than if the Transaction was set aside and they were to prove for their debt in the winding up of the Company.   The key issue for Justice Hammerschlag to consider was therefore whether the Company was insolvent at the time the Transaction was entered into or became insolvent because of the Transaction.     His Honour found that immediately following the Transaction, the Company had no cash or other readily available resources to meet debts due at the time. His Honour found that further significant amounts were due in the days, weeks and months after the Transaction for which the Company had no assets available to pay its Creditors.   The Defendant submitted that the Company was not insolvent at the time the payments were made on the basis that the Defendant would have sought and on-loaned funds in the order of $200,000 to assist the Company to meet its debts if the Company requested the Defendant to do so. It was put that this represented a resource available to the Company which should be taken into account in assessing its ability to pay its debts. Although his Honour acknowledged that credit resources must be taken into account in assessing insolvency, his Honour did not accept the submission because the Defendant's evidence on this point was unsatisfactory and evidence of the Defendant's prior conduct was inconsistent with the prospect that she would make such money available. Furthermore, the amounts which would become due only days after the Transaction would have far exceeded $200,000.   Further, and in any event, pursuant to section 588E(4) of the Act, the Company was deemed to have been insolvent due to its failure to keep books and records.   His Honour also considered whether the Defendant could establish the defence under section 588FG(2) of Act. His Honour recognised that the defence has two elements, for which the Defendant bears the onus.  The first element is that at the time the Defendant became a party to the Transaction, she had no reasonable grounds for suspecting that the Company was insolvent or would become insolvent by reason of entering into the Transaction. The second is that a reasonable person in her circumstances would have had no such grounds for suspecting insolvency.   His Honour did not accept that the Defendant did not suspect that the Company was insolvent or would become insolvent.  His Honour stated that the Defendant had reasonable grounds for so suspecting.  In addition, any reasonable person in the Defendant's circumstances would have had grounds to so suspect having regard to the following facts all of which the Defendant knew:   * the Company was being closed down rather than being sold; * staff, including family members, were being let go in circumstances where the Company was unable to pay them; * the Defendant had lodged a caveat on her son's property two days before the Transaction to protect her position under an agreement which was never produced before the court.   **(ii) The unreasonable director related transaction claim**   With respect to the Unreasonable Director Related Transaction Claim pursuant to sections 588FDA(1)(a) and (b) of the Act, it was not put in issue that the Transaction was a payment made by the Company to a close associate of the Company's sole Director. The Company's sole Director was the Defendant's son.   The only issue before the Court was therefore whether, as contemplated by section 588FDA(1)(c) of the Act, it may be expected that a reasonable person in the Company's position would not have entered into the Transaction having regard to:   * the benefits (if any) to the Company of entering into the Transaction; * the detriment to the Company of entering into the Transaction; * the respective benefits to the other parties to the Transaction; and * any other relevant matter.   His Honour held that the only benefit to the Company was that it was able to sell its properties and discharge its debts both to the Lender and to the Defendants. The detriment to the Company was that it was left in a position where it was unable to satisfy its other non-secured creditors. The benefit to the Defendant and her deceased husband was that they received payment of their unsecured obligations in full in preference to the claims of other unsecured creditors.   His Honour concluded that this was a case of a Company under the stewardship of a son having conferred a benefit on his mother and the estate of his father in circumstances where legitimate unsecured creditors had been prejudiced. Furthermore, there was no evidence that the Company took any steps to obtain from any source, including the Defendant, any funds to alleviate the position of the other unsecured creditors.     In his Honour's opinion, no reasonable person in the Company's circumstances would have entered into the Transaction. It was an unreasonable director related transaction within the provisions of section 588FDA(1) of the Act.   Justice Hammerschlag made the orders requested.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.7 Examination of surrounding circumstances in interpreting a contract**   (By Steven Rice, Freehills)   County Securities Pty Limited v Challenger Group Holdings Pty Limited [2008] NSWCA 193, New South Wales Court of Appeal, Spigelman CJ, Beazley and McColl JJA, 14 August 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/august/2008nswca193.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/august/2008nswca193.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This decision examines the principles of interpretation used to ascertain the intentions of parties to be bound by a contract that is partly in writing and partly verbal.   **(b) Facts**   The respondent had a "swap business" under which it entered into swap arrangements with two counterparties. The counterparties agreed with the respondent that they would receive the economic benefit from or detriment of a notional parcel of shares. The respondent hedged its exposure under this arrangement by acquiring a physical parcel of shares of the same composition as the notional parcel. The physical parcel was purchased using monies from the swap counterparties and a margin loan. Interest on the margin loan was capitalised by the respondent.   The appellant later agreed to acquire the swap arrangements from the respondent. To affect this, the appellant agreed to acquire the physical parcel of shares from the respondent and the swaps were novated from the respondent to the appellant. The respondent paid out the balance of its margin loan and the appellant made its own arrangements with the margin lender. The value of the margin loan obtained by the appellant was equal to that formerly held by the respondent, and it included the capitalised interest.   At trial, the appellant pleaded that the margin loan balance which the appellant became responsible for wrongly included the amount of capitalised interest and sought damages for this amount. The appellant contended that it did not know, until some time after the contractual documentation had been signed and the swap arrangements novated, that the margin loan liability it assumed included capitalised interest. The appellant said it would not have entered into the transfer of the swap arrangements if it had been aware of the inclusion of the capitalised interest, as this inclusion made the transaction unprofitable for it.   The appellant was not successful in this claim before the primary judge. On appeal, it was alleged by the appellant that the agreement between it, the respondent and a related body of the respondent for the sale of the swap business was constituted in writing, in conversations and by conduct, and this contract did not contemplate the payment by the appellant of an amount for the capitalised interest.   **(c) Decision**   In a largely concurring judgment, Spigelman CJ, Beazley JA, McColl JA allowed the appeal. The appellant was successful in its claim for damages in relation to the capitalised interest.   McColl JA delivered the leading judgement. Her Honour noted that the only difference in the factual contentions of the appellant and of the respondent was that the respondent submitted that the agreement between the parties to transfer the swap business did not contain oral terms. Critically, the oral terms in issue were to the effect that the sale of the swap business would be at no profit to the respondent or loss to the appellant.   In finding for the appellant, her Honour cited (at [149]) Toll (FCGT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165 for the proposition that "the terms of a contractual document [are] to be determined by what a reasonable person would have understood them to mean". Applying Toll, her Honour concluded (at [170]) that the sale of the swap business was characterised by a "high degree of informality and trust", and that it was "not easy to identify offer and acceptance, or even the precise date upon which the parties agreed to be bound".   McColl JA made a number of significant findings. First, her Honour found that the transfer agreement did include the oral term that the transfer of the swap business would take place with no profit to the respondent and no loss to the appellant. Following from this, her Honour concluded the primary judge did not place correct weight on the conclusion that the assumption of the capitalised interest by the appellant meant that the respondent was making a profit (of $338,639.84) on the transaction. Secondly, McColl JA was of the view that the focus of the primary judge on the statement of cash flows of the respondent to determine profit or loss was misconceived, as cash flow and profit/loss are conceptually different matters. Thirdly, her Honour disagreed with the findings of the trial judge about a conversation between representatives of the parties, McColl JA holding (at 189]) that the "fact that a conversation takes place 'in passing' does not necessarily deny it contractual effect". Lastly, her Honour noted that the swap business generated a profit to the respondent of around $70,000 per annum, and that a payment by the appellant for capitalised interest would take some years to recoup.   In making the above findings, McColl JA cited Byrne v Australian Airlines Limited (1995) 185 CLR 410 with approval. Her Honour considered that case is authority that where a contract is oral or partly oral and partly in writing, the express terms of the contract need first be determined - whether by inference from the evidence, a course of dealing between the parties or because they are so obvious that they go without saying. Similarly, Spigelman CJ cited Deane v The City Bank of Sydney (1904) 2 CLR 198 at 209 for the proposition that "when a contract is partly in writing and partly verbal, all the circumstances may be looked at and considered for the purpose of construing the contract, and even to vary the written documents", and held that in the circumstances here the parol evidence rule was not applicable.   From the above, McColl JA concluded that it was unlikely that the parties intended the appellant to pay the capitalised interest. Her Honour noted at [204] that this was an informal but commercial contract and that it was "improbable" that a reasonable, knowledgeable person at the time of the contract (Maggbury Pty Limited v Hafele Australia Pty Limited [2001] HCA 70; (2001) 210 CLR 181 at 188 [11] per Gleeson CJ, Gummow and Hayne JJ) would have entered into a contract "so lacking in commercial reality" (as it would have been if a party had agreed to take on such a loss as represented by the capitalized interest). In forming this view, her Honour cited Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd [1968] HCA 8; (1968) 118 CLR 429 (at 437); Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36; (1973) 129 CLR 99 (at 109); Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd (1990) 20 NSWLR 310 (at 313-4); and Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15 per Giles JA (at [64]).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.8 Appointing a liquidator - the side of angels**   (By Cameron Belyea, Clayton Utz)   Johnson Winter & Slattery in the matter of Firepower Operations Pty Ltd (No 2) [2008] FCA 1228, Federal Court of Australia, Lindgren J, 13 August 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/august/2008fca1228.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/august/2008fca1228.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**   In considering who to appoint to the office of liquidator, the court may consider the relative funding capabilities of the incumbent administrator and a proposed liquidator who is funded by a petitioning creditor. Neither will have a conflict merely because they are proposed by particular parties, so all other things being equal, it makes sense to appoint a person to the role of liquidator who has the funding capability to discharge the functions of office.   **(b) Facts**    The petitioning creditor was a substantial investor in the fuel additive business undertaken by entities within the Firepower group of companies. On the filing of an application to wind up Firepower Operations Pty Ltd, Mr Johnston, the principal behind the company, first responded with an affidavit of solvency, then five days later, appointed Geoffrey David McDonald and Brent Kijurina as voluntary administrators on the grounds of insolvency of the company.     When the winding up application came on for hearing, the court ordered the winding up of Firepower Operations, then was faced with the question of whether to appoint the incumbent administrators or Mr Bryan Hughes, a partner of Pitcher Partners, as liquidator(s).    The petitioning creditor favoured the latter and provided an enforceable undertaking to the court to fund Mr Hughes up to $100,000 to investigate Firepower's affairs and recoverability of assets, but would not extend that undertaking to the incumbents.   The incumbents suggested Mr Hughes might, because of the proposed funding, be perceived to be too close to the petitioning creditor in investigating whether that party was in fact a creditor or was instead a capital investor (and therefore a member rather than creditor of the company).     **(c) Decision**    The court decided that perception of association between the proposed liquidators and Mr Johnston on the one hand, and Mr Hughes and the petitioning creditor on the other did not necessarily give rise to a relevant conflict.     In the case of Mr Hughes, the issue of funding was dealt with this way:  "While in a perfect world it may be desirable that where there is a challenge to the indebtedness of the funding creditor, the issue be determined by a liquidator who has not been funded by that creditor, it should not be assumed that a liquidator who has been so funded will not perform the duties imposed on him or her by the law.  I note that the question of independence is discussed in Ch 6 of the Insolvency Practitioners Association's Code of Professional Practice for Insolvencies Professionals".   The reasoning of the court - that the mere association between a proposed liquidator and an interested party in the liquidation does not necessarily give rise to a conflict - is entirely consistent with a finding by the Supreme Court of Western Australia made a few days later on 19 August 2008. In the latter decision, the Court upheld the independence of Mr Hughes (and co-partner, Christopher Munday) as voluntary administrators of companies within the Monarch group, notwithstanding their earlier performance of limited pre-appointment functions for those companies.    It is respectfully submitted that the findings of each of these courts, in completely different administrations, are consistent with the notion that the test of independence, being a conflict based test, is only negatived if the evidence establishes:   "a real and not merely theoretical possibility of conflict" or a degree of involvement with a particular party "likely to impede or inhibit the liquidator from acting impartially in the interests of all creditors or be such as would give rise to a reasonable apprehension on the part of a creditor of lack of impartiality ..." Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd (1994) 14 ACSR 230 at 234 (Santow J); see also National Australia Bank Ltd v Wily [2002] NSWSC 573 at [22] amongst others."   Having dismissed conflict as a bar to appointment, the decision is properly analysed in discretion.  Here, the court found that while the fact the incumbents were appointed by Mr Johnston, the principal behind Firepower's business, would not taint them personally, it might predispose unsecured creditors against their appointment as liquidators.     The court then turned to the question of utility/futility, noting that the funding of Mr Hughes in the face of the acknowledged lack of funding of the incumbents was a powerful consideration in the face of an appointment of the former over the latter.     This appears to represent a pragmatic approach to the (although not mentioned) constraints of section 545 of the Corporations Act which save an unfunded liquidator from incurring costs to preserve property.  It is fair to assume the court was concerned a lack of funding may impede investigations by the incumbents into the affairs of the Firepower entities.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.9 Failure to satisfy criteria for grant of leave to bring proceedings on behalf of a company**   (By Charles Slattery, DLA Phillips Fox)   Joinery Products Pty Ltd v Imlach [2008] TASSC 40, Supreme Court of Tasmania, Holt AsJ, 12 August 2008   The full text of this judgment is available at:   [http://cclsr.law.unimelb.edu.au/judgments/states/tas/2008/august/2008tassc40.htm](http://cclsr.law.unimelb.edu.au/judgments/states/tas/2008/august/2008tassc40.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This case involved an application for leave to bring derivative proceedings on behalf of a company under sections 236 and 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). The claims arose from an alleged breach of directors' duties and misrepresentation by a director of the Company.  Section 237(2) of the Act specifies the criteria to be satisfied before leave to bring proceedings on behalf of a company may be granted. Amongst other things, the court must be satisfied that there is a serious question to be tried and that it is in the best interests of the company to do so.   His Honour was not satisfied that there was a serious question to be tried or that it was in the best interests of the company that leave be granted. Accordingly, the application was dismissed.  **(b) Facts**  Chris Kelly and Brian Imlach were the directors of Joinery Product Sales Pty Ltd (the Company). The Company carried on two businesses, a joinery business and a window manufacturing business.  By agreement (the Agreement) dated 8 September 2004, Kelly and Imlach agreed that the joinery business of the Company would be sold to Joinery Products Pty Ltd, a company owned by Kelly, and the window business of the Company would be sold to GP Glass Pty Ltd, a company owned by Imlach.  The Agreement followed several months of negotiations between the parties and contained no provisions restraining either party from operating a competing business of the other director.  In January 2005, Imlach set up a joinery business in competition with Kelly's business.  By writ issued 23 January 2007, Joinery Products Pty Ltd and Kelly commenced proceedings against Imlach, GP Glass Pty Ltd and Top Centre Pty Ltd, claiming that Imlach was a fiduciary of Joinery Products Pty Ltd and Kelly and owed them a duty of fidelity which he breached by failing to inform them prior to entering the Agreement that he was planning to set up a competing joinery business. Further, Kelly claimed that Imlach falsely represented to Joinery Products Pty Ltd in the period leading up to the execution of the Agreement that he had no intention of setting up a competing joinery business and, but for the misrepresentation, the Agreement would not have come into existence. The Company was not a party to the writ.   His Honour held that Imlach, by virtue of being a director, owed a fiduciary duty to the Company only and not to Joinery Products Pty Ltd. He added that generally a director's fiduciary duties in relation to the affairs of a company are owed to the company alone and fiduciary duties having identical content cannot be owed both to the company and to one or more of the shareholders.    **(c) Application to bring derivative proceedings on behalf of the Company**  Kelly then applied for leave to bring derivative proceedings in the name of the Company against Imlach, GP Glass Pty Ltd and Top Centre Pty Ltd pursuant to sections 236 and 237(1) and (2) of the Act, alleging that:   * the Company was a party to the negotiations which led to the Agreement; * Imlach was a fiduciary of the Company and owed to it an equitable duty of fidelity; * Imlach owed to the Company the director's duties specified in sections 181-183 of the Act; * in breach of these duties Imlach failed to disclose to the Company his intention of setting up a competing joinery business prior to it executing the Agreement; * knowingly and as a result of these breaches GP Glass Pty Ltd and Top Centre Pty Ltd received profits from the competing joinery business; * Imlach misrepresented to the Company that following the Agreement he would only undertake the window business and that the Company relied on this representation when executing the Agreement; * Imlach's failure to disclose his intent to compete amounted to a misrepresentation to the Company which the Company relied upon to its detriment; and * As a result of executing the Agreement the Company has suffered loss and damage.   The Act requires the court to grant leave to a person referred to in section 236(1)(a) if the criteria set out in section 237(2) are satisfied.    It was conceded by Kelly that if he failed to satisfy the court as to the existence of any one or more of the criteria contained in section 237(2) the application must be refused.   The defendants claimed that the applicants failed to prove that there was a serious question to be tried and that it was in the best interests of the Company that leave be granted. The defendants also claimed that the applicants failed to prove that they were acting in good faith.    **(d) Decision**  **(i) Serious question to be tried**  In order to satisfy the 'serious question to be tried' test contained in section 237(2)(d) of the Act, the applicant only needed to satisfy the relatively low threshold required for interlocutory injunctions: Australian Broadcasting Corp v Lenah Game Meats Pty Ltd (2001) 185 ALR 1. The applicants were required to show a sufficient likelihood of success in proving that Imlach had breached his duties as director of the Company and had made misrepresentations to the Company during negotiations for the Agreement.   After reviewing the relevant authorities his Honour held that the applicants had not satisfied this requirement.   His Honour found that Imlach did not engage in criminal conduct by setting up a competing business, the solvency of the Company was never under threat and, whilst there was a clear conflict between the director's personal interest and the interests of the Company, the acquisition of the Company's businesses by both directors could not occur without the Company's interests being subordinated.  Kelly and Imlach controlled all of the shares of the company and so their conduct in subordinating the interests of the Company was considered by his Honour to have been authorised by the Company by the unanimous agreement of the shareholders.    Accordingly, he found that there was not a serious question to be tried in relation to the alleged breach of director's duties.    **(ii) Misrepresentation**    His Honour found that there was insufficient evidence that the Company entered into the Agreement influenced by a belief that Imlach would not conduct a competing joinery business. In particular, the applicants failed to prove that Imlach in fact made the representation that he would only operate a glass manufacturing business following the execution of the Agreement, and there was no evidence that the Company suffered any loss or damage as a result of the competing business. Accordingly, he found that there was not a serious question to be tried in relation to the alleged misrepresentation.   **(iii) Best interests of the Company**   His Honour noted that if he had found that the applicants had proven that there was a serious question to be tried on the claim of breach of director's duties he would have concluded that it was in the best interests of the Company that the Applicants have leave to pursue the claim.   Similarly, his Honour held that if it had been shown that the misrepresentation claim had raised a serious question to be tried and leave was to be granted in respect of the breach of the director's duties claim, he would have concluded that it was in the best interests of the Company that the applicants be granted leave to pursue the claim on behalf of the Company.   However, as the applicants failed to prove that there was a serious question to be tried for either the breach of director's duties claim or the misrepresentation claim, the application was dismissed.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.10 Reinstatement of a corporation under section 601AH of the Corporations Act**   (By James Davies, Mallesons Stephen Jaques)   Deputy Commissioner of Taxation; in the matter of James Hardie Australia Finance Pty Ltd (Deregistered) [2008] FCA 1181, Federal Court of Australia, Lindgren J, 8 August 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/august/2008fca1181.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/august/2008fca1181.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This decision confirms that the notion of "a person aggrieved by the deregistration" of a company under section 601AH(2)(a)(i) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) is to be given a broad reading. It includes the Deputy Commissioner ("Commissioner") of the Australian Tax Office ("ATO") when acting in accordance with its statutory obligations, even when the Commissioner's interest arises after the decision to deregister the company has been made.   In circumstances where the ATO has completed its internal processes and seeks the reinstatement of registration of a company in order to make a determination, assessment and appoint a liquidator to further investigate the finances of the company, it appears that courts are prepared to allow the reinstatement of registration.   **(b) Facts**   James Hardie Australia Finance Pty Ltd (ACN 089 600 760) (Deregistered) ("JHAF") made three relevant transactions ("Transactions") between 2001 and 2003, involving:   * a reduction in the issued capital in JHAF by $735 million without a cancellation of shares; * an unfranked dividend payment of $316 million; and * a further reduction in the issued capital in JHAF by $7.5 million without a cancellation of shares.   The first two of the Transactions involved payment to a parent company which has since been deregistered, while the latter payment was to a different parent company (which is still in existence).  The Transactions had the effect of denuding JHAF of its share capital; which was subsequently reduced to $1,000.  JHAF was then deregistered on 23 August 2005.   Throughout 2005 and 2006, the ATO received information from the United States Internal Revenue Service ("IRS") relating to a cross-border master repurchase agreement ("Repo Arrangement") between numerous James Hardie entities. Following the receipt of this information, the ATO formed the view that the Transactions formed a part of the Repo Arrangement, and that JHAF may have had an outstanding liability to the ATO in excess of $150 million.   The Commissioner applied under section 601AH of the Corporations Act for orders to reinstate JHAF and allow the appointment of a liquidator to further investigate the Transactions. The ATO believed that a determination should be made as it had formed the view that a "tax benefit" had been obtained pursuant to a "scheme" under section 177F of the [Income Tax Assessment Act 1936 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "Default) ("ITAA"), and that following this, an amended assessment should be issued to JHAF.   **(c) Decision**   **(i) Was the Commissioner "a person aggrieved by the deregistration" of JHAF?**   The court confirmed that the expression "a person aggrieved by the deregistration" should not be construed narrowly and that it does not matter that the person's interest in the decision to deregister arises after the deregistration.   The Commissioner was charged with administering the ITAA and wished to make a determination and an amended assessment, and would not be in a position to act unless JHAF was reinstated. The court held that the position of the Commissioner was analogous to that of the Australian Competition and Consumer Commission which had previously been acknowledged as having sufficient standing to apply for a reinstatement under section 601AH.   **(ii) Was it "just that the company's registration be reinstated"?**   It was contended that the ATO knew of the deregistration at least 20 months earlier than the evidence they presented demonstrated, and that the Commissioner's ostensible tardiness in failing to notify the liquidator of JHAF of the amount that was thought to be enough to discharge any outstanding tax liability "as soon as practicable" was a failure by the Commissioner to meet its obligation under section 260-45(3) in Schedule 1 of the [Taxation Administration Act 1953 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6441" \t "Default) ("TA Act"). However, the Commissioner rebutted this assertion by saying that it was not until the receipt of information from the IRS in 2005 and 2006 that it became aware of the possibility of making a determination and amended assessment.   The court held that there was some delay, but that the amount of delay was too difficult to quantify precisely, and thus, it was not possible to conclude that there had been a disqualifying delay.   It was also contended that there would be substantial prejudice to JHAF and possibly others arising from a reinstatement, as the Commissioner's proposal was to issue a determination and amended assessment without providing JHAF with the opportunity to be heard. Further, JHAF would only have a 60 day time limit for lodging an objection to the assessment under section 14ZW of the TA Act.   However, the court held that it was not clear on the evidence whether the ATO would allow JHAF to be heard prior to the determination and assessment. In any case, JHAF would be able to challenge the assessment in review or appeal proceedings, while section 14ZX(4) of the TA Act provides for the possibility of an extension of the 60 day time limit. Therefore, the court was unable to decline to reinstate registration on this ground.   **(iii) Utility or futility of the court's orders**   The court confirmed previous authority in stating that it would not "make an order which is futile, as where the reinstated company would be left without the funding necessary to permit the liquidator to do any work." Here however, the Commissioner had indicated that it would meet the costs of the liquidator.   The issue of futility was also relevant in the sense that the bulk of the tax liability sought by the ATO may not have been recoverable since it related to a company no longer in existence. Even though the first and second of the Transactions involved payments to a deregistered company, the Commissioner submitted that these transactions were completed with the knowledge of the Commissioner's interest in the Transactions. The court tacitly accepted the Commissioner's submission that a liquidator of JHAF may have a right of recovery against persons or entities other than the parent of JHAF which received the payments, and thus the court's orders would not be futile. This position was supported by the court's view that the Commissioner should at least have the opportunity to make the determination, assessment and enter into discussions with the possible liquidator.   **(iv) Clearance certificate**   The Commissioner also submitted that, because the liquidator of JHAF had not complied with section 260-45 of the TA Act which prevents a liquidator from disposing of assets without a clearance certificate from the Commissioner, JHAF should never have been deregistered and that it was appropriate for the original liquidator to be replaced with another one. The court held that there was no failure of the liquidator of JHAF to comply with section 260-45; rather it was the Australian Securities and Investments Commission which deregistered JHAF.   **(v) Conclusion**   The court ordered that the registration of JHAF be reinstated and that a new liquidator be appointed.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.11 Removal of liquidators due to their distant location**  (By Michael Watts, Blake Dawson)   Northbuild Constructions Pty Ltd v ACN 103 753 484 Pty Ltd [2008] QSC 182, Supreme Court of Queensland, Chesterman J, 6 August 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2008/august/2008qsc182.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2008/august/2008qsc182.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**   The applicant, Northbuild Constructions Pty Ltd (Northbuild), sought an order pursuant to section 463A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) that the liquidators of the respondent, ACN 103 753 484 Pty Ltd (ACN) be removed.  The liquidators were Mr Stephen Hundy and Mr Ezio Senator (the liquidators).  Northbuild alleged a lack of impartiality by the liquidators.  Northbuild further sought that David Michael Stimpson and Terry Grant Van Der Velde be appointed in their place.   Despite finding that there was no evidence of misconduct, impartiality or inappropriate conduct in the liquidators conduct, Chesterman J ordered:   * that Hundy and Senatore be removed as liquidators; * that David Michael Stimpson and Terry Grant Van Der Velde be appointed liquidators in their place; and * that the liquidators be granted costs of conducting the liquidation to date and of appearing to resist the application that they be removed.   **(b) Facts**   Northbuild entered into a contract with ACN in January 2004 to build a block of residential units at Caloundra. ACN was formerly known as Blue Chip Development Corporation Pty Ltd, a company incorporated for the sole purpose of having the unit block built.  Northbuild has been paid roughly $11,000,000 under the contract but claims a further sum of $1,105,980.90 together with interest of $287,060.50. Northbuild commenced proceedings to recover the outstanding sum, interest and costs.    Northbuild's action was stayed by consent in February 2006 pending resolution of a variation claim under the building contract by an arbitrator. The arbitration was concluded on 16 February 2006; however the arbitrator has not handed down his award. Due to the delay, the order staying the proceedings has been vacated and orders in the proceedings have been made.   ACN has four creditors: 1. National Australia Bank owed about $1,000,000 secured by a real property mortgage. 2. Northbuild owed $1,406,382 3. The Australian Tax Office owed $144,815 4. Prime Property Investment Pty Ltd owed $800,000 (a company associated with a director of ACN).    Chesterman J also noted that ACN borrowed additional monies from second mortgagees. The second mortgagees were companies owned by or associated with directors of ACN. Their debts have been paid in full. Chesterman J noted that it is unusual for a second mortgagee to be paid in priority to a first registered mortgagee.   On 9 November 2007 an order for costs in the amount of $11,253.75 in favour of Northbuild was made against ACN. In March 2008 Northbuild applied to wind ACN up on the ground of insolvency proved by its failure to comply with the statutory demand that it pay the amount of assessed costs.   On 23 April 2008 ACN appointed Hundy and Senatore to be administrators of the company pursuant to section 463A of the Corporations Act. On 16 May they were appointed liquidators and commenced its winding up.   Northbuild sought an order that the liquidators be removed due an alleged lack of impartiality by the liquidators and their prior association with the directors of ACN. This was based on the fact that the liquidators had continued to use the firm of solicitors who had formerly acted for ACN and its directors prior to the winding up.     **(c) Decision**    Chesterman J found no evidence of a lack of impartiality. In any event, on 6 May 2008 the liquidators undertook to Northbuild that they would not use the services of the solicitors during the winding up.    Although Northbuild did not raise the issue, Chesterman J however found a ground supporting the removal of the liquidators. This was based on the following factors:   * the liquidators reside and practice as accountants in Canberra; * ACN was incorporated in the ACT however it has no other connection to the ACT; * the remaining assets of ACN are in Queensland; * ACN's directors are located in Queensland; * investigation into ACN and its directors will need to be undertaken in Queensland. * the liquidators have retained Brisbane solicitors and travel to Brisbane for meetings associated with the winding up.   Northbuild's claim arises out of its performance of a building contract. The liquidators will have to investigate the claim and Northbuild's performance under the contract. This will necessarily require the oral examination of ACN's directors in Brisbane and South-East Queensland and an examination of Northbuild's officers and documents which are in Brisbane. Chesterman J acknowledged the obvious additional expense and inconvenience generated by the distant location of the liquidators.    Section 503 of the Corporations Act provides that a court may, on cause shown, remove a liquidator and appoint another liquidator. The section requires that an applicant show cause why the liquidator should be removed. In Re Eraville Pty Ltd (1980) 5 ACLR 203, the court held that an applicant must establish facts justifying the removal by satisfactory evidence.   Chesterman J noted that although the removal of liquidators is often based on grounds of alleged misconduct or unfitness, this was not necessary to obtain an order for the removal of a liquidator.   Chesterman J stated that "sufficient cause is shown for the removal of a liquidator where it is proved that the removal would be in the best interests of the liquidation: where the removal would allow for the better conduct of a winding up and which would therefore be to the general benefit of the creditors".   The following cases were referred to:   * In Re Keypak Homecare Ltd (1987) BSLC 409, Millet J stated "it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation". * The 1878 case of Re Association of Land Financiers (1878) 10 CH D 269, in which it was accepted that a ground for the removal of a liquidator is that another liquidator could conduct the winding up more cheaply. * In Re Federal Bank of Australia Ltd [1894] 20 VLR 199 it was held that enhanced efficiency has also been recognised as a ground justifying the replacement of liquidators.   Chesterman J was satisfied that all of the above considerations were present in this case. Chesterman J stated that "even with the facility of modern telecommunications and regular airline schedules between capital cities, there are still disadvantages in the conduct of a winding up in one city by liquidators in another".   In support of reaching this conclusion, Chesterman J considered the counter arguments and noted that:   * the winding up has not progressed very far; * only the debt of the Australian Tax Office has been satisfied; * the liquidators have only spent $22,000 in the course of the liquidation; and * the liquidators have not commenced an examination of three of the four debts.   Accordingly, Chesterman J was of the view that removal of the liquidators would not occasion great delay or additional expense.    It was also raised by the respondent that the applicant, Northbuild, had consented to the appointment of the liquidators. Chesterman J thought this point was of little concern. He noted that there was no criticism of how the liquidators were appointed, but whether it is in the best interests of the liquidation if they remain.   The respondent also pointed out that the liquidators had retained Brisbane solicitors who have become familiar with the winding up. It was submitted that to retain another firm would result in a loss of knowledge of ACN's affairs and a waste of money. Chesterman J however found that there was no reason why the new liquidators should not retain the present solicitors.    As there was no evidence of misconduct or impartiality by the liquidators, Chesterman J ordered that the liquidators be entitled to the costs of conducting the litigation to date and of appearing to resist their removal. Given that their removal was based on their geographic location, this should not deprive them of the costs they have incurred to date.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5)  **5.12 Successful appeal by former HIH director against disqualification by APRA from holding a senior insurance role**    (By Gabrielle Hirsch, DLA Phillips Fox)   Abbott and Australian Prudential Regulation Authority [2008] AATA 641, Administrative Appeals Tribunal, Mr P W Taylor SC, 23 July 2008   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/aata/2008/july/2008aata641.htm](http://cclsr.law.unimelb.edu.au/judgments/states/aata/2008/july/2008aata641.htm" \t "_New)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This decision concerned an application by Charles Abbott, a former director of HIH Insurance Limited ('HIH') against a decision by the Australian Prudential Regulation Authority (APRA) (acting under section 25A(1) of the [Insurance Act 1973](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "Default)) to disqualify Mr Abbott from being the holder of a senior insurance role. Taylor SC of the Tribunal set aside the decision under review as the evidence adduced did not satisfy him that Mr Abbott was not a fit and proper person to act as a director or senior manager of a general insurer of the kind referred to in section 24(1) of the Insurance Act.   **(b) Facts**   On 15 March 2001, HIH and its related companies applied to the Supreme Court of NSW for appointment of a provisional liquidator. Prior to its liquidation, Mr Abbott had been one of the directors of HIH.   On 18 February 2005 APRA, acting under section 25A(1) of the Insurance Act disqualified Mr Abbott from being the holder of a senior insurance role. This was based on a decision that his conduct as a director of HIH satisfied APRA that Mr Abbott was not a fit and proper person to carry out the role of a director or senior manager of a general insurer. APRA confirmed its decision on 3 August 2005 in response to a reconsideration request by Mr Abbott. Mr Abbott subsequently lodged a review application with the Administrative Appeals Tribunal on 1 September 2005.   APRA contended that Mr Abbott's unfitness was demonstrated by:   * a failure to disclose to the HIH Board certain details of his entitlement under a consultancy agreement with a large law firm of which he was formerly a partner. (This consultancy agreement was entered into by Ashkirk Pty Ltd, the trustee of the Abbott Family Trust); * a failure to disclose to the HIH Board the extent of his interest in a consultancy agreement between Ashkirk and HIH Holdings (Asia) Ltd ('HIH Asia'); * his alleged involvement in HIH paying almost $2 million commission on 14 March 2001 in relation to HIH's proposed sale of properties to Consolidated Press Holdings Ltd; * his conduct concerning HIH paying Ashkirk consultancy fees of $181,445 on 14 March 2001, when he knew that there was a significant prospect of HIH's insolvency.   This conduct, APRA contended, evidenced a lack of candour in dealing with the HIH Board, a conflict of interest between Mr Abbott's duty to HIH and his personal financial interests, an unseemly and improper fixation on his own financial interests when the risk of HIH's insolvency was apparent, a willingness to prefer his own financial interests to those of HIH and a lack of diligence in ensuring HIH's assets were not distributed improperly. APRA also complained that Mr Abbott failed to acknowledge any impropriety in obtaining the preferential payment.   **(c) Decision**    **(i) Full disclosure of the Ashkirk consultancy agreements**    APRA argued that Mr Abbott's disclosure of the Ashkirk consultancy agreements with Mr Abbott's former law firm and with HIH Asia was inadequate as, whilst their existence was disclosed, Mr Abbott did not disclose the terms of the agreement nor the applicable commission percentages to the HIH Board. APRA further contended that the consultancy agreement with HIH Asia, which provided for a 'success fee', involved a significant conflict of interest.   Taylor SC held that there were no prescriptive statutory disclosure obligations nor any fiduciary disclosure obligations under which Abbott was obliged to disclose the actual commission percentage he was entitled to under the Ashkirk consultancy agreements.   Further, the Tribunal disagreed with APRA's contention of a material conflict as a "considerable distortion of reality". Rather, once the freely negotiated agreement had been reached, the interests of the contracting parties in relation to the pursuit of the identified 'success fee' contingency were wholly aligned.    APRA did not establish the existence of any standard of accepted disclosure practice in relation to which Mr Abbott's conduct could be argued to be materially deficient. As such, there was nothing that could lead to an adverse opinion about Mr Abbott's fitness on that basis.   **(ii) The $1.965 million commission to Cooper and Tilley**   On 14 March 2001, HIH paid $1.965 million to a firm of solicitors retained by Messers Cooper and Tilley. This fee represented a commission for Mr Tilley facilitating negotiations with Kerry Packer's Consolidated Press Holdings Ltd ('CPH') over the sale of the HIH property portfolio. The fee was approved at a meeting on 13 March 2001 and was paid on the last day before the provisional liquidators were appointed.    APRA argued that there was no commercial justification for HIH making a payment to Messers Cooper and Tilley in advance of having reached a binding agreement with CPH. Although Mr Wein (the CEO) authorised the payment, APRA claimed that Mr Abbott had agreed with or at least been present when the decision was made. This knowledge and acquiescence was indicative of unfitness to act.   Mr Abbott gave evidence that he could not recollect being present at the meeting on 13 March 2001 and categorically denied authorising the payment of any fee. The Tribunal determined that the circumstances surrounding the payment of the commission did not involve Mr Abbott and were therefore not relevant to an evaluation of his conduct. As such, they could not justify any adverse finding in relation to his fitness to act in a senior insurance role.   **(iii) Payment of the Ashkirk invoices on 14 March 2001**   On 14 March 2001, Mr Wein informed Mr Abbott that he was going to 'pay all consultants' outstanding bills today' and requested that Mr Abbott provide him with outstanding Ashkirk invoices. Mr Abbott subsequently telephoned his brother (a solicitor and director of Ashkirk) to ask for advice on whether Ashkirk should accept payment of the invoices.    The Tribunal found that Mr Abbott presented and sought payment of the Ashkirk invoices at a time when he knew HIH faced a real risk of insolvency and that external administration was imminent. Later in the day, he twice enquired about payment and thereby at least encouraged existing efforts to affect it. Taylor SC felt that by this time, Mr Abbott had probably concluded that the appointment of a provisional liquidator was likely to occur.   While accepting Mr Abbott's evidence that he did not believe HIH was insolvent or that KPMG (who had earlier that day presented a draft report on the financial position of HIH) had reached a concluded view about HIH's solvency, Taylor SC found that Mr Abbott's conduct in encouraging the pre-emptive payment of the Ashkirk invoices was improper. However, that conduct did not breach any law or involve any misuse of his position as a director of HIH. Further, it did not lead to satisfaction that Mr Abbott's conduct on the day in question indicated a lack of good character, or that he was a person who was not fit and proper to act in a senior insurance role.   **(d) Conclusion**   Taylor SC concluded that the evidence adduced did not satisfy him that Mr Abbott was not a fit and proper person to be, or to act as, a director, senior manager or agent of the kind referred to in section 24(1) of the Insurance Act. His conclusion was fortified by the narrow compass of criticisms that were advanced by APRA against Mr Abbott as director of HIH and the evidence of Mr Abbott's exemplary background and good repute. Accordingly, he set aside the decision under review.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20133%20September%202008_files/spacer%281%29.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  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