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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  | | --- | --- | | **Bulletin No. 120**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), Director, Centre for Corporate Law and Securities Regulation  Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Securities Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com/" \t "_new).   1. [Recent Corporate Law and Corporate Governance Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#h1) 2. [Recent ASIC Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#h2) 3. [Recent ASX Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#h3) 4. [Recent Takeovers Panel Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#h4) 5. [Recent Corporate Law Decisions](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#h5) 6. [Contributions](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#h6) 7. [View previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | [odify My Newsfeed](http://my.lawlex.com.au/default.asp?goto=news_sub) [earch Newsfeed Archive](http://my.lawlex.com.au/default.asp?goto=news) [iew user guide](http://my.lawlex.com.au/content/static/LawlexGeneralUserGuide.pdf) [earch the law](http://my.lawlex.com.au/default.asp?goto=search_leg) [bout legislative alert](http://www.lawlex.com.au/content/view/69/0) [bout SH&E Monitor](http://www.lawlex.com.au/content/view/94/146/)[bout Lawlex](http://www.lawlex.com.au/content/view/42/0) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** | [own](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%231) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | | | [1. Recent Corporate Law and Corporate Governance Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#1)  [1.1 Disclosure guidelines for Australian hedge funds](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#11) [1.2 Report on private equity in Australia](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#12) [1.3 Insolvency reform package passes Senate](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#13) [1.4 Statutory oversight of ASIC](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#14) [1.5 Reports on non-equities transparency and commodity and exotic derivatives](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#15) [1.6 Parliamentary committee report on superannuation](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#16) [1.7 Shareholder voting in the UK – fourth Myners report](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#17) [1.8 APRA releases Basel II approach to market risk](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#18) [1.9 APRA responds to Life Insurance Act amendments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#19) [1.10 APEC finance ministers meeting - Australian Treasury background notes](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#110) [1.11 APRA releases discussion paper relating to foreign insurers](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#111) [1.12 APRA releases revised Basel II standardised approaches](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#112) [1.13 APRA releases 10 years of superannuation data: 1996-2006](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#113) [1.14 IPO trends](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#114) [1.15 UK parliamentary report on private equity](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#115) [1.16 Consultation on possible European private company statute](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#116) [1.17 Reports on application of EU recommendations on directors' pay and independence](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#117) [1.18 CESR identifies further issues for work in the area of the market abuse directive](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#118) [1.19 Issues relating to firms that advise institutional investors on proxy voting](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#119) [1.20 Global venture capital report](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#120) [1.21 Research reports on termination payments to senior executives](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#121)  [2. Recent ASIC Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#2)  [2.1 ASIC outlines new and improved disclosure for the unlisted and unrated debentures market](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#21)  [3. Recent ASX Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#3)  [3.1 ASX Corporate Governance Council releases revised corporate governance principles and recommendations](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#31) [3.2 ASX annual report](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#32)  [4. Recent Takeovers Panel Developments](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#4)  [4.1 Rinker Group Limited 02R- Panel decision](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#41) [4.2 Auspine Limited - Panel decision](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#42)  [5. Recent Corporate Law Decisions](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#5)  [5.1 Use of section 1318 for acts beyond the Corporations Act](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#51) [5.2 Conversion: liability of employees and company directors](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#52) [5.3 No representation and no duty of care disclaimers upheld by English Court of Appeal](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#53) [5.4 Class actions and the use of litigation funding](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#54) [5.5 Extending the ‘decision period’ to the end of the ‘convening period’](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#55) [5.6 Court orders wind up and restraining orders against unregistered managed investment scheme](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#56) [5.7 Is the general discretion to extend time pursuant to the provisions of section 1322(4)(d) of the former Corporations Law available to extend the time limit for claims for compensation based on a breach of director’s duties?](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#57) [5.8 The rule of attribution: Is a failure by employees attributable to the proprietor employer company?](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#58) [5.9 Promissory notes](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#59) [5.10 Liquidators obtaining approval for the compromise of a debt](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm#510) |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%232) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | | |  | | --- | | **1.1 Disclosure guidelines for Australian hedge funds**  On 21 August 2007, the Alternative Investment Management Association (AIMA) published guidelines on what it regards as good disclosure practices for Australian hedge funds. The topics dealt with in the disclosure guidelines include disclaimers, key features of the fund, details about the fund manager and other intermediaries, investment approach, strategy and style of the fund, risks of investing, fees and other costs, information about investing in the fund, valuation, unit pricing and distributions, reporting, taxation, and further information about the hedge fund including conflicts management.  The disclosure guidelines are on the [AIMA website](http://www.aima-australia.org/forms/AIMAAustGuidelinesRiskDisclosure_Aug07.pdf" \t "_new).  **1.2 Report on private equity in Australia**  On 20 August 2007, the Senate Standing Committee on Economics published a report titled “Private equity investment in Australia”. The main conclusion of the Committee is the following:  “The committee does not consider that any convincing case has been made for any further regulation of private equity activity in Australia at this time. It recognises and endorses the ongoing watching brief maintained on this issue by the Treasury, the RBA, the ACCC, ASIC and the FIRB. The requirements of Chapter 6 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "default ), the conflict of interest rules, sector-specific legislation and the FIRB guidelines offer appropriate and adequate protection for Australian companies and the Australian public. The activities of both private and listed Australian companies will continue to be reported under the Corporations Act and through the international accounting standards set by the Australian Accounting Standards Board. Private equity consortiums will themselves be guided in their decision-making by prospects for economic success and growth.  “The committee believes it is important to continue to attract foreign investment into Australia and does not accept the narrowly held view that some sectors of the national economy should be protected from private equity activity. The committee views private equity as an opportunity to reinvigorate underperforming public companies, which will subsequently benefit Australian consumers, shareholders and workers. It does not see the market imperative that drives foreign investors to buy out Australian companies as being inconsistent with the national interest and notes the protections already afforded under foreign investment policy and the [Foreign Acquisitions and Takeovers Act 1975](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6803" \t "default ).”  The topics examined in the report are:   * International and domestic trends in private equity; * Effects of private equity on capital markets; * Tax revenue implications; and * Whether the current regulation of private equity adequate to protect the economy and the national interest.   The report is available on the [Senate Standing Committee on Economics website](http://www.aph.gov.au/senate/committee/economics_ctte/private_equity/index.htm" \t "_new).  **1.3 Insolvency reforms package passes Senate**  (By Michael Quinlan (Partner) and Angela Martin (Senior Associate), Allens Arthur Robinson)  Draft legislation dubbed 'the first comprehensive package for insolvency laws since the 1988 Harmer Review' passed the Australian Senate on 9 August 2007. The [Corporations Amendment (Insolvency) Bill 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96414" \t "default) will become an Act once Royal Assent is received and most of its provisions will come into force.  In November 2006, the draft Corporations Amendment (Insolvency) Bill 2007 and Corporations and ASIC Amendment Regulations 2007 were released by the Parliamentary Secretary to the Treasurer, Chris Pearce, for public comment by 23 February 2007.  The purpose of the Bill is to implement a range of key changes to streamline the process involved in insolvent external administration by increasing their flexibility, removing unnecessary regulatory burdens and reflecting the practices that are already in common use.  The Bill focuses on four main areas:  **(a) Improving outcomes for creditors**  It is intended to improve outcomes to creditors through enhancing protection for employee entitlements, improved information to creditors, removal of unnecessary procedural requirements, and by introducing a statutory pooling process to facilitate the winding up of related companies.  **(b) Deterring corporate misconduct**  The Bill includes a number of provisions that are intended to punish and deter corporate misconduct primarily through the establishment of an assetless administration fund to improve the quality of information forwarded to ASIC by insolvency practitioners, and a new ASIC enforcement program targeted at phoenix company behaviour. The assetless administration fund targeted at deterring phoenix company behaviour has already been implemented. As at 30 June 2007, the fund has resulted in the disqualification of 46 directors for a total of 154 years, with another 53 possible bannings in progress.  In support of this initiative, reforms will restore the longstanding interpretation of the non-applicability of penalty privilege in proceedings for disqualification or banning orders. ASIC will also be provided with enhanced powers to investigate the conduct of registered liquidators.  **(c) Improving regulation of insolvency practitioners**  There are also a range of measures aimed at improving the regulation of insolvency practitioners primarily through enhancements to the registration regime administered by ASIC but also through the introduction of more flexible disciplinary procedures. For example, the Companies Auditors and Liquidators Disciplinary Board (the CALDB) is to be given more power and flexibility by providing the CALDB Chairman with the option to convene pre-hearing conferences in order to fix hearing dates or give directions concerning the timetable for submissions or evidence. The CALDB may caution or reprimand anyone who breaches such directions.  **(d) Fine-tuning voluntary administration**  Although it is generally acknowledged that the voluntary administration procedures currently in place are effective, the Bill includes amendments aimed at addressing several technical issues in order to enhance the efficiency and cost effectiveness of the process. These amendments largely recognise market developments and opportunities for improvement that have been identified since the procedure was introduced in 1993 and include matters such as narrowing the circumstances in which creditors will be entitled to terminate a Deed of Company Arrangement (DOCA), slightly extending the timing for the holding of creditors' meetings and the fact that a company under a DOCA may seek a court order that it need not indicate on public documents that it is subject to a DOCA.  In addition, there are certain provisions aimed at streamlining the transitions from liquidation to administration and vice versa.  As a matter of standard legal procedure, the Bill awaits Royal Assent before it becomes law. Although no date is currently set for this to happen, the transitional provisions in the Bill indicate that, once it does become law, the majority of the Act will be effective immediately, with the remaining provisions becoming effective, at the latest, six months after the day the Act receives Royal Assent.  *Please note: The [Corporations Amendment (Insolvency) Act 2007 No. 132 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96414" \t "default) was assented to on 20 August 2007.*  **1.4 Statutory oversight of ASIC**  On 9 August 2007, the Parliamentary Joint Committee on Corporations and Financial Services published its report titled “Statutory Oversight of the Australian Securities and Investments Commission”. The issues raised by the Committee and discussed with ASIC were:   * Property investment scheme collapses * Bank conduct and dispute resolution procedures * Professional indemnity insurance for financial planners * ASIC review of the EFT Code * Superannuation advice and shadow shopping survey * Australian National Audit Office report on ASIC’s investigation procedures.   The report is available on the [Parliamentary Joint Committee website](http://www.aph.gov.au/Senate/committee/corporations_ctte/asic/asic_june_07/report.pdf" \t "_new).  **1.5 Reports on non-equities transparency and commodity and exotic derivatives**  On 9 August 2007, the Committee of European Securities Regulators (CESR) published its advice to the European Commission on non-equities transparency, as well as a report on commodity and exotic derivatives.  The two documents published in relation to two requests from the European Commission are:   * Technical advice on non-equities transparency (CESR/07-284b); and * A compilation of responses by CESR Members to the European Commission's request for initial assistance on commodity and exotic derivatives and related business (CESR/07-429).   Both of these requests for CESR's technical advice are intended to assist the European Commission in preparing two reports to the EU institutions on whether there is a need to extend the MIFID transparency requirements to non-equities (bonds) and how to include within MIFID an appropriate regulatory framework for commodity and exotic derivatives, as set out in Article 65 of MiFID.  **Non-equities transparency:** In terms of non-equities transparency, CESR concluded that it has not recognised evident market failure in relation to market transparency which would warrant mandatory transparency for bonds. However, some re-distribution of the existing transparency information could be useful to help retail participants. CESR also recognises that there are market-led initiatives planned in this direction. CESR proposes that the progress of these initiatives should be followed and their effect evaluated before considering any possible regulatory action. CESR´s response was prepared in close co-operation with different markets participants including a public consultation and an open hearing.  **Commodities:** In relation to commodities, the document covers the first part of the Commission's request, and includes an initial fact-finding exercise on the regulation and operation of commodity and exotic derivatives in Member States. The document is based on responses from individual CESR members and as this part of the work to be undertaken by CESR has been a fact-finding exercise it has not been subject to public consultation.  CESR will develop a follow up report for the Commission to address the remaining areas of their request for advice in October 2007. In particular, this will include the application of MiFID exemptions and Article 38 of the MiFID implementing Regulation which set out the requirements related to persons exercising significant influence over the management of the regulated market.  Further information is available on the [CESR website](http://www.cesr-eu.org/" \t "_new) .  **1.6 Parliamentary committee report on superannuation**  On 7 August 2007, Senator Grant Chapman, Chairman of the Parliamentary Joint Committee on Corporations and Financial Services tabled the committee's report on superannuation. The report, entitled, 'The structure and operation of the superannuation industry', comes after a wide-ranging inquiry by the Joint Committee and after consideration of over 90 submissions from many organisations representing both the private and public sectors, as well as from corporations and individuals. The committee held 6 public hearings in Sydney, Melbourne and Canberra.  The report examines the regulation of the superannuation industry and describes industry trends that have resulted in total superannuation savings in Australia exceeding $1 trillion. It also examines reporting requirements of superannuation funds, including disclosure of promotional advertising and third party transactions with service providers and the propriety and transparency of these relationships. Member investment choice, the role of the trustee and APRA's interpretation of law and policy are also analysed, as is the safeguarding of superannuation savings. The report also addresses superannuation portability, exit fees and 'lost' superannuation. The reasons for growth in the number of self-managed superannuation funds (SMSFs) and issues relating to their administration, regulation and future viability are examined.  Some of the key recommendations made by the committee include:   * a review of the laws governing superannuation to identify how they may be rationalised and simplified; * the formation of compulsory accounting and disclosure by all funds for promotional advertising, sponsorship expenses and executive remuneration; * the provision by ASIC of guidance to superannuation funds on targeted communication to separate categories of fund members without triggering the need for a statement of advice; * the implementation of an effective disclosure policy for product disclosure statements, annual reports, related party transactions, shelf fees, key service provision agreements and capital backing arrangements; * the introduction of mandatory unit pricing for all public offer superannuation funds; * the provision of online superannuation calculators; * prohibiting exit fees that exceed the administrative cost of transfer; * clarification of the role of trustees in super funds offering member investment choice; * improved readability and standardisation of superannuation product disclosure statements; * the development of appropriate nomenclature where product recommendation advice is limited by sales imperatives; * the removal of the active member test from the definition of an Australian Superannuation Fund; * consideration by the Australian Taxation Office of raising the maximum number of trustees for any one SMSF from four to ten, in line with current and future demand; and * amending the auditing requirements for SMSFs run by qualified accountants.   The report is available on the [Parliamentary Joint Committee website](http://www.aph.gov.au/Senate/committee/corporations_ctte/index.htm" \t "_new).  **1.7 Shareholder voting in the UK - fourth Myners report**  On 30 July 2007, Paul Myners issued his fourth report to the Shareholder Voting Working Group (SVWG) on his review of the impediments to voting UK shares. Voting levels have risen to over 60%, up from 50% three years ago. However, although much work is being put into determining how particular shares should be voted, not enough effort is then made to ensure that the voting process works and votes get through.  Georgeson Shareholder Ltd traced the votes of 25 institutional investors at one FTSE 100 company's AGM in 2006 and found that almost 5% of the votes were "lost". This demonstrates that the process is still flawed and that not enough importance is being given to voting at company meetings. In particular, almost half of these "lost votes" were due to participants over-voting as they did not know their correct entitlement and issued instructions for more votes than they should. This problem can be exacerbated by the use of omnibus accounts and can result in the entire instruction being rejected.   Myners is urging all those involved in the voting system, particularly issuers, agents and registrars, to actively address these failings by making the system more efficient and transparent. He will also be writing to a number of FTSE 100 Chairmen to ask them to trace their votes to see if any have been lost and report on the findings. The National Association of Pension Funds, the Association of British Insurers and the Investment Management Association, the main trade associations representing the beneficial owners and their agents, support such exercises as they will help ensure the work undertaken in determining how to vote is not undermined by flaws in the voting process.  The Paul Myners' report is available on the [Investment Funds website](http://www.investmentfunds.org.uk/press/2007/20070730-01.pdf" \t "_new).  **1.8 APRA releases Basel II approach to market risk**  On 2 August 2007, the Australian Prudential Regulation Authority (APRA) released its proposed approach to the treatment of market risk under the Basel II capital adequacy regime, known as the Basel II Framework.  APRA has released a discussion paper, draft prudential standard and a prudential practice guide that set out proposed refinements to APRA's current approach to market risk for authorised deposit-taking institutions (ADIs). The draft prudential standard is intended to replace the current Prudential Standard APS 113 Capital Adequacy: Market Risk.  The proposed approach better aligns ADI market risk capital requirements with the Basel II Framework, but preserves APRA's requirement that ADIs have in place a framework to measure, manage, and monitor market risk that is commensurate with the nature, scale and complexity of their operations.  As is currently the case, an ADI must use the standard method of market risk measurement or obtain APRA's approval to use its own risk measurement model. APRA also requires an ADI using the advanced approaches to measuring credit risk and operational risk to hold regulatory capital against its interest rate risk in the banking book, which is covered by a separate prudential standard.  The suite of Basel II prudential standards is expected to be finalised in the second half of 2007. The new Basel II capital adequacy regime will come into force in Australia on 1 January 2008.  Further information is available on the [APRA website](http://www.apra.gov.au/media-releases/07_31.cfm" \t "_new).  **1.9 APRA responds to Life Insurance Act amendments**  On 2 August 2007, the Australian Prudential Regulation Authority (APRA) released a consultation package on its proposals to maintain the prudential framework for life companies, including friendly societies, in the light of amendments being made to the [Life Insurance Act 1995](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6638" \t "default) (Life Act).  The [Financial Sector Legislation Amendment (Simplifying Regulation and Review) Bill 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96992" \t "default), implements Government commitments in response to the recommendations of the Taskforce on Reducing Regulatory Burdens on Business, in its Report "Rethinking Regulation". The Bill removes several sections of the Life Act.  To ensure the continued operation of the existing prudential framework, APRA proposes to replicate most of the provisions removed from the Life Act in new and amended prudential standards. These include:   * two new prudential standards to ensure that key provisions relating to actuaries, auditors and reinsurance continue to operate; * the reissue of actuarial standards, which are currently set by the Life Insurance Actuarial Standards Board, as APRA prudential standards; and * minor amendments relating to governance and 'fit and proper' requirements.   APRA is consulting with industry to ensure that the transition to the revised Life Act occurs as smoothly as possible.  APRA is proposing that the new prudential standards will be available in the fourth quarter of 2007 and take effect on 1 January 2008.  The consultation package comprises a discussion paper and a series of draft prudential standards and instructions. These documents are available on the [APRA](http://www.apra.gov.au/policy" \t "_new) website.  **1.10 APEC finance ministers' meeting - Australian Treasury background notes**  The Australian Treasury prepared a number of background notes on the policy themes discussed by the Asia Pacific Economic Cooperation (APEC) finance ministers and heads of the international finance institutions at their meeting on 2-3 August 2007.  The background notes are:   * Note 1 - Global capital flows and strengthening investment in the Asia-Pacific region; * Note 2 - Energy security and climate change; * Note 3 - Transparency and sustainability of the public balance sheet; and * Note 4 - Making private capital markets work better in the Asia-Pacific region.   The background notes are available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=002&ContentID=1281" \t "_new).  **1.11 APRA releases discussion paper relating to foreign insurers**   On 31 July 2007, the Australian Prudential Regulation Authority (APRA) issued a discussion paper on proposed refinements to the general insurance prudential framework. This followed the Government's announcement on 3 May 2007 'Enhancing Integrity of Insurance in Australia'.   The Government's announcement related to direct offshore foreign insurers (DOFIs) and discretionary mutual funds (DMFs). It foreshadowed amendments to the Insurance Act 1973 that would require DOFIs wishing to continue operating in the Australian market to be authorised by APRA. The [Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96990" \t "default) was introduced into Parliament on 21 June 2007.  The proposed refinements to the prudential framework will have some effect not only on DOFIs that wish to become APRA-authorised but also on all APRA-authorised general insurers.  The proposals recognise five different categories of insurer, based on their risk profiles. The five categories of insurer are locally incorporated insurers, wholly owned subsidiaries of local or foreign insurers, foreign insurers operating as foreign branches, association captives, and sole parent captives.  The Government intends that offshore foreign reinsures will not be required to be authorised in Australia.  APRA's discussion paper does not address the proposed exemptions from prudential regulation foreshadowed in the Government's announcement. The Treasury is developing options for such exemptions and intends to issue a separate consultation paper on this topic.  APRA invites interested parties, including local and foreign insurers, insurance agents and brokers, reinsurers and buyers of insurance, to comment on the proposed refinements to the prudential framework that are intended to apply from 1 July 2008.  Written submissions should be forwarded to [GIRFPF@apra.gov.au](mailto:GIRFPF@apra.gov.au) by 11 September 2007.  The discussion paper is available on the [APRA website](http://www.apra.gov.au/General/Proposals-relating-to-GI.cfm" \t "_new).  **1.12 APRA releases revised Basel II standardised approaches**   On 31 July 2007, the Australian Prudential Regulation Authority (APRA) released a paper that sets out its responses to submissions on its proposals to implement the standardised approaches under the new Basel II capital adequacy regime, known as the Basel II Framework.  APRA's response paper addresses issues raised in submissions and is accompanied by two final draft prudential standards that incorporate a number of amendments suggested in the consultation process.  The final draft prudential standards cover:   * the standardised approach to credit risk (first release in April 2005); and * the standardised approach to operational risk (first release in July 2005).   The proposals form part of the Basel II capital adequacy regime for ADIs that will come into force on 1 January 2008. The full suite of Basel II prudential standards is expected to be finalised in late 2007.  The vast majority of ADIs - banks, building societies and credit unions - will use the standardised approaches in determining their regulatory capital requirements.  Comments on the response paper and the final draft prudential standards APS 112 Capital Adequacy: Standardised Approach to Credit Risk and APS 114 Capital Adequacy: Standardised Approach to Operational Risk are invited by 3 September 2007 and can be emailed to [basel2@apra.gov.au](mailto:basel2@apra.gov.au).  These documents are available on the [APRA website](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm" \t "_new).  **1.13 APRA releases 10 years of superannuation data: 1996-2006**  On 26 July 2007, the Australian Prudential Regulation Authority (APRA) released statistics on trends in superannuation in Australia over the ten years from June 1996 to June 2006.  The special edition of APRA's Insight publication, "Celebrating 10 years of superannuation data collection 1996-2006", includes general statistics on assets, accounts and contributions, as well as data focusing on the manner of investment, return on assets, investment choice and asset allocation of the default investment strategy.  Total superannuation assets in Australia over the ten year period grew at an annual average rate of 14.3 per cent, and almost quadrupled from $245.3 billion in June 1996 to $912.0 billion in June 2006. This growth has increased superannuation assets as a proportion of Gross Domestic Product (GDP) from under 40 per cent in 1996 to nearly 100 per cent in 2006.  Small funds and industry funds experienced some of the strongest asset growth over the past decade, at rates of 22.7 per cent and 22.5 per cent, respectively. Retail funds (excluding eligible rollover funds - ERFs) grew by 17.5 per cent, public sector funds by 12.8 per cent and corporate funds by 2.2 per cent.  The publication shows that contributions grew an average of 12.0 per cent annually over the past ten years, with member and employer contributions growing 14.2 per cent and 11.4 per cent per year, respectively. Benefit payments grew on average by 7.9 per cent annually with pensions and lump sum benefit payments growing by 13.3 per cent and 6.5 per cent per year, respectively.  A significant change over the ten year period was the consolidation in the number of larger APRA-regulated superannuation funds. These numbers fell from just under 5,000 funds to just under 1,000, which are in turn overseen by just over 300 APRA-licensed trustees.  The combination of smaller fund numbers and substantial asset growth has meant that, over the past ten years, the average APRA-regulated fund has increased from around $40 million to around $800 million.  The publication also shows that, from 1996 to 2006, the average return on assets (ROA) for superannuation entities with at least $100 million was 6.7 per cent. Public sector funds had an average ROA of 8.0 per cent, followed by corporate funds with 7.8 per cent, industry funds with 6.7 per cent, ERFs with 5.4 per cent and retail funds (excluding ERFs) with 5.3 per cent.  Other figures show that those entities with assets of at least $1 billion achieved the highest ROA of 6.8 per cent over the ten years from 1996 to 2006. This was followed by entities with assets of under $100 million with 6.4 per cent (though the population is very small and consists largely of corporate funds), entities with assets of between $100 million and $500 million and entities with assets of between $500 million and $1 billion, both with 6.3 per cent.  Accounts with an average balance of at least $100,000 achieved the highest ROA of 7.7 per cent over the ten years from 1996 to 2006. This was followed by accounts with an average balance of between $25,000 and $100,000 (7.3 per cent), between $10,000 and $25,000 (5.7 per cent), between $5,000 and $10,000 (5.4 per cent) and under $5,000 (4.4 per cent).  The information in the publication was compiled from data from APRA, the Australian Bureau of Statistics (ABS) and the Australian Tax Office (ATO).  The publication is available on the [APRA website](http://www.apra.gov.au/Insight" \t "_new).  **1.14 IPO trends**  Initial Public Offerings (IPOs) worldwide surged in the second quarter of 2007 with US$88 billion raised in 531 IPOs making this the second most active quarter of the last five years, both in number of IPOs and capital raised, according to the inaugural quarterly Global IPO Report from Ernst & Young published on 25 July 2007.  The number of listings globally was up 40% on the first quarter of 2007 and 16% on the second quarter of last year, while the amount of capital raised rose 144% on the previous quarter and 42% on the same quarter last year. Much of this activity was driven by the emerging markets; Brazil, Russia, India and China together raised $US35 billion in 90 IPOs and accounted for four of the five largest IPOs in the second quarter.  There was a sharp rise in large listings on domestic exchanges - just three of the top 20 IPOs in the second quarter chose not to list in their home markets.  Overall, capital raised by companies in the US, China and Russia made up about half of the global total with US$15.7 billion, US$15.5 billion and US$11.7 billion respectively. In terms of the highest number of IPOs Australia led the way with 66, ahead of the US (59) and China (50).  The high number of IPOs in Australia saw the ASX take top spot among the world's exchanges by number of listings, ahead of New York's NASDAQ and London's AIM. However, by capital raised the London Stock Exchange (LSE), Hong Kong Stock Exchange (HKSE) and New York Stock Exchange (NYSE) were the top three exchanges respectively this quarter.  Although only three per cent of the total number of IPOs in the second quarter listed on LSE, it secured first place among the exchanges by attracting 17% of capital raised worldwide, mainly due to large Russian deals, including two of the quarter's top five largest. HKSE saw a similar situation, securing the same number of listings as LSE, but attracting 14% of total capital raised this quarter, principally due to the listings of two large Chinese companies.  In terms of sector, companies from the financials and materials industries dominated the list of top 20 IPOs in the second quarter. A third of all capital raised was by financial companies, followed by industrials (14%), real estate (12%) and materials (11%). By number of listings, materials companies led the way with a 19% market share of IPOs ahead of technology (13%), industrials and financials (both 12%).  Other key activities included:   * There were 20 IPOs and US$5.4 billion raised by companies in Brazil, up from 11 IPOs and US$3.6 billion raised in the first quarter; * The number of Indian companies listing was 20, down from 37 in the first quarter, while capital raised was US$2.4 billion, up from US$2.1 billion; * In Europe, Russia led the way in the amount of capital raised with US$11.7 billion, followed by Germany (US$4.1 billion), UK (US$3.6 billion), Italy (US$2.9 billion) and Spain (US$2.5 billion); and * By number of deals, the UK headed the European table with 25 IPOs, ahead of France (15), Poland (15), Germany (13) and Italy (11).   **1.15 UK parliamentary report on private equity**  On 23 July 2007, the Treasury Committee of the UK House of Commons published a report titled "Private Equity". The matters dealt with in the report included:   * The private equity industry (the size of the industry, the growth of the industry, typical fund structures, rates of return, future prospects for private equity) * Private and public equity models compared (advantages and disadvantages of private equity, chain of ownership, investment horizon, reporting requirements, incentives, leverage, job creation and destruction, pensions, public or private equity?) * Economic risk and financial stability (market abuse and conflicts of interest, leverage and economic risk, the increase in leverage, the economic and credit cycle, covenant-lite loans, excessive leverage, unclear ownership of economic risk) * Transparency (transparency to the public and to employees, independent data, a legislative response?, transparency to investors, the purpose of transparency, competition and the fee structure, the TUPE regulations) * Taxation (taper relief and carried interest, the memorandum of understanding, tax treatment of debt and equity, tax domiciliary status).   The report is available on the [Treasury Committee website](http://www.publications.parliament.uk/pa/cm200607/cmselect/cmtreasy/567/56702.htm" \t "_new).  **1.16 Consultation on possible European private company statute**  On 19 July 2007, the European Commission launched a public consultation on the obstacles companies - in particular small and medium-sized enterprises (SMEs) - face when conducting cross-border business in the EU and on the content of a possible European Private Company Statute. Responses will be taken into account in a forthcoming impact assessment and possible legislative proposal. The deadline for responses is 31 October 2007.  The questionnaire is divided in two sets of questions:   * The first set is addressed to businesses, and in particular to the management of SMEs and larger companies. These questions ask for evidence of the legal and other barriers companies face when they conduct business through an establishment (subsidiary or branch) in another Member State. Respondents' views are also requested on the appropriateness of a new European legal form. * The second set is more legal in approach and aims at gathering stakeholders' opinions on the content of a possible Statute.   The questionnaire is available on the [Europa website](http://ec.europa.eu/internal_market/company/epc/index_en.htm" \t "_new).  **1.17 Reports on application of EU recommendations on directors' pay and independence**  On 19 July 2007, the European Commission published two reports on Member States' application of EU recommendations on company directors' pay and independence. Both reports conclude that the application of corporate governance standards has improved, but some weaknesses remain. The report on directors' remuneration shows that transparency standards are widely followed, but in some Member States it is still not recommended that shareholders vote on this issue. The report on the role of independent non-executive directors finds that there is progress in improving governance standards in this field, but some of the recommended standards have not been followed in all Member States. For example, in some Member States a former Chief Executive Officer (CEO) of a company can still become its chairman without any cooling off period. According to the report, this undermines the independence of non-executive supervision. Also, some Member States do not recommend a sufficient number of independent board members for remuneration and audit committees.  **(a) Report on directors' remuneration** Remuneration is one of the main areas of potential conflict of interest for executive directors. Excessive remuneration has also emerged as a prominent feature in many corporate fraud scandals. The Commission's 2004 Recommendation on directors' remuneration (IP/04/1183) provides for high standards of disclosure on this issue and recommends greater involvement of shareholders in the decisions relating to remuneration.  The Commission has now issued a report on how Member States apply the recommended standards, which finds widespread disclosure of remuneration, but some reluctance to involve shareholders fully in the decision over remuneration policy.  **(b) Report on independent non-executive directors**  The Commission's 2004 Recommendation on the role of non-executive or supervisory directors and on supervisory board committees (IP/04/1182) aims at improving shareholders' control over executive management by reinforcing the presence of independent directors on boards and board committees. The Commission has now published a report on how Member States apply the recommended standards, which finds that a majority of Member states comply to a large extent with the recommendations, but some weaknesses remain.  The reports are available at:   * [Internal Market - Company Law and Corporate Governance - Directors' remuneration](http://ec.europa.eu/internal_market/company/directors-remun/index_en.htm" \t "_new); and * [Internal Market - Company Law - Independent Directors](http://ec.europa.eu/internal_market/company/independence/index_en.htm" \t "_new)   **1.18 CESR identifies further issues for work in the area of the market abuse directive**  In July 2007, the Committee of European Securities Regulators (CESR) published its work program for further work in the area of the Market Abuse Directive (Ref CESR/07-416). The work program encompasses issues where CESR identifies a need for further consideration and, therefore, further guidance may be provided to CESR Members and/or to the market, to the extent possible.  Many of the issues included in the work program have been flagged by market participants during the Call for Evidence, which CESR launched in 2006. This took place following two years of experience gained with the new market abuse regime in operation in Europe (Ref CESR/ 06-078) and the consultation for the 2nd set of guidance on the Operation of the Market Abuse Directive (Ref CESR/06-562b) that was released on 12 July 2007. Other issues have been identified in the mapping exercise of the implementation of the Market Abuse Directive that was conducted by the Review Panel of CESR.  Issues identified for further work include:   * Assistance to the European Commission in developing the list of sanctions and measures applicable under the MAD, in order to accommodate concerns about the diversity of measures and sanctions applied in Member States; * Harmonisation of requirements for insiders' lists; * Suspicious transactions reporting: guidance on not only to which authority the reports are submitted, but also further work to establish whether CESR can produce further guidance on expectations as regards reporting; * Stabilisation Regime as Level 3 (the strict objectives and limits of the Regulation and the diverging application by supervisors of the Regulation in relation to Accepted Market Practices (AMPs) do not provide sufficient legal certainty); * The two-fold notion of inside information will be considered further. This includes the definition of insider information/delay of public disclosure; concerns about the problems arising from having one definition of inside information for both the insider trading prohibition and the issuer disclosure obligations; and also, the question of the requirement not to mislead the public in the case of a delay of public disclosure); * A mapping of the existing thresholds in Member States and other practices of CESR Members will be undertaken. This will include, for example, stock options program; who is entitled to publish directors' dealings; notifications of transactions by persons discharging managerial responsibilities and consideration of whether there is a case for recommending adjustment of the threshold; and * Develop guidance on the definition of inside information with regard to commodity derivatives to the extent possible.   In relation to these issues, CESR will seek to develop guidelines for CESR Members and/or the markets. However, where appropriate, CESR will consider whether in any cases it is appropriate to propose that the European Commission examine an issue in its forthcoming review of the operations of the Directive.  Further information is available on the [CESR website](http://www.cesr-eu.org/data/document/07_518.pdf" \t "_new).  **1.19 Issues relating to firms that advise institutional investors on proxy voting**  The US Government Accountability Office (GAO) has published a report on issues relating to firms that advise institutional investors on proxy voting.  At annual meetings, shareholders of public corporations can vote on various issues (eg mergers and acquisitions) through proxy voting. Institutional investors (eg mutual funds and pension funds) cast the majority of proxy votes due to their large share holdings. In recent years, concerns have been raised about a group of about five firms that provide research and recommendations on proxy votes to their institutional investor clients.  GAO was asked to report on: (1) potential conflicts of interest that may exist with proxy advisory firms and the steps that the US Securities and Exchange Commission (SEC) has taken to oversee these firms; (2) the factors that may impede or promote competition within the proxy advisory industry; and (3) institutional investors' use of the firms' services and the firms' potential influence on proxy vote outcomes.  GAO reviewed SEC examinations of proxy advisory firms, spoke with industry professionals, and conducted structured interviews with 31 randomly selected institutional investors.  GAO does not make any recommendations in the report.  The report is available on the [GAO website](http://www.gao.gov/new.items/d07765.pdf%20" \t "_new).  **1.20 Global venture capital report**  Global venture capital investment last year reached US$35.2 billion, the highest level since 2001 according to a report published by Ernst & Young. The acceleration has been bolstered by the increasing globalization of both venture capital funds and venture-backed companies and a substantial investor focus on emerging sectors.  The report is available on the [Ernst & Young](http://www.ey.com/global/content.nsf/International/SGM_-_Global_VC_Insights_2007_-_Form" \t "_new) website.  **1.21 Research reports on termination payments to senior executives**  The Centre for Corporate Law and Securities Regulation at the University of Melbourne has published two reports on termination payments for senior executives. One report examines the regulation of termination payments and the second report presents the results of an empirical study of termination payments. The titles of the research reports are:   * Seven: The Corporations Act, Corporate Governance, and Termination Payments to Senior Employees * Share-Based Remuneration and Termination Payments to Company Directors: What are the Rules?   The research reports are available on the [Centre for Corporate Law and Securities Regulation website](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/index.cfm" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%233) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | | |  | | --- | | **2.1 ASIC outlines new and improved disclosure for the unlisted and unrated debentures market**  On 23 August 2007, the Australian Securities and Investments Commission (ASIC) released a consultation paper on proposals to improve disclosure to retail investors in the $8 billion unlisted and unrated debenture market.  The improved disclosure measures (for consultation) are based on an 'if not, why not' basis of reporting. That is, issuers would report to investors against certain principles and benchmarks, which they should follow or explain why they may not have followed those principles and benchmarks.  The consultation paper is the next major stage in ASIC's Three Point Plan to deal with unlisted and unrated debentures, announced by ASIC Chairman Mr D'Aloisio at a hearing of the Senate Standing Committee on Economics on 30 May 2007.  Since the Senate Committee hearing, ASIC has further analysed the unlisted, unrated debenture market and consulted a range of industry experts on the risks of the business models commonly used by issuers of these investments.  ASIC's proposals are built around four key principles which focus on additional and improved disclosure. They are designed around:   1. providing benchmarks (such as credit rating of risk, liquidity and capital adequacy) to help retail investors and their advisers to assess risk and the risk-reward prospects of unlisted and unrated debentures; 2. requiring disclosure against those benchmarks; 3. requiring those involved with issuers (e.g. trustees, advisers, valuers and auditors) to use those benchmarks in carrying out their responsibilities; and 4. educating investors and potential investors to understand those benchmarks and use them in their decision-making process.   The additional disclosures ASIC proposes are to be on an 'if not, why not' basis. The 'if not, why not' basis of disclosure would be the basis of prospectus disclosure and the ongoing disclosures issuers must make.  ASIC's consultation paper also proposes that advertising for these products should not use words such as 'secure' and 'safe' and should either disclose a credit rating on repayment of principal or state that no rating exists and there is risk an investor may lose some or all of their capital. For retail investors, ASIC plans to produce an Investor Guide to aid their understanding of disclosure documents and conduct an education campaign to improve understanding of such matters as the need for investment diversification.  ASIC's consultation paper provides an appendix which lists issuers of unrated and unlisted debentures. The appendix is a listing only and does not signify any particular level of risk with those debentures. It is simply a list of unlisted and unrated debentures.  **Background**  Comments on the "Unlisted, unrated debentures - improving disclosure for retail investors" consultation paper are due 1 October 2007. ASIC will consider submissions before publishing a regulatory guide in October 2007. New fundraising documents are expected to comply with the new 'if not, why not' benchmarks from 1 December 2007.  The benchmarks that are proposed serve as the basis for enhanced disclosure. They cover credit ratings, adequate equity capital, adequate liquidity, lending principles (loan to valuation ratios), loan portfolio diversification, valuations, related party transactions and rollovers.  ASIC is proposing reporting on an 'if not, why not' basis against these benchmarks:   1. Issuers should have their debentures rated for credit risk by a recognised agency, and have that rating disclosed in the prospectus and advertising. 2. Issuers should have a minimum of 20 per cent equity where funds are directly or indirectly lent to property development. In other cases, the equity should be a minimum of 10 per cent. 3. Issuers should estimate their cash needs for the next three months and have cash on-hand to meet this need. 4. Issuers lending money to property development should be required to maintain a 70 per cent loan to valuation ratio on 'as if complete' valuations and 80 per cent on the basis of the latest market valuation. 5. Issuers should disclose how many loans they have, or expect to have, over the coming 12 months by number, value, location, activity and percentage of secured loans. 6. Valuations should be provided. Development property assets should be valued on a cost, 'as is' and 'as if complete' basis with all three disclosed. 7. Issuers should disclose how many loans they have, or expect to make, to related parties over the next 12 months and what assessment and approval process the follow for such loans. 8. Issuers should disclose their approach to rollovers, including default rollovers.   The consultation paper is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_89_Unlisted,%20unrated%20debentures.pdf/$file/CP_89_Unlisted,%20unrated%20debentures.pdf" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%234) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | | |  | | --- | | **3.1 ASX Corporate Governance Council releases revised corporate governance principles and recommendations**  The ASX Corporate Governance Council ("the Council") has released the second edition of the Corporate Governance Principles and Recommendations (Revised Principles). This is the first revision of the document since it was released in March 2003. The Council's changes to the Principles represent the results of its review of the Principles and its consideration of over 100 submissions received in response to the November 2006 Consultation Paper and Exposure Draft of the Council's proposed changes. Overall submissions expressed strong support for the Principles and the "if not, why not" approach to corporate governance reporting.  **Key changes**  The key changes are:   * "Best practice" has been removed from the title and the text of the document - to be known as the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations. Council's intention is to eliminate any perception that the Principles are prescriptive and so not to discourage companies from adopting alternative practices and "if not, why not" reporting where appropriate. * There are now eight Principles instead of ten and 26 instead of 28 Recommendations. Principle 8 has been amalgamated into Principles 1 and 2, and Principle 10 amalgamated into Principles 3 and 7. * Guidance to Principle 2: Structure the Board to Add Value sets out a list of "relationships affecting independent status" that a company should take into account when determining the independence of a director rather than providing a 'definition' of independence. Companies are required to disclose their reasons for considering a director 'independent' notwithstanding the existence of one of these relationships. * The Council recommends that companies' trading policies prohibit hedging unvested options and that any hedging of vested options should be disclosed to the company under Principle 3: Promote Ethical and Responsible Decision-Making. This position complements the Government proposal to amend the Corporations Act to require companies to disclose their policy on hedging of options. * Principle 7: Recognise and Manage Risk now makes it clear that material business risks involve both financial and non-financial risks. Companies are encouraged to adopt appropriate risk oversight and management policies and internal control systems rather than disclosing specific material business risks. Submissions overwhelmingly opposed disclosure of specific risks. * Recommendation 7.2 now deals with "material business risks" in broad terms. Where a company has risks relating to sustainability or corporate social responsibility (CR) that are material to its business they should be considered in the context of the revised Recommendation 7.2. * Recommendation 7.3 contains a revised version of the existing "assurance" or "sign-off" on financial reporting risks. The Recommendation requires the board to disclose that it has received assurance from the CEO/CFO that the declaration under section 295A of the Corporations Act is founded on a sound system of risk management and internal control which is operating effectively in all material respects in relation to financial reporting risks. * Recommendation 9.4 has been deleted and instead commentary has been added to Recommendation 8.2 suggesting companies may wish to consult shareholders about equity-based incentive plans involving the issue of new shares to executives, other than directors, prior to implementing them.   Other major findings to emerge from Council's review:   * Strong support for the 'if not, why not' reporting approach and general agreement that there should be no exemption from the Principles for small and medium-sized entities. * Significant interest in sustainability and CR issues, although submissions indicate that sustainability/CR has a wide variety of meanings. The bulk of submissions focussed on the risk and risk management aspects of sustainability/CR. Many submissions said that any new Recommendation should avoid constraining the ability of companies to adopt approaches that best suit their circumstances and the needs and interests of their investors and stakeholders, and should not restrict their ability to comment on other aspects and objectives of their sustainability/CR activities. * The Council considers that sustainability/CR issues are best reflected in the 'mainstream' of corporate governance activities; that is, through strengthened risk management processes and reporting. * The importance of material business risks, including those related to sustainability/CR, should be clarified and recognised. Companies are encouraged to establish appropriate risk management and oversight policies and structures, and to disclose a description of those policies in the context of Principle. * The Council has not introduced a requirement to disclose individual material business risks.   Companies will be required to report against the Revised Principles in the first financial year commencing on or after 1 January 2008, although companies are encouraged to make an early transition to the Revised Principles.  The Revised Principles and the Council Response Paper is available on the [ASX website](http://www.asx.com.au/supervision/governance/revised_corporate_governance_principles_and_recommendations.htm" \t "_new).  **3.2 ASX annual report**  ASX's FY07 Annual Report along with the complete full-year result material is available on the [ASX website](file:///C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/www.asx.com.au" \t "_new).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%235) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | | |  | | --- | | **4.1 Rinker Group Limited 02R - Panel decision**  On 12 August 2007, the Takeovers Panel advised that it has made a declaration of unacceptable circumstances and proposes to make orders in relation to an application it received on 16 July 2007 from CEMEX Australia Pty Ltd (CEMEX).  The application (Review Application) was made under section 657EA of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "default). The Review Application sought review of the decision of the Panel in the Rinker 02 proceedings to make a declaration of unacceptable circumstances and final orders in relation to an application it received on 13 June 2007 from the Australian Securities and Investments Commission (ASIC), concerning an off-market takeover bid (CEMEX Offer) by CEMEX for Rinker Group Limited (Rinker) and the affairs of Rinker.  The review Panel considered that the circumstances of:   * on 10 April 2007, CEMEX announcing that the 'offer is CEMEX's best and final offer, in the absence of a superior proposal ' (10 April announcement); and * on 7 May CEMEX announcing that it would allow Rinker shareholders to retain the A$0.25 dividend declared by Rinker on 27 April and that it was taking steps that were necessary to facilitate that outcome (7 May announcement), gave rise to unacceptable circumstances.   The Panel considered that CEMEX's 10 April announcement did not clearly, unambiguously and proximately reserve the right to improve the Offer other than in the event of a superior proposal. The Panel considered that in making the 7 May announcement CEMEX failed to follow the best and final statement in the 10 April announcement. The Panel considered the departure from the best and final statement was inconsistent with the 'truth in takeovers' policy, which the Panel considers to be a fundamental principle of an efficient, competitive and informed securities market.  The Panel considers that Rinker shareholders and the market were entitled to assume that there would be no further improvements to the Offer after 10 April (in the absence of a superior offer). The Panel considers that in making the 7 May announcement CEMEX failed to follow the best and final statement in the 10 April announcement. In so doing, in the period between the 10 April and 7 May announcements:   * the acquisition of control over Rinker shares did not take place in an efficient, competitive and informed market; * Rinker shareholders and the directors of Rinker were not given enough information to enable them to assess the merits of the Offer; and * Rinker shareholders who sold shares (other than by accepting the Offer) after the 10 April announcement and before the 7 May announcement did not have an equal opportunity to share in the benefits flowing from the Offer.   For these and other reasons (which will be set out in the Panel's reasons for decision), the Panel made the declaration of unacceptable circumstances.  The Panel has considered what orders would be appropriate to protect the interests of persons affected by the unacceptable circumstances. The Panel has provided the orders that it proposes to make to the parties for comment under section 657D of the Corporations Act. The Panel expects to finalise the orders shortly and will publish them when finalised.  The Panel has indicated that if judicial review of the review Panel's decision in the Rinker 02R proceedings is sought it will stay its orders pending completion of the review or further order.  The Panel will publish its reasons for its decision in due course.  **4.2 Auspine Limited - Panel decision**  On 8 August 2007, the Takeovers Panel advised that following an undertaking from Auspine Limited (Auspine) to release an amended supplementary target's statement, the Panel has decided not to commence proceedings in relation to an application from Gunns Limited (Gunns), concerning the affairs of Auspine (see TP 54/2007).  In its application, Gunns submitted that there were deficiencies in Auspine's target statement dated 12 July 2007 and aspects of the Independent Expert's Report which accompanied the Target's Statement (IER).  In response to the issues raised in the application, Auspine released to the market two specialist reports relied upon by the independent expert and referred to in the IER.  Auspine also provided a draft supplementary target's statement (STS) to the Panel to address the issues from the application which the Panel identified as raising concerns for it, and to respond further to Gunns' takeover offer.  Following additional submissions to address concerns raised by the Panel, the Panel was satisfied with the additional and corrective disclosure proposed by Auspine in the STS to address the Panel's concerns, and did not object to Auspine including further information in the STS to respond to Gunns' takeover offer. The Panel sought (and received) an undertaking from Auspine that it would send the STS to Auspine shareholders.  In light of the additional and corrective disclosure in the STS, the Panel decided not to commence proceedings.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%236) | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | | |  | | --- | | **5.1 Use of section 1318 for acts beyond the Corporations Act**  (By Matthew Davis, Mallesons Stephen Jaques)  Deputy Commissioner of Taxation v Dick [2007] NSWCA 190, New South Wales Court of Appeal, Spigelman CJ, Santow JA, Basten JA, 3 August 2007  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswca190.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswca190.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**  A director of a company was subject to a penalty under the [Income Tax Assessment Act 1936 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "_new) ("ITAA") for failing to remit PAYG moneys deducted from employees' pay to the Tax Commissioner. The director sought to rely on the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "default ) section 1318 general court discretion to excuse a person who has 'acted honestly' and 'ought fairly be excused'.  All three justices refused the director's appeal. Spigelman CJ held that section 1318 has no application to any statutorily imposed obligation (other than obligations imposed by the Corporations Act) and thus was not applicable to the present ITAA-imposed obligation. Basten JA held that the generally applicable section 1318 was inconsistent with the more specific defence provisions found in the ITAA itself. The presence of these specific defences precluded application of the general section 1318. Santow JA held that section 1318 can apply to statutorily imposed obligations other than those from the Corporations Act, provided a requisite degree of corporate connection is present, as was the case here. However, he reached a similar conclusion to Basten JA, that the presence of the specific ITAA defences precluded exercise of the general section 1318.  **(b) Facts**  The respondent was a director of a company, in which role he was liable under section 222AOB of the ITAA for a penalty in relation to tax moneys withheld from employees under PAYG and not remitted to the Tax Commissioner during a 10 month period in 2002-03. The subject of this appeal was the successful argument the director ran at trial: that he ought to be excused from any default under the ITAA by relying on the court's discretion under section 1318 of the Corporations Act 2001 (Cth).  This appeal raised two principal issues:   * does the court's power to grant relief under section 1318 of the Corporations Act extend to granting relief for the present ITAA penalty; and * whether relief should have been granted in the present circumstances.   **(c) Decision**  Spigelman CJ, Santow JA, and Basten JA each published separate reasons, differing in some respects. However, the unanimous result was that the appeal was upheld, section 1318 did not apply, and the director was ordered to pay the penalty.  **(i) Does section 1318 only apply to breaches of the Corporations Act?**  The appellant, the Deputy Commissioner of Taxation, argued that section 1318 is precluded from applying at all given that the default or breach of duty arises outside the context of the Corporations Act, or otherwise lacks the requisite corporate character.  Spigelman CJ held that section 1318 has no application to any statutorily imposed obligation, other than obligations imposed by the Corporations Act.  He reached this conclusion by noting that there is no case of which he is aware in Australia or England which has applied section 1318 (or its equivalent) to a breach of a statutory obligation imposed by legislation other than corporations law (and general law duties). Additionally, he held that this is particularly the case in the present scenario because the ITAA statutory obligation which the director failed to fulfil, does not primarily serve a corporate law purpose, rather being directed towards revenue purposes. Accordingly, he decided in the appellant's favour, precluding the director from relying on section 1318.  Santow JA reasoned that the obligation's statutory source being outside the Corporations Act was not, of itself, a barrier to the application of section 1318. He argued that provided a sufficient level of corporate connection is present in the statutory obligation, section 1318 should be available. Whilst he acknowledged that at times, assessing the required degree of connection with corporate matters may be difficult to determine, this should not bar section 1318 applying beyond the Corporations Act, provided the obligation is centrally concerned with corporations. OH&S laws are provided as an example of an area which would not have the requisite connection.  Santow JA found that in the present scenario, a requisite connection was present. He reasoned that this connection comes from the legislative background of the provision. He noted that the relevant ITAA provisions replaced the Tax Commissioner's priority in a winding up, which was closely aligned to, and originally found in, Australian companies statutes. The replacement provisions require that directors of a company failing to remit its PAYG to the Commissioner must cause the company to appoint an administrator or be wound up (ITAA section 222AOB). These are matters, Santow JA noted, 'which arise in a corporate law context. Indeed they reach into a core area concerned with corporations, namely their liquidation or administration.' These, he concluded, are powerful considerations for attributing a sufficient connection, and thus section 1318 is not incapable of applying on the grounds that the relevant ITAA provisions have insufficient corporate connection.  Accordingly, having decided that section 1318 was not outright excluded, Santow JA continued his reasoning to determine if it was applicable in the present scenario.  **(ii) Does section 1318 not apply because the ITAA contains inconsistent provisions?**  The appellant argued that the ITAA provisions constitute an exhaustive legislative regime covering the field leaving no scope to invoke section 1318, and that there is a contradiction between the ITAA which imposes specific liability and section 1318 which is merely a general provision of a later Act. The ITAA defences are found in section 222AOJ and depend essentially upon illness, good reason for not taking part in the management of the company or the reasonableness and extent of steps taken to ensure that directors complied with their obligations. In contrast, section 1318 provides a more general defence, where the person has 'acted honestly' and 'ought fairly be excused'.  Santow JA decided that difficulties in reconciling the two sets of provisions necessarily excluded the operation of the general section 1318. He concluded that the specific statutory defences of the ITAA differ substantially from the general nature of the section 1318 discretion; the two 'are clearly repugnant to one another'. Accordingly as specific defences preclude use of general ones, Santow JA decided that the director was barred from use of the section 1318 discretion.  Basten JA, who reached a similar result, looked at both the history of section 1318 and the practical operation of the potentially inconsistent provisions - reasoning that they 'cannot operate together' - concluding that section 1318 is denied operation in relation to the liability of a director under the relevant ITAA provisions. Spigelman CJ concurred with this reasoning (as the alternative to his outright exclusion of section 1318, described above).  **(iii) Civil proceedings 'for' default or breach**  Santow JA alone responded to this preliminary contention of the appellant. The penalty imposed arises automatically under the ITAA as a consequence of default - no proceedings are required to establish a default. Accordingly, the appellant argued that section 1318 was not applicable because exercise of the section 1318 discretion required proceedings 'for' a default or breach of duty, whereas in the present proceedings the relevant ITAA provision merely enforced a statutorily imposed liability. Santow JA disagreed with this line of reasoning, finding that although enforcement proceedings are not needed to establish the default occurred, "for" is used in the broader sense as equivalent to "in respect of" and thus section 1318 is not rendered inapplicable.  **(iv) Should relief have been granted in this case?**  As detailed above, as all of the justices concluded that section 1318 would not be capable of application to the respondent in the present scenario; whether or not the facts would warrant the court to exercise the section 1318 relief is only a hypothetical one. Nevertheless Santow JA briefly addressed the issue. As the director was aware that the company was in serious financial difficulty; had not been remitting deductions of PAYG; did not take any steps to address the situation; and was on notice, Santow JA noted that there 'would be formidable difficulties in the way of a favourable exercise of discretion even were section 1318 capable of application.'  **5.2 Conversion: liability of employees and company directors**  (By Tim Kelly, DLA Phillips Fox)  Coastal Recycled Cooking Oils Pty Ltd v Innovative Business Action and Strategies Pty Ltd [2007] NSWSC 831, New South Wales Supreme Court, Rein AJ, 3 August 2007.  The full text of this judgement is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc831.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/august/2007nswsc831.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 plaintiff ("Coastal") claimed damages for conversion from each of four related defendants. Coastal carries on a business in NSW of recycling used cooking oil. It does so by providing drums and tanks to restaurants and other like establishments that wish to appropriately dispose of used oils. Once full, Coastal arranges collection of the drums and tanks. During a period between 2000 and 2003 Coastal organised for a contractor, namely the first defendant ("IBAS") to collect the oil for it.  Coastal claimed that IBAS, by two of its employees, the second and third defendants ("Johnson" and "Mulligan"), had taken oil from drums and tanks of Coastal and converted it for IBAS's use. Further, Coastal claimed that the fourth defendant ("Humphries") as the sole director of IBAS was vicariously liable for the tort of IBAS's employees.  His Honour found each of IBAS and Humphries, liable for the tort of conversion. Damages were awarded in favour of Coastal.  **(b) Facts**  In the carrying out of Coastal's business, neither Coastal nor the customer charged each other. There was a recognised benefit to both parties - Coastal later on-selling the oil for use in diesel fuel, and the customers being able to dispose of the oil without infringing any environmental legislation.  During the period 2000-2003, Coastal did not carry out all the collecting of oil itself - Coastal used IBAS in approximately 80% of the Sydney metropolitan area to collect the oil and return it to Coastal. Coastal accordingly payed IBAS a fee for its services.  Coastal claimed that during the period IBAS was contracted to Coastal to collect the oil, Johnson and Mulligan, as employees of IBAS, took oil from drums and tanks of Coastal and converted it for various uses of their own, contrary to the agreement in place. Furthermore, Coastal claimed Humphries, as sole director of IBAS, was vicariously liable.  Prior to the hearing Coastal reached a settlement against Johnson and Mulligan, in which no moneys were paid to Coastal. Both IBAS and Humphries failed to appear in the proceedings.  **(c) Decision**  **(i) Evidentiary issues**  Crucial to the findings of Rein J was the failure of IBAS and Humphries to appear in the proceedings and/or to call witnesses. Such failings adversely affected the findings made against them, specifically in two ways.  First, Rein J held that a Jones v Dunkel ((1959) 101 CLR 298) inference could be drawn, namely that:   * The court may infer that the evidence of the absent witness, if called, would not have assisted the party who failed to call that witness; and * The court may draw with greater confidence any inference unfavourable to the party who failed to call the witness if that witness seems to be in a position to cast light on whether that inference should properly be drawn.   Secondly, his Honour confirmed that the case against IBAS and Humphries was a circumstantial one, noting that the court in making its findings should consider the totality of the evidence.  **(ii) Did IBAS, through its employees, take the oil?**  Rein J held, based on the limited evidence before the court, that Mulligan and Johnson had taken oil from Coastal's drums and tanks. His Honour concluded they did so either as employees on behalf of IBAS or as subcontractors of IBAS. His Honour further concluded the oil was taken away to be refined and sold by IBAS.  **(iii) Was the oil taken by IBAS owned by Coastal?**  Rein J found that Coastal was in fact the rightful owner of the oil taken from its drums and tanks. His Honour stated that it was implicit in the arrangements in place between Coastal and its customers that the customer, by placing oil in the drum, tank or tin of Coastal was ceding ownership of the oil specifically to Coastal, thereby giving up any claim to the oil. There was nothing in the evidence provided to the court to suggest otherwise.  His Honour further noted that consideration to be sufficient at law need not be monetary. In this case, the customer offered to deposit oil in the drums without payment in return for the drums being made available for that purpose and the removal of the oil from the premises.  **(iii) Was IBAS liable for conversion?**  Rein J held that Coastal had sufficient title to sue in conversion and that IBAS was liable for such. In so finding, his Honour noted that: "The essence of conversion is dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel": per Dixon J in Penfolds Wines Pty Ltd v Elliot (1946) 74 CLR 204 at 229.  In this respect, his Honour held that on placement of the oil in the containers of Coastal, Coastal in fact had an immediate right of possession in a chattel of its own. Furthermore, his Honour found that IBAS by its employees had sufficiently converted the oil by placing it on trucks owned by IBAS and then by receiving it at its premises, refining and selling it.  **(iv) What damages were awarded to Coastal?**  Rein J awarded damages in favour of Coastal in the amount of $285,969.50. Coastal's original claim was for an amount of $571,939. However, his Honour noted that despite a lack of evidence before the court, allowance needed to be made for two reasons. First, for the disruption to Coastal's business due to the eventual termination of its arrangements with IBAS - that disruption not being linked to the loss due to conversion. Secondly, his Honour made an allowance for the fact there was evidence IBAS was on occasions using its own drums to collect oil from establishments which Coastal regarded as its customers - oil placed in IBAS's drums was not considered oil belonging to Coastal and as such could not be the subject of conversion.  **(v) Was Humphries, as sole director of IBAS, vicariously liable?**  Justice Rein found that Humphries was vicariously liable for the actions of IBAS's employees, Mulligan and Johnson. In so doing, his Honour affirmed the decisions of Rainham Chemical Works Ltd (in liq) v Belvedere Fish Guano Co Ltd [1921] 2 AC 465 at 476 and C Evans & Sons Ltd v Spritebrand Ltd [1985] 1 WLR 317 at 329. Redlich J stated in Rainham at [201]: "For a tort such as conversion that does not require a particular intention, a director is liable for the tortious acts of the corporation which he or she directed or procured regardless of the director's state of mind. The level of involvement and the degree of control which a director exercises will determine whether it can be said that the acts have been directed or procured by the director." Rein J noted that, generally a director who procures or directs the tort will not be the person directly involved in the commission of the tort, as was the case with Humphries.  His Honour drew the inference that Humphries had directed Mulligan and Johnson to take oil from Coastal receptacles, noting that he came to that conclusion with greater confidence given the failure of Humphries to adduce any evidence to the contrary.  **(vi) Conclusion**  IBAS and Humphries were held liable for the tort of conversion and damages were awarded to Coastal for an amount of $285,969.50.  **5.3 No representation and no duty of care disclaimers upheld by English Court of Appeal**  (By Damien Bryne Hill, Herbert Smith, London)  IFE Fund S.A. v Goldman Sachs International [2007] EWCA Civ 811, Supreme Court of Judicature Court of Appeal (Civil Division), 31 July 2007  The full text of this judgment is available at: [http://www.bailii.org/ew/cases/EWCA/Civ/2007/811.html](http://www.bailii.org/ew/cases/EWCA/Civ/2007/811.html" \t "_new)  **(a) Summary**  The November 2006 Judgment of Mr Justice Toulson (as he then was) in IFE Fund S.A. v Goldman Sachs International provided clarification on the extent to which financial institutions who arrange and syndicate credit facilities on behalf of their clients make implied representations and/or owe duties of care to the banks and financial institutions who are invited to participate in the credit facility.  IFE appealed against Mr Justice Toulson's Judgment. The appeal was heard during July 2007 by Lord Justices Waller, Gage and Lawrence Collins. On 31 July 2007 the Court of Appeal handed down their judgment dismissing IFE's appeal.  **(b) Background**   In 2000 GSI acted as arranger and underwriter of syndicated debt facilities for Autodis S.A. to fund its acquisition of Finelist plc. GSI, as arranger, had circulated an Information Memorandum in March 2000 to potential investors, including IFE. The Information Memorandum contained an explicit statement (headed "Important Notice") that GSI was not making any representation, warranty or undertaking, express or implied, in respect of the information contained in the Information Memorandum and did not accept any responsibility for the accuracy or completeness of the information. The Important Notice also made clear that GSI was not accepting any responsibility for updating the information contained in the Information Memorandum or for advising any potential or actual participant of any information which subsequently came to its attention. These types of disclaimers were (and are) standard ones in the market place.  At the end of May 2000 IFE purchased €20 million of Autodis bonds from GSI. In autumn 2000 Finelist went into receivership following the discovery of accounting irregularities. IFE alleged that by providing to it the Information Memorandum and accountants due diligence reports on Finelist, GSI had impliedly represented that it was not aware of facts which showed that statements about Finelist's financial performance contained in the Information Memorandum or in the accountants' due diligence reports were or might be incorrect in any material way. IFE claimed that the implied representations were continuing ones which it was entitled to and did regard as remaining true until the date on which it purchased the bonds from GSI. IFE alleged that these representations were rendered incorrect following the receipt of further financial information by GSI after the date it had circulated the Information Memorandum to IFE but before IFE had acquired the bonds. IFE also alleged that GSI owed it a duty of care to inform IFE prior to it purchasing the bonds if it became aware of any facts or matters which might cast doubt on the information contained in the Information Memorandum and the accountants' reports.  Mr Justice Toulson, at first instance, held that no implied representations of the type pleaded by IFE had been made. He did consider however that there was an implied representation by GSI that in supplying the Information Memorandum it was acting in good faith and that this was a continuing representation. This did not assist IFE's case as it had not (rightly) sought to allege bad faith. As for IFE's allegations that GSI owed them a duty in tort to take reasonable care to inform IFE in the event that they became aware of information that cast doubt on the information contained in the Information Memorandum, Mr Justice Toulson could see no basis on which it would be fair to impose on GSI the duty of care contended for by IFE in circumstances where GSI was not acting as IFE's adviser or purporting to carry out any professional service for IFE.  The main issues on appeal for consideration by the Court of Appeal, therefore, were whether Mr Justice Toulson had been correct in concluding that GSI had not made the alleged implied representations and whether GSI had a freestanding duty of care in negligence to IFE.  **(c) Court of Appeal's judgment on IFE's negligence claims**  Waller LJ's judgment (with which Gage LJ and Lawrence Collins LJ agreed) dealt with IFE's negligence claim.  Waller LJ considered that IFE's argument was "hopeless" in circumstances where it was clear from the Information Memorandum language that GSI was not assuming any responsibility towards IFE or the other proposed participants in the facilities and applied the House of Lords judgment in the well known case of Hedley Byrne v Heller & Partners [1964] A.C. 465. Waller LJ stated:  "The foundation for liability for negligent misstatements demonstrates that where the terms on which someone is prepared to give advice or make a statement negatives any assumption of responsibility no duty of care will be owed. Although there might be cases where the law would impose a duty by virtue of a particular state of facts despite an attempt not "to assume responsibility" the relationship between GSI either as arranger or as vendor would not be one of them."  **(d) Court of Appeal's judgment on IFE's misrepresentation claims**  Insofar as IFE's case that by providing the Information Memorandum GSI had impliedly made representations that they were not aware of any matters which showed that the facts or opinions in the Information Memorandum or accountants' reports "were or might be untrue" were concerned, Lord Justice Waller considered that these were:  "…simply impossible to spell out of the supply of the [Information Memorandum] since GSI make it clear by the "Important Notice" that they have no obligation to check. As the judge said, an implied representation of the scope contended for ... would potentially require GSI to do an evaluation contrary to the express terms of the [Information Memorandum]".  Waller LJ in his judgment did not specifically state whether he agreed with Mr Justice Toulson's comments concerning the existence of an implied representation of good faith.  Lord Justice Gage considered that the question of what representation, if any, was made by GSI must be considered by reference to the terms of the Important Notice in the Information Memorandum. Lord Justice Gage held that:   "The only implied representation made by GSI arising out of the [Information Memorandum] was as the judge found one of good faith. There was, in my judgment, no implied representation that the information provided in the Arthur Andersen reports annexed to the [Information Memorandum] was accurate. There was an express statement that GSI would not review or check the information contained in the [Information Memorandum]. In my view it follows that it is only if GSI actually knew that it had in its possession information which made the information in the [Information Memorandum] misleading that it could be liable for breach of the representation of good faith, provided the necessary intention was proved".  As mentioned above IFE had never sought to put their case on this basis.  **(e) Comment**  The Court of Appeal's judgment will provide comfort to financial institutions who act as arrangers of credit facilities that the boilerplate language commonly contained in their Information Memoranda will be given due regard in the event that the court has to consider what legal obligations they might owe to actual or potential investors. In circumstances where, in the event of litigation, such language will be subject to close scrutiny it makes sense for it to be reviewed on a regular basis to ensure that it provides the desired protection and is appropriate for the transaction in question.  It is also important to ensure that those involved in transactions act in a manner that is consistent with the protection which the arranger seeks to derive from the boilerplate language. For example, it is of little benefit to have no representation language included in an Information Memorandum if those involved in the transaction subsequently make representations to potential participants as the court will look to the substance of the transaction and not just the form.  It is apparent that the courts, both at first instance and on appeal, had little enthusiasm in seeking to impose a duty of care in negligence on arrangers to disclose information to potential and actual participants in a transaction where the arranger adequately disclaims responsibility. Accordingly, if investors wish to get specific assurances from arrangers they should ensure that they obtain this expressly.  **5.4 Class actions and the use of litigation funding**  (By Sholam Blustein, Blake Dawson Waldron)  P Dawson Nominees Pty Ltd v Multiplex Ltd [2007] FCA 1061, Federal Court of Australia, Finkelstein J, 19 July 2007  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/july/2007fca1061.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/july/2007fca1061.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 motion filed by the respondents considers facts arising from the action brought by P Dawson Nominees Pty Ltd, on its own behalf and on behalf of others, following its acquisition of securities in Multiplex Limited (Multiplex) and/or Multiplex Funds Management Limited (MFM). P Dawson Nominees Pty Ltd brought the initial action because of the loss and damage allegedly suffered as a result of one of the respondents failure to properly disclose developments relating to the Wembley Stadium construction project in the United Kingdom.  In order to bring the class action against the 2 members in the Multiplex group the applicants had, as at the commencement of the proceeding, entered into a litigation funding agreement with International Litigation Funding Partners, Inc. (ILF) as a condition precedent to entering into the retainer with their legal counsel, Maurice Blackburn Cashman (MBC).  The motion brought by the respondents considers whether the class action brought by P Dawson Nominees Pty Ltd adhered to the policy and legislative rules governing class actions as defined in section 33A to 33 JZ of the [Federal Court of Australia Act 1976 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default) ("the Act").  **(b) Facts**  **(i) Original proceeding**  Multiplex is a public company whose shares are listed on the Australian Securities Exchange (ASX). MFM, a related company, is the responsible entity of both the Multiplex Property Trust and the Multiplex SITES Trust. Ordinary shares in Multiplex give the holder an interest in Multiplex group stapled securities, which are traded on the ASX. Investors can also acquire an interest in Multiplex Step-up Income Distributing Trust Issued Exchangeable Securities (Multiplex SITES). Multiplex SITES are also traded on the ASX.  In 2000 a Multiplex subsidiary, Multiplex Constructions (UK) Ltd, entered into a contract to design and build Wembley Stadium in the United Kingdom. The construction project was not completed within time and the final cost of construction well exceeded the budgeted costs. Consequently, the problematic construction had an adverse effect on profits and price of Multiplex shares, stapled securities and Multiplex SITES.  The applicants contended that Multiplex knew, or reasonably would have known, that it was likely that the Wembley Stadium project was well behind schedule. The applicants alleged that the information about the project and its effect on profits was information which Multiplex were required to disclose to the ASX in accordance with the various ASX disclosure requirements. Further, the claimants contended that Multiplex made a number of misleading representations in relation to the progress of Wembley Stadium, which if found to be misleading or deceptive would lead to a contravention of, among others, section 1041H(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "default).  **(ii) Motion brought by the respondents**  The respondents primary contention in this motion was that the proceeding brought by the class of investors could not continued as a valid class action. The respondents contend that sections 33A to 33ZL of the Act establish the process for a class action to proceed in Australia. Fundamentally, section 33J of the Act notes that the process must be an 'opt-out' system that is a system where all members of a class will be automatically included in a proceeding unless they voluntarily decide to remove themselves from the class.  The respondents argued that because each member of the claiming class had entered into a funding agreement with ILF (a condition of the retainer which the claimants entered into with MBC) it meant that each member had voluntarily opted into the class of applicants. For this reason, the process of opting in meant that it was inconsistent with the terms and policy of representative proceedings in Australia and therefore the court should strike out the class action in accordance with section 33N(1)(d) of the Act as it was inappropriate that the claims be pursued by means of a representative proceeding.  The respondents also contended that the contractual disincentives to termination of the agreement subvert the 'opt out' process which is central to Part IVA of the Act and amounts to an abuse of the court's processes. Finally the respondents contended that it is inimical to Part IVA of the Act to require a person who wishes to be a group member to enter into a funding agreement with a particular funder.  **(c) Decision**  The court held that the class action brought by P Dawson Nominees Pty Ltd accorded with the statutory system established by section 33A to 33ZL and therefore refused to grant the relief sought by the respondents.  **(i) Criteria for class actions**  The court noted that modern class actions serve a very important purpose within the legal process by permitting litigation of a suit involving common questions where there are too many plaintiffs for proper joinder of their individual matters. Section 33C(1) of the Act sets out the 3 conditions which must be satisfied for a class action to commence. These condition are:   * numerosity (7 or more persons must have claims against the same person); * connectivity (the claims of all those person are in respect of, or arise out of, the same, similar or related circumstances); and * commonality (the claims of all those person give rise to a substantial common issue of law or fact).   The Act provides that if the above 3 criteria have been satisfied a proceeding may be commenced by one or more group members for or on behalf of all (or some) of the group unless section 33N is enlivened which allows the court to prevent the proceeding taking place as a class action.  **(ii) Did the acceptance of the funding agreement lead to the class action being an 'opt-in' rather than an 'opt-out' process?**  The court specifically noted that the funding agreement which the members entered into as part of their retainer with MBC did not cause the members to irrevocably opt into the action. Even if it could be so described, all that Part IVA of the Act requires is that a group member can opt out of a group proceeding at any time. That is what the group members could do by virtue of the termination provisions in the funding agreement.  The fundamental provisions of the funding agreement which the court relied on in its findings that the funding agreement did not contravene the 'opt-out' criteria were:   * a cooling off provision which allowed each group member to withdraw from the agreement without any cost; * the ability for a member of the group to change his or her lawyer (MBC) after consultation with ILF; and * (most importantly) the agreement will terminate if the group member settles his claim against Multiplex or opts out of the class action. In the former case, and in the latter if the group member recovers damages from Multiplex, the group member is still required to apply the amount received as if the agreement remained in force (that is in favour of ILF's costs as providing ILF with a percentage of the damages). In other words, if a group member decides that he or she does not want to be bound by any judgment in the action there is nothing preventing him or her from opting out at the appropriate time.   **(iii) Did the funding agreement with ILF enliven section 33N(1)(d) of the Act?**  The primary contention of the respondents was that section 33N(1)(d) should be applied by the court. For section 33N(1)(d) to apply it is necessary in this case first to determine whether it is inappropriate that the claims be pursued by means of a representative proceeding.  It was held by Finkelstein J that this action was a very good example of litigation that is best suited for class action procedures. The outcome, if the action were not commenced as a class action, would be 40 or more separate actions where the plaintiff in each makes the same allegations or, which is more probable, only one or two actions.  The court noted that the idea that it is better to have 40 or so large and complex actions each costing millions of dollars to run when all the issues can be litigated in one action can be dismissed out of hand. That is particularly so when it is clear that on any objective standard the benefit to the respondents of having at most a few actions instead of 40 or more is as great as it is for group members. Further, the court stated that the notion that it is inappropriate for this action to proceed as a representative proceeding if the true alternative is that there will be no action to vindicate the rights of any group member is equally unacceptable.  The court dismissed the respondent's application.  **5.5 Extending the 'decision period' to the end of the 'convening period'**  (By Andrew Lumsden and Tommy Kam, Corrs Chambers Westgarth)  Australian Capital Reserve Limited (Administrators Appointed) v High Tower Investments Pty Limited (Administrators Appointed) [2007] FCA 1028, Federal Court of Australia, Gyles J, 6 July 2007  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/july/2007fca1028.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/july/2007fca1028.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 cases where substantially the whole of the property of a company under administration is subject to a charge, the chargee may enforce the charge before or during the 'decision period'. In circumstances where it would be 'sensible' to extend the 'decision period' to the last day of the 'convening period', a court may make an order to that effect under section 447A(1) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "default) ("the Act"). This is particularly so if 'the task of unravelling the facts and circumstances relevant to each form of decision making will be part of the same process' (at [18]).  **(b) Facts**  The Estate Property Group ('EPG') consisted of a number of companies, including the First Applicant, Australian Capital Reserve Limited ('ACR'), and the ten Respondent companies which acted as special purpose vehicles of EPG ('SPVs'). ACR raised funds from the public by issuing debentures to investors ('Noteholders'), and then loaned the funds to other EPG companies, including the SPVs. The loans were generally advanced on the basis that the borrower granted to ACR a mortgage over its real property assets ('the charges').  On 28 May 2007, the Eleventh Respondents (the 'EPG Administrators') were appointed administrators of ACR and the SPVs. The 'decision period' for the purposes of section 441A of the Act in respect of the administration of each of those companies was due to expire on 12 June 2007. On 4 June 2007, the Second Applicants (the 'ACR Administrators') were appointed administrators of ACR in lieu of the EPG Administrators at a meeting of creditors of ACR, which primarily consisted of the Noteholders. It was considered appropriate that ACR should have separate administrators to avoid the potential for conflicts of duty brought about by ACR's position as a substantial inter-company creditor of each of the SPVs.  Because of their late appointment, the 'decision period' had been truncated so far as the ACR Administrators were concerned. It was estimated that it would take at least 10 weeks for the ACR Administrators to make the necessary enquiries and assessments before they could form opinions as to whether to enforce any of the charges. Consequently, in the present case, ACR and the ACR Administrators sought an order from the court under section 447A(1) of the Act to extend the 'decision period', but determined that if an extension was not granted, they would take steps to enforce the charges against the SPVs on 12 June 2007 in order to preserve ACR's rights under section 441A of the Act. This course of action could well have been detrimental to the interests of ACR's creditors if it prompted prior ranking mortgagees to take enforcement action which they otherwise might not have taken.  **(c) Decision**  Justice Gyles held that the court had power under section 447A(1) of the Act to make the order sought by ACR and the ACR Administrators. His Honour stated that '[a]dministrations vary greatly and s 447A provides the necessary flexibility if the object of Pt 5.3A - set out in s 435A - is to be realised' (at [15]). His Honour was 'in no doubt that an extension of the "decision period" was required in the circumstances of the case', but stated that the 'more difficult question' to be resolved was the length of the extension to be granted (at [14]).  Gyles J held that in the circumstances of the inter-related administrations in the present case, 'it would be sensible to link the "decision period" with the various "convening periods"…so as to recognise the inter-relationship between the various administrations', especially where '[i]t is likely that the task of unravelling the facts and circumstances relevant to each form of decision making will be part of the same process' (at [18]). Moreover, the SPVs consented to the orders sought, ASIC took no formal position in relation to the application, and the result of the application did not affect the rights of any other secured creditor in relation to the enforcement of its security.  Ultimately, the 'decision period' was extended to the last day of the 'convening period' under section 439A of the Act for each of the SPVs save one. Gyles J also noted that the extension was granted in general terms applicable not just to the charges held by ACR, 'so as to avoid any possible argument that any other secured creditor had been disadvantaged by a special deal' (at [17]).  **5.6 Court orders wind up and restraining orders against unregistered managed investment scheme**  (By Christine Huynh, Mallesons Stephen Jaques)  Australian Securities and Investments Commission v Fuelbanc Ltd [2007] FCA 960, Federal Court of Australia, Heerey J, 29 June 2007  The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca960.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca960.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 Federal Court held that the Fuelbanc scheme, under which investors gave money and barter units known as trade dollars in exchange for a promise to pay weekly instalments into a debit card for use by each investor at service stations, fell within the definition of a managed investment scheme. This was despite it purporting to be a body corporate in an attempt to avoid registration and disclosure requirements under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "default ).  The court also held that it was able to make declarations despite the possibility of future criminal proceedings.  **(b) Facts**  ASIC took action against four companies (Fuelbanc Australia Limited, Paycards Global Pty Ltd, Paycards Investments Pty Ltd and PC Property Group Pty Ltd) and three individuals (Stephen McDougall, Timothy McDougall and Matthew McDougall) for the winding up of an unregistered managed investment scheme known as FUELbanc, as well as declarations, injunctions and various ancillary orders. The orders sought by ASIC were not opposed.  The scheme involved debit cards issued for the purchase of fuel. It also used a barter system in which goods and services were exchanged for barter units known as trade dollars. Under the scheme, participants stipulated a weekly fuel requirement in dollars and paid the total amount, half in cash and half in trade dollars as well as a joining fee. In return, participants received a weekly amount into a debit card every Sunday. The website that the scheme was promoted on claimed that FUELbanc lent both the Australian dollars and the trade dollars to PayCards Global and that FUELbanc's ability to meet its instalment obligations to participate was dependant on those loans being repaid.  However, ASIC's investigations found that:   * FUELbanc had been relying on the ongoing deposits of new participants to meet its obligations to existing participants; * some of the funds had been distributed for the benefit of the directors or their related parties; * minimum amounts had been transferred to PayCards and the returns were minimal; and * the required return for FUELbanc to meet its weekly commitments to participants without relying on new participants was between 375% and 1980% and not 160% as suggested by Stephen McDougall.   **(c) Decision**  **(i) Was it a managed investment scheme?**  The court held that the FUELbanc scheme was a managed investment scheme within the meaning of the definition in section 9 of the Corporations Act, as participants contributed money (or money's worth) as consideration to acquire rights to benefits produced by the debit card. These contributions were pooled or used in a common enterprise to produce financial benefits for the members who held interests in the scheme. Further, the participants did not have day to day control over the operations of the scheme.  Of relevance is the fact that the definition of a managed investment scheme excludes a body corporate. The purpose of this exclusion is to ensure that the ordinary engagements of a company in commercial activities do not come within the managed investment scheme regime. The exception did not apply to this case because the legal foundation for the arrangement was not membership of the company but the contractual relationship between the company and the participant. Moreover, the participant became a member of the scheme whether or not he or she becomes a member of the company.  **(ii) Contraventions- unregistered managed investment scheme**  Under section 601ED(5), a person must not operate in this jurisdiction a managed investment scheme that is required to be registered under section 601EB unless the scheme is so registered. The scheme in this case required registration under section 601ED(1)(a) as it had more than twenty members. Under section 601EE(1)(a) if a person operates a managed investment scheme in contravention of section 601ED(5), ASIC may apply to the court to have the scheme wound up. The court therefore made orders that the scheme and the incorporated defendants be wound up, and appointed two individuals as joint liquidators of the scheme and the company defendants.  **(iii) Contraventions- financial services business**  The court drew from a number of definitions within Chapter 7 of the Corporations Act to hold that FUELbanc was carrying on a financial services business within the meaning of section 761A and must hold an Australian financial services licence under section 911A(1). None of the defendants held a financial services licence.  **(iv) Liability of Stephen McDougall**   The key question in determining McDougall's liability was whether he was a person operating the scheme within the meaning of section 601EE. In ASIC v Pegasus Leveraged Options Group Pty Ltd (2002) 41 ACSR 561, the court held that the term 'operate' does not refer to ownership but rather to acts which constitute the activities which constitute the managed investment scheme. In this case, given that McDougall formulated the scheme and managed its day to day operations, he was operating the scheme.  The court made the following orders against McDougall:   * permanently restrained him from operating or promoting the FUELbanc scheme; * prevented him from carrying on a managed investment scheme that requires registration and has not been registered; * forbade him from carrying on a business in relation to financial products or financial services by providing financial product advice or dealing in financial products without holding an Australian financial services licence; and * to the extent that the reasonable costs and expenses of the winding up of the scheme cannot be paid out of the assets out the scheme, required McDougall to pay the shortfall.   ASIC had the proceedings dismissed against Timothy McDougall and Matthew McDougall with no order as to costs as they were involved to a lesser extent.  **(v) Declarations**  ASIC sought declarations that, from January 2006 to July 2006, all defendants except Timothy McDougall and Matthew McDougall:   * contravened section 601ED(5) of the Corporations Act by operating the unregistered managed investment scheme; and * contravened section 911A of the Corporations Act by carrying on a financial services business in this jurisdiction by offering interests in the scheme without holding an Australian financial services licence.   The issue was whether declarations may be made where there is the possibility of criminal proceedings. In ASIC v Intertax Holdings, the court noted that where the possibility of prosecution is open it would be contrary to the ordinary practice to give a declaration which would in substance amount to a declaration that the defendant had committed a crime. In this case, ASIC had not ruled out the possibility of future criminal proceedings. The court distinguished this case from Intervax because in Intervax, the declaration was based on a hypothetical fact.  The declarations given here were not hypothetical but rather a formal way to record the conclusion the court had reached on the evidence. Given that the declaration simply declared the bare fact that the defendants operated an unregistered managed investment scheme and carried on a financial services business without a licence, it is unlikely that there would be an effect on any future hypothetical criminal prosecution.  **5.7 Is the general discretion to extend time pursuant to the provisions of section 1322(4)(d) of the former Corporations Law available to extend the time limit for claims for compensation based on a breach of director's duties?**  (By Kathryn Finlayson, Minter Ellison)  Newtronics Pty Ltd (Receivers and Managers Appointed)(In Liquidation) v Giorgio Sergio Gjergja [2007] VCS 195, Supreme Court of Victoria, Byrne J, 28 June 2007  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsc195.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsc195.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 general discretion to extend time pursuant to the provisions of section 1322(4)(d) of the former Corporations Law is not available to extend the time limit prescribed under the provisions of former section 1317HD(2).  The language of section 1317HD(2), in particular the position of the word 'only' and the structure of Part 9.4B indicated that section 1322(4) had no application under section 1317HD.  **(b) Facts**  The plaintiff, Newtronics Pty Ltd, was the designer, manufacturer and vendor of electronic controllers. The defendants were directors of Newtronics at the relevant time and accordingly its officers pursuant to section 232 of the Corporations Law as then in force.  In late 1994, Newtronics supplied electronic components to Seeley International Pty Ltd which Seeley incorporated into air conditioners. Three of these air conditioners caused house fires. On 12 February 1998, Seeley commenced proceedings against Newtronics in the Federal Court of Australia alleging that the electronic components were negligently designed and constructed by Newtronics and caused the fires. On 18 January 2002, the Federal Court awarded judgment in favour of Seeley in the sum of $8.9 million plus interest and costs.  This proceeding was issued by the liquidator of Newtronics almost four years after the judgment in favour of Seeley was entered against Newtronics.  Newtronics alleged that the defendants:   * knew or ought to have known that the electronic components supplied by Newtronics to Seeley were defective and might fail; * took no steps to rectify the defects or to withdraw or recall the defective products; and * contravened their duties as directors under section 232(4) of the former Corporations Law.   Newtronics sought to recover the amount of judgment awarded in favour of Seeley on the basis that the conduct of the defendants was a contravention of former section 1317HD(1) of Part 9.4B of the former Corporations Law. Section 1317HD was a civil penalty provision which provided that the directors could be liable to an order for compensation.  The defendants argued that Newtronics' application was statute barred pursuant to the provisions of former section 1317HD(2). Section 1317HD(2) provided that 'Proceedings under this section may only be begun within six years after the contravention'. Newtronics' application was filed approximately 11 years after the alleged contraventions.  In reply, Newtronics brought an application pursuant to section 1322(4)(d) seeking an order extending the period prescribed by section 1317HD(2). Section 1322(4) relevantly provided that "… the court may, on application by any interested person, make … all or any of the following orders, either unconditionally or subject to such conditions as the court imposes:… (d) an order extending the period for doing an act, matter or thing or instituting or taking any proceeding under this Law or in relation to a corporation;... and may make such consequential or ancillary orders as the court thinks fit".  The main issues before the Supreme Court were:   * whether section 1322(4)(d) was available in circumstances where the Corporations Law prescribed a specific time limit; and * if section 1322(4)(d) was so available, whether relief should be granted to Newtronics in the present case.   **(c) Decision**  His Honour Justice Byrne held that section 1322(4)(d) was not available to extend the time limit prescribed in section 1317HD.  His Honour recognised that section 1322(4)(d) was a 'general curative power' of wide import which had been 'construed liberally' to overcome various difficulties caused by the strict application of time limits in the former Corporations Law. However, section 1322 is a general provision and must operate in conjunction with, and yield to, other more specific provisions of the Corporations Law.  In considering the interaction of section 1322(4)(d) and section 1317HD, his Honour considered:   * the language of section 1317HD(2) and, in particular, the meaning and utility of the word 'only'; * the structure of Part 9.4B and, in particular, the absence of any provision to alleviate hardship which might be caused by the time limitation indicated that section 1322(4) had no application under section 1317HD; * that section 1317HD was an additional statutory right conferred by parliament. It operated in addition to a corporation's common law or equitable rights and it was reasonable that such an additional right was subject to a time limitation; and * for general policy reasons, certainty of outcomes supported the imposition of a limitation period in any commercial dispute.   His Honour also considered the applicant's contention that it would suffer hardship if an extension of time within which to bring the application was not granted because the time limit prescribed in section 1317HD(2) expired at a time when the receiver who controlled Newtronics was associated with the defendants.  His Honour noted that those circumstances might give rise to other rights or remedies but could not affect his task of construing the statute.  Although it was not required, Justice Byrne also commented that, if he had found that section 1322 was available to extend the time limit under section 1317HD(2), he would not have exercised his discretion in favour of Newtronics because:   * there was a serious risk of injustice to the parties where certain evidence must be given 13 years after the event; * the liquidator's delay of almost four years, although mainly explained, was inordinate. In particular, the writ, once filed, was not served for six months; and * the liquidator could have approached Court for an extension of time prior to commencement of proceedings. The time limit was specified by statute and should not be lightly disregarded.   This judgment examined statutory provisions which were part of the former Corporations Law. Section 1322(4)(d) of the former Corporations Law is in similar terms to section 1322(4)(d) of the Corporations Act. However, section 1317HD(2) of the former Corporations Law was repealed and not repeated in similar terms in the Corporations Act. Instead, section 1317K of the Corporations Act provides that "Proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order may be started no later than 6 years after the contravention".  Given the different wording used in the former section 1317HD(2) and section 1317K and, in particular, the absence of the word "only" from section 1317K, a court might now reach a different conclusion in relation to the possible application of section 1317K to the facts of the case.  **5.8 The rule of attribution: Is a failure by employees attributable to the proprietor employer company?**  (By Anita Siassios, DLA Phillips Fox)  ABC Developmental Learning Centres Pty Ltd v Joanne Wallace [2007] VSCA 138, Supreme Court of Victoria Court of Appeal, Maxwell P, Chernov and Neave JJA, 28 June 2007  The full text of the judgement is available at  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsca138.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsca138.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 concerns whether or not the failure of 2 staff members to adequately perform their job was attributable to the proprietor, ABC Developmental Learning Centres Pty Ltd (ABC), under Part 4 of the [Children's Services Act 1996 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=2038" \t "default) ("the Act").  Joanne Wallace, an authorised officer of the Department of Human Services, filed charges against ABC in the Magistrates' Court, alleging breaches of sections 26 and 27 of the Act. Section 26 is concerned with the protection of children from hazards. Section 27(1) states that a proprietor of a children's service must ensure that all children educated / cared for by the service are adequately supervised at all times. Section 27(2) states that a staff member of the service must ensure that any child in their care is adequately supervised.  The Magistrate found, as a fact, that the 2 staff members had failed to ensure that all children in their care were adequately supervised. Accordingly, section 27 had been breached (the Magistrate dismissed the charge under section 26 in light of this finding). ABC was fined $200 (the penalty under section 27) without conviction.  The Magistrate then also considered whether or not the failure of the 2 staff members could be attributed to ABC, and concluded that their failure could be attributed to ABC (i.e. their failure to ensure adequate supervision was the failure of ABC).  ABC appealed the Magistrate's decision, which was dismissed. The Judge on appeal concluded that the Magistrate was correct in attributing the identified failures of the 2 staff members to ABC for the purposes of prosecution under sections 26 and 27. ABC appealed, by leave, from that dismissal to the Supreme Court of Victoria Court of Appeal (VSCA).  **(b) Facts**  One afternoon in 2003, in a childcare centre owned and operated by ABC (Centre), 12 children were in the playground, and were being supervised by 3 ABC staff members. One of the staff members went to the toilet, leaving the 12 children in the care of the other 2. The 2 remaining staff members had a clear and uninterrupted view of the playground. However, one of the 12 children contrived to climb over the playground fence and leave the Centre, unsupervised and unaccompanied, by moving a foam block against a fence and using it as a base to climb over it.  The Magistrate found as a fact that the 2 staff members had failed to ensure that all children in their care were adequately supervised. The Magistrate also noted that an internal review conducted by ABC had reached the same conclusion.  **(c) Decision**  **(i) Rule of attribution**  In a joint judgement, their Honours upheld the comments of the Magistrate and Judge on appeal on the rule of attribution. The Magistrate adopted the Privy Council's (PC) statement (per Lord Hoffmann) in Meridian Global Funds Management Asia Ltd v Securities Commission (Meridian) [1995] 2 AC 500 on the rule of attribution. Here, Lord Hoffmann stated that the special rule of attribution is a matter of interpretation: how was the legislation intended to apply, given that it was intended to apply to a company.  The Judge on appeal also treated the PC decision in Meridian as the appropriate framework for analysis, and added that the scope of the rule will depend upon the court's interpretation of the terms of the offence and the attainment of the policy objectives of the enabling statute.  **(ii) Question of attribution**  Their Honours held that no rules of attribution (of acts of an employee to the employer company) were called for in this matter, despite the Magistrate and Judge on appeal's decision (although their Honours held that had it been necessary for the VSCA to consider the question of attribution, then they would not hesitate to uphold the conclusion of the Judge on appeal).  Instead, their Honours relied on the reasoning from R v Commercial Industrial Construction Group Pty Ltd (2006) 14 VR 321 (CICG). In CICG, the employer was alleged to have breached its statutory duty under what is now section 21 of the [Occupational Health and Safety Act 2004 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82221" \t "default) ("the OHS Act") to ensure a safe working environment for employees. In CICG, it was held that:   1. breach of this general safety duty did not depend on proof of the state of mind of the employer (i.e. the employer's knowledge of a crime); 2. it was immaterial at what level in an organisation the safety breach occurred; and 3. there is no defence of honest or reasonable mistake and so liability is absolute.   Their Honours also relied on commentary surrounding the interpretation of CICG, which suggested that where a statutory duty to do something is imposed on an employer, and the employer fails to comply (albeit because an employee fails to carry out his duties), then that person commits the physical element of an offence, and the employer is personally, and not vicariously, liable.  Despite ABC's claims that vicarious liability was being imposed, their Honours held that no question of vicarious liability arose from this matter. The duty to ensure adequate supervision was imposed on ABC, as proprietor, by the Act (which stated that if ABC breached this duty, then it was directly liable).  Accordingly, where the employer is liable, it is because they, personally, have failed to do what the law requires of them.  The general safety duty in CICG was likened to that of a proprietor of a children's service to ensure adequate supervision of children in this matter. Accordingly, their Honours decided that a proprietor who has a duty to ensure that a certain state of affairs exists is in breach of that duty if the state of affairs does not exist, however that may have come to be. In this case, the state of affairs to be maintained was the adequate supervision of all children, and ABC failed to maintain it.   Their Honours also stated that it is a question of fact in each case whether or not a lapse in supervision by a staff member will constitute a failure by the proprietor to ensure adequate supervision. Additionally, it will depend on the court's view of what the proprietor's duty required in the circumstances. However, no issue of this kind arose in this case, as ABC conceded that there had not been adequate supervision.  ABC unsuccessfully argued that the duty under section 27(1) of the Act was distinguishable from the general safety duty under the OHS Act on two grounds:   1. the word 'adequate' in section 27(1) of the Act introduced an element of fault, such that proof of negligence on the part of the proprietor was an element of the offence under section 27(1); and 2. section 27(1) imposed a separate and complimentary duty on staff members to ensure adequate supervision.   On the first ground, their Honours held that the word 'adequate' does not introduce the notion of fault, and does not import consideration of the proprietor's knowledge. Rather, the word defines the scope of the duty, and defines the state of affairs which it is the duty of the proprietor to bring about and maintain.  On the second ground, their Honours held that a parallel duty is imposed on the proprietor and the staff under section 27 of the Act, which does not limit the scope or nature of the duty imposed on the proprietor. Rather, the imposition of the parallel duties on the proprietor and staff members is intended to promote the object of ensuring the adequate supervision of children.  **(iii) Intention to make corporate proprietor liable for employee acts**  ABC argued that, if the legislature had intended to make a corporate proprietor liable for all of the acts of every employee, agent and officer, irrespective of their position and responsibilities that could have been expressly done. ABC supported their argument by providing examples of provisions in other pieces of legislation, which explicitly stated such intention.  Their Honours held that statutory attribution provisions of this kind were required only where the relevant legislation made it necessary to decide whether the conduct / state of mind of an employee of a company is attributable to the conduct / state of mind of the company. No such question arose under section 27 of the Act, in light of their decision discussed above.  **5.9 Promissory notes**  (By Paul Schaefer, Blake Dawson Waldron)  Re: York Street Mezzanine Pty Ltd (in liq) [2007] FCA 922, Federal Court of Australia, Finkelstein J, 28 June 2007  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca922.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca922.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 Westpoint group constructed large residential and retail developments. In order to procure finance for each development, a company in the group would purchase land and borrow funds from an institutional lender on the security of a mortgage over the land and a charge over the development company's assets. A mezzanine company then raised the balance of the finance from the public.  By July 2004, the Westpoint group began to run out of money. A plan was devised to persuade investors who had invested in York Street Mezzanine to transfer their investments to Ann Street Mezzanine. As part of the transfer, investors were to exchange promissory notes issued to them by York Street Mezzanine for new promissory notes with a later maturity date that were issued by Ann Street Mezzanine.  The Westpoint group ultimately went into liquidation. The liquidators applied to the court for directions in relation to the ability of investors, who had transferred their money from York Street Mezzanine to Ann Street Mezzanine, to recover their money.  The facts of the case concern Brendan Dunphy, who was identified by the liquidators of the Westpoint group as one such investor.  **(b) Facts**  Mr. Dunphy received a copy of an information memorandum outlining investment possibilities from York Street Mezzanine in late 2004. Following receipt of the memorandum he applied for a promissory note with a value of $100,000. The note was issued to him by York Street Mezzanine on 24 January 2005.  In July 2005, York Street Mezzanine sent a letter to Mr. Dunphy inviting him to rollover his investment into the Ann Street Development. Mr. Dunphy completed the rollover application form and sent it to York Street Mezzanine, along with the original promissory note that had been issued to him. On 1 August 2005, Ann Street Mezzanine issued Mr. Dunphy with a promissory note with a face value of $100,000.  **(c) Decision**  Justice Finkelstein held that there were several questions that should be considered by the court:  **(i) Was the document issued by York Street Mezzanine a valid promissory note?**  The York Street promissory note was stated to have an expiry date of 30 November 2005. It was noted, however, that the expiry date could be brought forward to "any earlier date York Street Mezzanine in its sole discretion determines."  Justice Finkelstein noted that it is an established principle that a promissory note cannot be expressed to be payable on a contingency. His Honour went on to say that this has led some courts to conclude that a document will not be a promissory note if the payer has an option to pay the sum due on any day of his choosing before the maturity date.  Ultimately, Finkelstein J rejected this contention. His Honour held that there was no uncertainty as to the expiry date of the note, as York Street Mezzanine was under no obligation to pay the amount owed pursuant to the note prior to 30 November 2005. As a result, the promissory note issued to Mr. Dunphy by York Street Mezzanine was valid.  **(ii) Had York Street Mezzanine discharged its obligations under the note?**  Justice Finkelstein stated that payment of money due under a promissory note can be by book entry, so long as the parties agree that payment can be made in this way.  His Honour held that there had been no express agreement between Mr. Dunphy and York Street Mezzanine regarding payment by book entry. However, payment by book entry had been anticipated and, by implication, agreed to by both parties.  Because it had made a payment by book entry in compliance with this agreement, Finkelstein J felt that York Street Mezzanine had discharged the obligations it owed to Mr. Dunphy.  **(iii) Could the agreement to transfer Mr. Dunphy's investment be set aside ab initio?**  Justice Finkelstein stated that Mr. Dunphy's election to transfer his investment in York Street Mezzanine to Ann Street Mezzanine resulted in an agreement with York Street Mezzanine as well as an agreement with Ann Street Mezzanine.  According to Finkelstein J, if the agreement between Ann Street Mezzanine and Mr. Dunphy could be rescinded, the agreement between York Street Mezzanine and Mr. Dunphy that originally gave rise to the transfer would also fail.  If this were the case, Mr. Dunphy would be able to claim the amount owed to him from York Street Mezzanine, pursuant to the terms of the original promissory note.  Justice Finkelstein stated that it was unclear whether a common law right to rescission was available to Mr. Dunphy. His Honour noted that the right to rescind at common law may be lost where the wronged party elects to affirm the agreement.  However, Finkelstein J went on to say that section 601MB and section 925A of the Corporations Act 2001 (Cth) may provide Mr. Dunphy with a way of setting aside the agreement that he had entered into with Ann Street Mezzanine.  **(iv) Section 601MB**  According to Finkelstein J, the result of section 601MB is that where an invitation to enter into a contract to subscribe for an interest in a managed scheme is made to an investor, the contract is voidable at the option of the investor if the managed investment scheme is not registered under section 601ED of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "default).  Justice Finkelstein felt that the Ann Street Development was a managed investment scheme for the purposes of the section, and noted that it had not been registered as required by the Act. His Honour felt that the information memorandum published by Ann Street Mezzanine could fairly be described as an invitation for the purposes of the section.  As a result, if Mr. Dunphy gave notice under section 601MB(1) and that notice stood, Ann Street Mezzanine would be obliged to refund the subscription money. Where payment was by book entry, this would be effected by reversing the book entry.  **(v) Section 925A**  Section 925A permits rescission of an agreement for the provision of a financial service where the provider of the financial service does not hold a financial services license.  According to Finkelstein J, as a result of sections 766A and 761E, an agreement will be taken to relate to the provision of a financial service if it results in the issue to a person of an interest in a managed investment scheme.  His Honour felt that the acquisition of My Dunphy of a promissory note from Ann Street Mezzanine was an acquisition of an interest in a managed investment scheme.  As a result, Mr. Dunphy could theoretically rescind the agreement entered into with Ann Street Mezzanine.  **5.10 Liquidators obtaining approval for the compromise of a debt**  (By Mark Cessario, Corrs Chambers Westgarth)  Elderslie Finance Corporation Ltd v Newpage Pty Ltd (No 6) [2007] FCA 1030, Federal Court of Australia, Lindgren J, 8 June 2007.  The full text of this judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca1030.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fca1030.htm" \t "_new) or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%20" \t "_new)  **(a) Summary**  Mr Hamilton, the liquidator of Newpage Pty Ltd ("Newpage"), claimed that payments made by Newpage to Casino Busters International Pty Ltd ("CBI") and Mr Parsons were voidable transactions. Mr Hamilton sought to compromise the claim against CBI and Mr Parsons, and sought approval from the court for that compromise under section 477(2A) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482%20%20" \t "default).  Section 477(2A) provides that a liquidator must not compromise a debt to the company, the value of which is greater than $20,000, without obtaining approval of either the court, the committee of inspection or obtaining a resolution of creditors.  In his judgment, Lindgren J held that a liquidator's claim for repayment of money paid away by the company under a voidable transaction is not a "debt to the company", and therefore the court would not have power to approve a compromise of that claim.  However, in this case his Honour was able to approve the compromise because Mr Hamilton had alternative claims against CBI and Mr Parsons that were claims of a "debt to the company".  Lindgren J noted that, where there is a doubt as to whether a claim is a debt to the company, the court should err on the side of treating the claim as a debt, rather than declining to grant approval of a compromise. In those circumstances, the court can also provide a direction under section 479(3) of the Corporations Act that the liquidator is justified in compromising the claim. In that way, the liquidator is granted some protection should it be later found that the claim was not one of a "debt to the company".  **(b) Facts**  In 2006 Newpage paid a total of $2,137,000 to CBI in two payments. The payments were made by Mr Yii, the sole director of Newpage, either for CBI or on behalf of Mr Parsons. There were conflicting accounts regarding the circumstances surrounding these payments, which, according to his Honour, made it difficult for Mr Hamilton to discharge his duties as liquidator of Newpage.  Mr Hamilton had been pursuing CBI, Mr Pasons and Mr Yii to recover the $2,137,000 and alleged in a Points of Claim that the payments were voidable transactions. Mr Hamilton proposed entering into a deed with CBI and Mr Parsons pursuant to which certain payments would be made to the applicants and Mr Parsons would make himself available to assist in the examination of Newpage's affairs and the claims being made against Mr Yii ("Deed").  In affidavit evidence Mr Hamilton deposed as to the limited financial capacity of CBI and Mr Parsons, and his view that the proposed settlement was beneficial and in the interests of Newpage's creditors. Justice Lindgren was of the view that the court should approve Mr Hamilton entering into the Deed, if the court had power to grant such approval.  **(c) Decision**  **(i) The application for approval of the compromise**  The primary consideration for his Honour was whether or not the claim being made by Mr Hamilton against CBI and Mr Parsons was a "debt" to Newpage for the purposes of section 477(2A) of the Corporations Act. His Honour noted that the court only has power to "approve" a compromise under that section that relates to a "debt to the company".  Lindgren J rejected the submissions of Mr Hamilton, Mr Parsons and CBI that an expansive construction should be given to the expression "debt to the company" such that it would include any claim which, if successful, would result in a judgment debt in favour of the company.  His Honour referred to, and agreed with, prior authority that claims by liquidators to recover amounts paid by the company under voidable transactions do not fall within the terms of section 477(2A).  Lindgren J also referred to the decisions of Barrett J in HIH Insurance Ltd and Related Matters [2004] NSWSC 5 and QBE Workers Compensation (NSW) Ltd v GJ Framework Pty Ltd (2006) 56 ACSR 687, wherein it was said that where there is room for argument about whether a claim is one of a "debt to the company", the court should err on the side of treating the claim as a debt rather than decline approval under section 477. However, his Honour also agreed with Barrett J's acknowledgment that if a claim is unquestionably not a debt, the correct approach is to reject an application under section 477 for approval of a compromise.  In the present case, his Honour found it unnecessary to determine whether Mr Hamilton's claims that the payments made by Elderslie were voidable transactions amounted to a "debt to the company". This was because, at the hearing, an Amended Points of Claim was filed which alleged additional causes of action in relation to the payments. His Honour found that at least one of those additional causes of action was a claim of a "debt to the company".  Lindgren J stated that, in considering an application under section 477(2A), the court does not enter upon the commercial merits of the compromise. Rather, the court concerns itself with matters such as a lack of good faith, an error in law or principle or whether there is a substantial ground for doubting the prudence of the liquidator's conduct.  His Honour concluded that it was appropriate that the compromise expressed in the Deed be approved.  **(ii) Obtain a direction from the court**  In his decision, Lindgren J noted that, in circumstances where there is doubt as to whether a claim is a "debt the company", the liquidator could also make an application for directions under section 479(3) of the Corporations Act.  In such circumstances, the court can grant approval for the compromise under section 477(2A) "to the extent that approval may be required", and also direct under section 479(3) that the liquidator is justified in entering into the compromise. By doing so, the direction under section 479(3) would provide some protection to the liquidator if it was later established that the claim was not a "debt to the company".  **(iii) Confidentiality**  A further issue raised in the proceedings was an application by Mr Hamilton to preserve the confidentiality of the terms of the compromise. The application was made under section 50 of the [Federal Court of Australia Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6941" \t "default), which provides that the court may make an order forbidding or restricting the publication of particular evidence, as appears to the court to be necessary in order to prevent prejudice to the administration of justice.  His Honour noted that, if Mr Hamilton was not required to obtain leave to enter into the compromise, he would have been able to reach an agreement with CBI and Mr Parsons that preserved the confidentiality of the compromise that he had reached. In particular, they could have preserved their negotiations and agreement against disclosure to Mr Yii, against whom Mr Hamilton was still pursuing claims.  His Honour also noted that, if liquidators knew that all their negotiations and compromise agreements would be made public in circumstances where the liquidator had an ongoing claim against another party, negotiation of compromises may be discouraged.  Therefore, whilst Lindgren J recognised that Mr Yii may get access to the Deed at some later stage (for example, in relation to the quantification of Mr Hamilton's claim against Mr Yii), his Honour ordered that the transcript of the hearing and the Deed not be published without leave of the court.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer%281%29.gif | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer.gif | We welcome users' suggestions for improvement to this [service](mailto:helpdesk.asiapac@saiglobal.com).   |  | | --- | | **DISCLAIMER** This email alert is not intended to be and is not a complete or definitive statement of the law on the relevant subject matter. No person should take any action or refrain from taking any action in reliance upon the contents of this alert without first obtaining advice from a qualified practitioner. SAI Global expressly disclaims liability for any loss or damage suffered howsoever caused whether due to negligence or otherwise arising from the use of this information. For further information or if you have received this notice in error or believe that the email has been forwarded to you in breach of our licence terms, please notify SAI Global immediately by telephone on 03 9278 1555 or email [helpdesk.asiapac@saiglobal.com](mailto:helpdesk.asiapac@saiglobal.com). | | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20120%20August%202007_files/spacer.gif |
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