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|  | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  | | --- | | **Bulletin No. 143**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), Director, Centre for Corporate Law and Securities Regulation  Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \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](http://www.blakedawson.com/" \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](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#h1) 2. [Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#h2) 3. [Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#h3) 4. [Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#h4) 5. [Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#h5) 6. [Contributions](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#7) 7. [Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | | [bout SAI Global](http://www.saiglobal.com/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** |  | | |  | | | [1. Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#1)  [1.1 Seminar - Directors' duties in a time of crisis - Melbourne and Sydney](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#011) [1.2 Review of corporate governance in financial institutions](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#012)  [1.3 US Treasury draft 'say-on-pay' legislation](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#013) [1.4 IOSCO publishes principles for outsourcing by markets](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#014) [1.5 European Commission proposes further revision of banking regulation to strengthen rules on bank capital and on remuneration in the banking sector](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#015) [1.6 Basel II capital framework enhancements announced by the Basel Committee](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#016) [1.7 CESR recommends a mandatory trade transparency regime for non-equity markets](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#017)    [1.8 Revised code of ethics for accountants](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#018)  [1.9 CESR launches a consultation on a pan-European short selling disclosure regime](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#019)    [1.10 UK government plans for the reform of financial markets](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0110) [1.11 CEBS publishes for consultation draft guidelines on liquidity buffers](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0111) [1.12 European Commission outlines ways to strengthen the safety of derivatives markets](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0112) [1.13 IOSCO consults on principles for periodic disclosure by listed entities](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0113) [1.14 Transparency directive: CESR maps coherence, equivalence and variance of supervisory powers and sanctioning regimes across Europe](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0114) [1.15 Taxation of employee share schemes](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0115) [1.16 SEC proposes measures to improve corporate governance including enhanced disclosure of corporate matters](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0116)  [1.17 IOSCO consults on disclosure requirements for public offerings of asset-banked securities](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0117) [1.18 Bank for International Settlements annual report](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0118) [1.19 Strengthening the UK financial system](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0119) [1.20 FSA details the enhanced standards people can expect from all investment advisers](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0120) [1.21 Report on securitisation in the insurance sector](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0121)  [1.22 IOSCO report on minority shareholder protection](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0122) [1.23 IOSCO publishes recommendations in response to the financial crisis in emerging markets](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0123) [1.24 Improved rules for EU investment funds](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0124) [1.25 World Bank research on financial crisis responses](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0125)  [2. Recent ASIC Developments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#2)  [2.1 ASIC seeks feedback on financial requirements and training requirements for margin lending facilities](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#021) [2.2 ASIC consults on licensing requirements for credit licensees](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#022) [2.3 Improved access to simple advice for superannuation fund members](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#023) [2.4 Improving disclosure of securities lending](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#024) [2.5 ASIC review of 30 June 2009 financial reports](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#025)  [3. Recent ASX Developments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#3)  [3.1 ACH Clearing Rules and SFE Clearing Rules - PSNA amendments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#031) [3.2 Analysis of corporate governance disclosures](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#032) [3.3 Monthly and quarterly market activity reports](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#033) [3.4 CFTC approval for new ASX energy products](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#034) [3.5 Listing Rules Guidance Note 15 - ASX schedule of listing fees](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#035) [3.6 Austraclear - new billing structure and fee level for Issue administration fees](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#036) [3.7 Review of trading by directors in 'blackout' period - Q1 2009](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#037) [3.8 Results of 2008 Australian share ownership study](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#038) [3.9 Standard & Poor's assigns AA- credit rating to ASX Clearing Corporation Limited](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#039) [3.10 Austraclear Services Limited - new agency arrangements](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0310)  [4. Recent Takeovers Panel Developments](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#4)  [4.1 Rey Resources Limited - Panel Decision](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#041)  [5. Recent Corporate Law Decisions](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#5)  [5.1 A breach of directors' duties arising from a director authorising a bonus payment to himself](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#051) [5.2 The scope of derivative actions under the Corporations Act](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#052) [5.3 Court's approval for transfer of shares by liquidator nunc pro tunc and special leave granted for distribution of surplus nunc pro tunc](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#053) [5.4 A breach of duty owed to a company gives rise to a corresponding liability to account to the company only](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#054) [5.5 Federal Court rejects CEMEX appeal against declaration of unacceptable circumstances by Takeovers Panel](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#055) [5.6 Application of the duomatic principle, estoppel and section 1322](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#056) [5.7 The legal requirements to be met for an order under section 1322(4)(d) to be made](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#057) [5.8 Inconsistency between state and federal laws - Duties of a liquidator in a voluntary winding-up](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#058) [5.9 The general prohibition of commencement of litigation before the end of a takeover period does not preclude the seeking of remedial relief during the takeover period pursuant to section 1325A(2) of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#059) [5.10 An order modifying the operation of reg 5.3A.07 is authorised by section 447A](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0510) [5.11 Deeds of company arrangement:  Buying of debts and unreasonable prejudice for the purposes of section 600A of the Corporations Act](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0511)  [5.12 When a Chairperson should exercise their casting vote to remove a liquidator and appoint an alternate liquidator](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0512)  [5.13 Conduct of receivers in prolonging a receivership subject to scrutiny](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm#0513) |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **1. Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  | | --- | | **1.1 Seminar - Directors' duties in a time of crisis - Melbourne and Sydney**  The global financial crisis means that the environment in which directors are operating is more challenging and more difficult than ever before. In addition, there is increased scrutiny of the decisions of company directors - by shareholders, creditors, government, the courts, the media and others. Two major challenges for directors are directors' duties in times of financial difficulty and directors' duties and executive remuneration.  This seminar brings together leading speakers to discuss the following important topics:  Directors' duties in insolvent situations:   * Insolvent trading tests * Duty to act in good faith and for proper purposes * Duty to consider creditors' interests * Interests of the company rather than the group * Corporate benefit and s187 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default)   Directors' duties and the remuneration challenge:   * Executive remuneration and the role of the Board and shareholders - regulatory response to community rage * Australian Productivity Commission inquiry - where is it headed and what are the likely outcomes? * Executive termination benefits - what will the new legislative restrictions mean for executive contracts and disclosure, and how should Boards deal with these issues? * NED remuneration - where is it headed?   Speakers for the seminars are: Tim Bednall (Sydney seminar), Partner, Mallesons Stephen Jaques; David Crawford, A.O.(Melbourne seminar), Company Director and Chairman; David Gonski, A.C.(Sydney seminar), Company Director and Chairman; Alison Lansley (Melbourne seminar), Partner, Mallesons Stephen Jaques; Stuart McCulloch (Sydney seminar), Partner, Allens Arthur Robinson; Jon Webster (Melbourne seminar): Partner, Allens Arthur Robinson.  The seminar is convened by Professor Ian Ramsay, Director of the Centre for Corporate Law & Securities Regulation at the University of Melbourne.    The seminar is being held in Melbourne on 12 August 2009 and Sydney on 8 September 2009, 5.30pm to 7.15pm.    The flyer and registration form are available on the [CCLSR](http://cclsr.law.unimelb.edu.au/go/news/index.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.2 Review of corporate governance in financial institutions**   The Walker Review on corporate governance in UK banks and other financial institutions was published on 16 July 2009. The report recommends strengthening boards and making challenge in the boardroom a fundamental part of the decision making process on risk matters. It also recommends measures to encourage institutional shareholders to play a more active role.    There are five key themes in the review:   * The Financial Reporting Council (FRC) Combined Code on Corporate Governance is fit for purpose. Although the Code needs amplification and better observance, there are no proposals for primary legislation. * Principal deficiencies in the boards of financial institutions have related to patterns of behaviour rather than to organisation. * Board level engagement in the high-level risk process should be materially increased, with particular attention to the monitoring of risk and discussion leading to decisions on risk appetite and tolerance. * There is a need for fund managers and other major shareholders to engage more productively with their investee companies. Boards should be more receptive to such initiative. * Substantial enhancement is needed in board level oversight of remuneration policies, in particular with respect to variable pay and disclosures.   The report makes 39 recommendations. Specific proposals include:   * Board level risk committees to be chaired by a non-executive director. * Risk committees to have the power to scrutinise and if necessary block large transactions. * Non-executives to dedicate up to 50% more time to their role and face heightened scrutiny under the Financial Services Authority (FSA) authorisation process. * Remuneration committees to be given more power to scrutinise firm-wide pay and oversee the remuneration of highly paid non-board member executives. * Significant deferred element in bonus schemes for all highly paid executives. * Increased public disclosure of the remuneration of highly paid executives (although not on the basis of naming individuals). * Increased engagement and communication for institutional shareholders. * FRC to sponsor an institutional shareholder code. * FSA to monitor conformity and disclosure by fund managers in relation to the code. * Institutional shareholders to agree a Memorandum of Understanding on collective action.   The report is available on the [UK Treasury](http://www.hm-treasury.gov.uk/d/walker_review_consultation_160709.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.3 US Treasury draft 'say-on-pay' legislation**  On 16 July 2009, the US Treasury delivered draft "say-on-pay" legislation to Congress that would require all publicly traded companies to give shareholders a non-binding vote on executive compensation packages. The legislation would:   * **Require a non-binding annual shareholder vote on compensation for all public companies:** All public companies will be required to include a non-binding shareholder vote on executive compensation as disclosed in the proxy for any annual meeting held after 15 December 2009. * **Compensation subject to the vote includes pay packages for senior executive officers:** The disclosures that would be subject to the say-on-pay vote include tables summarizing salary, bonuses, stock and option awards and total compensation for senior executive officers, as well as summaries of golden parachute and pension compensation and a narrative explanation of the board's compensation decisions. * **Mandate a separate vote on golden parachutes in the case of a merger or acquisition, with disclosure of the amounts executives will receive:** While golden parachutes are meant to align the interests of executives and shareholders in the event of a merger, managers may still be able to use their leverage to re-negotiate a larger payout - with one study finding that 27% of target CEOs received special cash payments newly granted at the time of the merger. By providing for a separate vote on golden parachutes, the legislation would allow shareholders to vote on any payments to executives, while requiring companies to disclose, in a clear and simple format, the exact amounts senior executive officers will receive if the merger occurs - amounts that often are not clear in earlier disclosures that go before a vote.   **Say-on-pay: The US experience**  While shareholder interest in say-on-pay has increased significantly and some US companies have adopted it, other companies have declined to permit shareholders to vote on executive pay, even when shareholders have voted to ask the company for that right.   * **Some companies have chosen to institute say-on-pay voluntarily:** In 2007, Aflac became the first publicly traded company to adopt say-on-pay.  The subsequent say-on-pay vote passed with 93% of shares voting in favour. * **Shareholders are increasingly asking US companies for the ability to have say-on-pay votes:** While reports of exact numbers vary, shareholder proposals requesting that their companies adopt the practice of holding say-on-pay votes have increased from over 50 in 2007, to over 80 in 2008, to over 100 in 2009.  These proposals, which are usually non-binding requests to institute say-on-pay votes in the future, enjoy support from a growing number of shareholders  with average vote totals increasing from 42.5 percent in 2007 to 46.7 percent so far this year.  In 2009, proposals requesting say-on-pay have garnered majority support at 19 companies, up from roughly 14 in 2008 and 8 in 2007. * **While some companies have responded to shareholder proposals by instituting say-on-pay, others have not, even when such proposals receive majority support:** In response to investor proposals, roughly 15 companies provided shareholders with say-on-pay in 2009, and a handful of other companies have announced plans to hold say-on-pay votes in future years.  However, some companies have chosen not to institute say-on-pay even when a majority of shareholders have expressed support for their company holding annual say-on-pay votes. In addition, even if a company does choose to institute say-on-pay in response to a shareholder vote, shareholders must typically wait at least another full year before a vote on compensation is placed on the proxy.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.4 IOSCO publishes principles for outsourcing by markets**    On 13 July 2009, the International Organization of Securities Commissions (IOSCO) Technical Committee published a final report titled 'Principles for Outsourcing by Markets' - containing a set of principles designed to assist market operators ie exchanges, and market authorities when considering outsourcing arrangements.    Many markets and their market operators use third party service providers to perform processes, services or activities that would otherwise be undertaken by the markets or market operators themselves.   The outsourcing principles set out the factors that market operators should consider when deciding whether, and to whom, to outsource processes, services or functions, and are also designed to assist market authorities in their oversight of these arrangements.    Outsourcing can bring substantial benefits for markets particularly through the lowering of costs whilst allowing access to a high level of expertise and the latest technology. However, it also raises a number of issues that may impact on the effectiveness and integrity of markets related to their ability to manage risks and monitor compliance with regulatory requirements.   Outsourcing thus poses a number of important challenges to both markets and market authorities and the principles are designed to address those concerns.    **Principles for outsourcing by markets**    The following areas and related principles have been identified as requiring consideration when a market outsources any of its processes, services or functions:    **(a) Due diligence in selecting the service provider and in monitoring the service provider's performance**    **Principle:** An outsourcing market should conduct suitable due diligence processes in selecting an appropriate third party service provider and in monitoring its ongoing performance.   The outsourcing market should also take appropriate steps to identify any conflicts of interest between the outsourcing market and the service provider (including affiliated entities and sub-contractors) and ensure that policies and procedures are in place to mitigate and manage any potential conflicts of interest which have been identified or could arise.    **(b) The contract with a service provider**    **Principle:** There should be a legally binding written contract between the outsourcing market and each third party service provider, the nature and detail of which should be appropriate to the materiality and nature of the outsourced activity to the ongoing business of the outsourcing market.    **(c) Business continuity at the outsourcing provider**    **Principle:** The outsourcing market should take appropriate measures to determine that its service providers establish and maintain emergency procedures and a plan for disaster recovery, with periodic testing of backup facilities.    **(d) Security and confidentiality of information**  **Principle:** The outsourcing market should take appropriate measures to determine that procedures are in place to protect the outsourcing market's proprietary, member-related and potentially market sensitive information and software.   The outsourcing market should take appropriate steps to require that service providers protect confidential information regarding the outsourcing market's members from intentional or inadvertent disclosure to unauthorised individuals.    **(e) Termination procedures**    **Principle:** Outsourcing with third party service providers should include contractual provisions relating to the termination of the contract and appropriate exit strategies.    **(f) Regulator's and market's access to books and records, including rights of inspection**    **Principle:** The market authority, the outsourcing market, and its auditors, should have access to the books and records of service providers relating to the outsourced activities and the market authority should be able to obtain promptly, upon request, other information concerning activities that are relevant to regulatory oversight.    This Report complements an existing IOSCO report - 'Principles on Outsourcing of Financial Services for Market Intermediaries' - which establishes a set of principles designed to assist regulated market intermediaries in determining the steps they should take when considering outsourcing activities.    The 'Principles for Outsourcing by Markets' report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD299.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.5 European Commission proposes further revision of banking regulation to strengthen rules on bank capital and on remuneration in the banking sector**  On 13 July 2009, the European Commission put forward a further revision of EU rules on capital requirements for banks that is designed to tighten up the way in which banks assess the risks connected with their trading book; impose higher capital requirements for re-securitisations; increase market confidence through stronger disclosure requirements for securitisation exposures; and require banks to have sound remuneration practices that do not encourage or reward excessive risk-taking. Under the new rules, banks will be restricted in their investments in highly complex re-securitisations if they cannot demonstrate that they have fully understood the risks involved, while national supervisory authorities will review banks' remuneration policies and have the power to impose sanctions if the policies do not meet the new requirements. The proposal, which amends the existing Capital Requirements Directives, represents part of the EU's response to the financial crisis, and reflects consultation with Member States, banking supervisors and industry. It now passes to the European Parliament and the Council of Ministers for consideration.  **Proposed amendments to the Capital Requirements Directives**   The purpose of the Capital Requirements Directives (2006/48/EC and 2006/49/EC) is to ensure the financial soundness of banks and investment firms. Together they stipulate how much of their own financial resources banks and investment firms must have in order to cover their risks and protect their depositors. This legal framework needs to be regularly updated and refined to respond to the needs of the financial system as a whole.    The main changes proposed are as follows:  **(a) Capital requirements for re-securitisations**  Re-securitisations are complex financial products that have played a role in the development of the financial crisis. In certain circumstances, banks that hold them can be exposed to considerable losses. The proposal will impose higher capital requirements for re-securitisations, to make sure that banks take proper account of the risks of investing in such complex financial products.  **(b) Disclosure of securitisation exposures**  Proper disclosure of the level of risks to which banks are exposed is necessary for market confidence. The new rules will tighten up disclosure requirements to increase the market confidence that is necessary to encourage banks to start lending to each other again.  **(c) Capital requirements for the trading book**  The trading book consists of all the financial instruments that a bank holds with the intention of re-selling them in the short term, or in order to hedge other instruments in the trading book. The proposal will change the way that banks assess the risks connected with their trading books to ensure that they fully reflect the potential losses from adverse market movements in the kind of stressed conditions that have been experienced recently.   **(d)  Remuneration policies and practices within banks**  The proposal will tackle perverse pay incentives by requiring banks and investment firms to have sound remuneration policies that do not encourage or reward excessive risk-taking. Banking supervisors will be given the power to sanction banks with remuneration policies that do not comply with the new requirements.   The proposal is available on the [Europa](http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.6 Basel II capital framework enhancements announced by the Basel Committee**  On 13 July 2009, the newly expanded Basel Committee on Banking Supervision (BIS) announced a final package of measures to strengthen the 1996 rules governing trading book capital and to enhance the three pillars of the Basel II framework.  The package is part of the Basel Committee's broader program to strengthen the regulatory capital framework. The program aims to introduce new standards to:   * promote the build-up of capital buffers that can be drawn down in periods of stress; * strengthen the quality of bank capital; and * introduce a leverage ratio as a backstop to Basel II.   The Committee's recently agreed trading book rules (Revisions to the Basel II market risk framework and Guidelines for computing capital for incremental risk in the trading book), which take effect at the end of 2010, introduce higher capital requirements to capture the credit risk of complex trading activities. They also include a stressed value-at-risk (VaR) requirement, which the Committee believes will help dampen the cyclicality of the minimum regulatory capital framework.  Under the Basel II enhancements approved at the July meeting, the Committee is strengthening the treatment for certain securitisations in Pillar 1 (minimum capital requirements). It is introducing higher risk weights for resecuritisation exposures (so-called CDOs of ABS) to better reflect the risk inherent in these products, as well as raising the credit conversion factor for short-term liquidity facilities to off-balance sheet conduits. The Committee is also requiring that banks conduct more rigorous credit analyses of externally rated securitisation exposures.  The Committee is issuing supplemental guidance under Pillar 2 (the supervisory review process) of Basel II. This guidance addresses the flaws in risk management practices revealed by the crisis.  It raises the standards for:   * firm-wide governance and risk management; * capturing the risk of off-balance sheet exposures and securitisation activities; * managing risk concentrations; and * providing incentives for banks to better manage risk and returns over the long term.   The supplemental guidance also incorporates the FSF Principles for Sound Compensation Practices, issued by the Financial Stability Board (formerly the Financial Stability Forum) in April 2009. The Committee, through its Standards Implementation Group, will begin work immediately on the practical implementation of these principles.  The Basel II package includes enhancements to the framework's third pillar (market discipline) to strengthen disclosure requirements for securitisations, off-balance sheet exposures and trading activities. These additional disclosure requirements will help reduce market uncertainties about the strength of banks' balance sheets related to capital market activities.  Banks and supervisors are expected to begin implementing the Pillar 2 guidance immediately. The new Pillar 1 capital requirements and Pillar 3 disclosures should be implemented no later than 31 December 2010. The Committee also agreed to keep in place the Basel I capital floors beyond the end of 2009.  Revisions to the Basel II Market Risk Framework is available on the [BIS](http://www.bis.org/publ/bcbs158.htm" \t "_new) website.   Guidelines for Computing Capital for Incremental Risk in the Trading Book is available on the [BIS](http://www.bis.org/publ/bcbs159.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.7 CESR recommends a mandatory trade transparency regime for non-equity markets**      On 10 July 2009, the Committee of European Securities Regulators (CERS) published its final report (Ref CESR/09-348) and feedback statement (Ref CESR/09-349) on the transparency of corporate bond, structured finance product and credit derivatives markets. CESR is of the view that current market-led initiatives have not provided a sufficient level of transparency. CESR considers that an increased level of transparency would be beneficial to the market and that a harmonised approach to post-trade transparency would be preferable to national initiatives taken in this area on the basis of the flexibility allowed by MiFID. CESR has therefore considered it necessary to inform the European Institutions on the main conclusions reached in its report and to recommend the adoption of a mandatory trade transparency regime for corporate bond, structured finance product and credit derivatives markets as soon as practicable.    The final report is available on the [CESR](http://www.cesr.eu/popup2.php?id=5798" \t "_new) website.  The feedback statement is available on the [CESR](http://www.cesr.eu/popup2.php?id=5799" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.8 Revised code of ethics for accountants**   On 10 July 2009, the International Ethics Standards Board for Accountants (IESBA) issued a revised 'Code of Ethics for Professional Accountants' (the Code), clarifying requirements for all professional accountants and strengthening the independence requirements of auditors.   The revised Code, which is effective on 1 January 2011, includes the following changes to strengthen independence requirements:   * Extending the independence requirements for audits of listed entities to all public interest entities; * Requiring a cooling off period before certain members of the firm can join public interest audit clients in certain specified positions; * Extending partner rotation requirements to all key audit partners; * Strengthening some of the provisions related to the provision of non-assurance services to audit clients; * Requiring a pre- or post-issuance review if total fees from a public interest audit client exceed 15% of the total fees of the firm for two consecutive years; and * Prohibiting key audit partners from being evaluated on or compensated for selling non-assurance services to their audit clients.   The revised Code maintains the principles-based approach supplemented by detailed requirements where necessary, resulting in a Code that is robust but also sufficiently flexible to address the wide-ranging circumstances encountered by professional accountants.  The International Federation of Accountants' Statements of Membership Obligations have as a central objective the convergence of a country's national code with the 'Code of Ethics for Professional Accountants'. Further, the requirements specify that member bodies should not apply less stringent standards than those stated in the Code.   Further information is available on the [IFAC](http://www.ifac.org/Members/DownLoads/code-of-ethics-for-professi-2.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.9 Consultation on a pan-European short selling disclosure regime**     On 8 July 2009, the Committee of European Securities Regulators (CERS) published a consultation paper on its proposal for a pan-European short selling disclosure regime (Ref. CESR/09-581). After a significant number of CESR Members took emergency measures to restrict short selling in financial instruments due to turbulent market conditions in the fall of 2008, as a first step, CESR developed a list which provided an overview of the situation across Europe, updating it when Members made changes in their short selling measures. In addition, CESR also considered it appropriate to launch a policy review, with the aim of formulating pan-European standards for short selling.    This consultation paper is available on the [CESR](http://www.cesr.eu/popup2.php?id=5791" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.10 UK government plans for the reform of financial markets**    On 8 July 2009, the Chancellor of the Exchequer Alistair Darling published 'Reforming Financial Markets', a document setting out the Government's proposals for the reform of the financial system.    The proposals focus on significant reform of the way banks are regulated, with more emphasis put on the risks financial firms can present to the economy and greater protections for consumers.     They include:   * new plans for the Financial Services Authority (FSA) to place higher capital requirements on firms that present greater risks to the system and measures to deal with the potential failure of institutions that could have a significant impact on the economy; * steps to help consumers make better informed choices, including a national money guidance service funded by a levy on the financial sector and a new independent consumer education body; and * a strengthened framework for financial stability, to deal with system-wide risks in today's more complex and global markets. This will include legislating to set up a new Council for Financial Stability - which will bring together the Bank of England, the FSA and the Treasury to monitor system-wide financial stability and respond to long-term risks as they emerge.   The report is available on the [UK Treasury](http://www.hm-treasury.gov.uk/reforming_financial_markets.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.11 CEBS publishes for consultation draft guidelines on liquidity buffers**  On 7 July 2009, the Committee of European Banking Supervisors (CEBS) published a consultation paper (CP28) on liquidity buffers. This paper sets out draft guidelines on the appropriate size and composition of liquidity buffers with a view to enhancing banks' resilience to liquidity shocks. Bespoke buffers should be in place to enable credit institutions to withstand a liquidity stress for a period of at least one month without changing their business models.   CP28 proposes in particular that, when building their buffers, credit institutions consider:   * three types of stress test scenarios: idiosyncratic, market specific, and a combination of the two; * a time horizon of at least one month; it will also be important to take into account a shorter time horizon of at least one week (acute phase of stress) during which a greater degree of confidence on the capacity for the eligible assets to generate liquidity would be required; and * that the core of the buffer should be composed of cash and assets that are both highly liquid in private markets and central bank eligible, although some flexibility might be appropriate for the longer term.   In particular, when it comes to stress tests for liquidity buffers, CEBS is keen not to define standardized parameters that could induce banks to trigger their buffers in similar market conditions, which in turn could pose systemic risks.  CEBS's draft guidelines are aimed primarily at banks' internal risk management, although they may be helpful for supervisory review purposes. They build on CEBS's interim report on liquidity buffers and "survival" periods published in March 2009 and should be read as a follow-up to CEBS's recommendations on liquidity risk management published in September 2008, in particular to recommendation 16 on liquidity buffers.   The consultation paper is available on the [CEBS](http://www.c-ebs.org/getdoc/8ed674fc-d767-4eed-b0c2-ac6f65b92d04/CP28-on-Liquidity-Buffers.aspx" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.12 European Commission outlines ways to strengthen the safety of derivatives markets**  On 3 July 2009, the European Commission adopted a Communication on ensuring efficient, safe and sound derivatives markets, following a commitment made in the Communication on 'Driving European recovery' (IP/09/351). The Communication looks at the role played by derivatives in the financial crisis and at the benefits and risks of derivatives markets, and assesses how risks can be reduced. Taking into account the outcome of the consultation, the Commission will draw operational conclusions before the end of its current mandate and present appropriate initiatives, including legislative proposals as justified, before the end of the year to increase transparency and ensure financial stability.  Taking into account the wide diversity of 'over the counter' (OTC) derivatives markets, the Communication outlines the tools to ensure that they do not harm financial stability. These tools, which can be combined with each other, are:   * **Standardisation:** This would enhance operational efficiency and reduce operational risks. It could be achieved by encouraging broader take up of standard contracts and electronic affirmation and confirmation services, central storage, automation of payments and collateral management processes. This requires investments and it may therefore be necessary to incentivise these investments. * **Central data repositories:** Such repositories collect data on, for example, number of transactions and size of outstanding positions. This increases transparency, knowledge and contributes to operational efficiency. Currently, such a repository exists for Credit Default Swaps (CDS) and could potentially be used for other derivatives segments as well. European securities regulators (CESR) are currently carrying out a feasibility study for data repository based in the European Union. In the light of the forthcoming CESR report, the Commission will decide on appropriate actions. * **Central Counter-party (CCP) clearing:** CCPs have proven their worth during the financial crisis. In view of those benefits, the Commission has since October 2008 worked with industry to ensure that clearing of CDS takes place on European CCPs. Industry has as a result committed to achieve CCP clearing by 31 July 2009. If industry is unable to deliver on this commitment, the Commission will have to consider other ways to incentivise the use of CCP clearing. The Commission also considers that the broader use of CCPs in other OTC derivatives markets should be incentivised, wherever possible. * **Trade execution on public trading venues:** For standardised derivatives that are cleared by a CCP, the question arises whether the trading of these contracts should take place on an organised trading venue where prices and other trade-related information are publicly displayed (e.g. a regulated market). This would improve price transparency and strengthen risk management. However, it could come at a cost in terms of satisfying the wide diversity of trading and risk management needs. The Commission will examine, taking into account the bespoke and flexible nature of OTC derivatives markets and the regime applicable to cash equities, how to arrive at a more transparent and efficient trading process for OTC derivatives. In this respect the Commission will further assess (i) the channelling of further trade flow through transparent and efficient trading venues and (ii) the appropriate level of transparency (price, transaction, position) for the variety of derivative markets trading venues.   The Communication also highlights the actions already undertaken in response to the financial crisis in the area of derivatives (e.g. CCP clearing for CDS, securitisation, credit rating agencies and hedge funds and other alternative investment management funds, supervision).  The Communication concludes that the crisis has highlighted how derivatives in general and CDS in particular have created a web of mutual dependence that made it difficult to understand, disentangle and contain risk in the immediate aftermath of a default. The characteristics of OTC derivative markets - the private nature of contracting with limited public information, the complex web of mutual dependence, the difficulties of understanding the nature and level of risks - increase uncertainty in times of market stress and accordingly may undermine financial stability. The Communication therefore outlines ways to strengthen derivatives markets so as to improve financial stability.  Further information is available on the [Europa](http://ec.europa.eu/internal_market/financial-markets/derivatives/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.13 IOSCO consults on principles for periodic disclosure by listed entities**    On 2 July 2009, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a consultation paper - 'Principles for Periodic Disclosure by Listed Entities' (Periodic Disclosure Principles) - that makes preliminary recommendations for disclosures that could be provided by issuers in periodic reports, particularly annual reports, of listed entities. The periodic disclosure principles also cover other issues related to periodic disclosure, such as the timeliness of disclosures, disclosure criteria and storage of information.    The Periodic Disclosure Principles are aimed at setting out what issues should be considered by securities regulators in developing or reviewing their disclosure regimes for the periodic reports of listed entities with securities listed or admitted to trading on a regulated market in which retail investors participate. These periodic reports enhance investor protection by providing relevant information which facilitates investor decision-making, by allowing investors to compare the performance of the same company over regular intervals and by enabling investors to make comparisons between different companies.    This consultation forms part of IOSCO's ongoing work to develop principles for disclosure by issuers of listed securities to investors in the public capital markets. These proposed principles would complement IOSCO's existing disclosure principles which provide guidance for cross-border offerings of equity securities (1998); ongoing disclosure and material development reporting (2002); management's discussion and analysis (2003); cross-border offerings of debt securities (2007); and offerings of asset-backed securities (2009).    The following principles have been identified as essential for any periodic disclosure regime:   * Periodic reports should contain relevant information; * For those periodic reports in which financial statements are included, the persons responsible for the financial statements provided should be clearly identified, and should state that the financial information provided in the report is fairly presented; * The issuer's internal control over financial reporting should be assessed or reviewed; * Information should be available to the public on a timely basis; * Periodic reports should be filed with the relevant regulator; * The information should be stored to facilitate public access to the information; * Disclosure criteria; * Equal access to disclosure; and * Equivalence of disclosure.   Comment is sought on these proposed principles by 31 August 2009.    The report is available on the [IOSCO](https://www.iosco.org/library/pubdocs/pdf/IOSCOPD298.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.14 Transparency directive: CESR maps coherence, equivalence and variance of supervisory powers and sanctioning regimes across Europe**    On 1 July 2009, the Committee of European Securities Regulators (CESR) published a review of supervisory powers and sanctioning regimes (Ref. CESR/09-058) assigned to CESR Members in relation to the Transparency Directive (TD).    The report gives a factual overview of the differences in supervisory powers, as well as administrative and criminal sanctioning regimes across Europe in relation to the TD and its implementing measures. It includes a stock taking exercise of the coherence, equivalence and actual use of powers among EU Member States as well as of the variance of sanctioning regimes. However, the report does not cover the actual day-to-day supervision of TD provisions as this has already been assessed by CESR's Transparency Group earlier in 2008 (Ref: CESR/08-514b).    CESR Members conducted this review during the course of 2008 and 2009 by mapping the differences in supervisory powers and criminal sanctioning regimes of all 29 CESR Member States.    **(a) The pan-European supervisory landscape**   Regarding the delegation of supervisory powers, the review showed great convergence: except for six Member States, all CESR Members are the designated central competent authority responsible for all aspects of the TD. Five Member States (Austria, Denmark, Ireland, Iceland and the UK) assigned another competent authority than the central competent authority. In four CESR Members (Ireland, Iceland, Norway and the UK) the designated central competent authority has delegated tasks to another national authority. In Sweden, the national law identifies the CESR Member as the competent administrative authority. However, the enforcement of listed issuers is within the remit of regulated markets which are neither the Competent Authority nor authorities to which these tasks have been delegated.    **(b) Regimes of supervisory powers**   As regards general obligations, ongoing information powers of the competent authorities and co-operation within the EU, a large majority of CESR Members follow the same supervisory regime, with exceptions ranging from two to five Member States. Besides providing an obligation for major shareholders or holders of voting rights to notify the relevant issuers on the acquisition or disposal of their major holdings, the TD also obliges issuers of securities admitted to trading on a regulated market to make public their annual, half-yearly financial reports and interim management statements. The finding of the review showed that significant differences between Member States only exist with respect to the powers regarding periodic information and the existence of cooperation agreements with regard to third countries.   **(c) Overall picture of measures and sanctions**   Administrative measures and fines are more common than criminal sanctions throughout the Membership across all articles under TD. All CESR Members can impose administrative measures for breaching the requirements under key articles of the TD. However, with regard to some other articles of the TD, there are a few exceptions where CESR Members can impose neither administrative measures nor fines. One Member does not have the ability to impose administrative fines for breaches of any the TD provisions. The mapping exercise undertaken by the Review Panel of CESR also showed that there are differences in respect of administrative measures and criminal sanctions that can be imposed in cases of infringements of the TD. These differences are predominantly due to the fact that Members States' legal systems differ across the EU and that Member States have the discretion to decide on the types of administrative measures applicable in cases of infringement of the TD. However, the actual use of these administrative measures and criminal sanctions in practice has not been assessed.    Further information is available on the [CESR](http://www.cesr.eu/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.15 Taxation of employee share schemes**   On 1 July 2009, the Australian Assistant Treasurer, Senator the Hon Nick Sherry, released a Policy Statement setting out the final taxation treatment of shares and rights acquired under employee share schemes.    Under the arrangements outlined on Budget night, all discounts on shares and rights provided under an employee share scheme would be assessed in the income year in which the shares and rights are acquired.    The Government issued a public consultation paper on a new regime, which sought to balance industry concerns with the need to address the problems of tax evasion and tax avoidance.   Modifications from the position announced in the consultation paper are:   * increasing the income tax threshold for eligibility for the upfront tax concessions from $150,000 to $180,000, to align it with the top marginal tax rate threshold; * providing further clarity on the meaning of "real risk of forfeiture" via the use of explanatory materials and Tax Office materials, including through the use of a range of example cameos to assist industry; * employees receiving benefits under these schemes will not be able to pay tax upfront and the scheme's governing rules must clearly distinguish these schemes from those eligible for the upfront tax exemption; * moving the deferred taxing point from a point at which the taxpayer will no longer have a real risk of losing the share or right to a point at which:  - in the case of shares, there is both no longer a real risk of the taxpayer losing the share and no restriction (present at acquisition) preventing the taxpayer from disposing of the share; and - in the case of rights to shares (options), there is both no longer a real risk of the taxpayer losing the right and no restriction (present at acquisition) preventing the taxpayer from either disposing or exercising of the right, however, if after exercising the right, the underlying share is subject to forfeiture and restrictions preventing the taxpayer from disposing of the underlying share, it is the point at which there is both no longer a real risk of the taxpayer losing the share and no restriction (present at acquisition) preventing the taxpayer from disposing of the share. * allowing the deferral of tax in relation to up to $5,000 worth of shares  under particular salary sacrifice based employee share schemes, where there is no real risk of forfeiture; * removing the reporting requirement for employers to report the market value of employee share scheme benefits in the year of grant, if this is not the year in which the employee is taxed; and * establishing a three part forward plan of consultation with industry by:  - asking the Board of Taxation to examine two remaining issues: (a) how best to determine the market value of employee share scheme benefits; and (b) whether shares and rights under an employee share scheme that are provided by start-up, research and development and speculative-type companies should be subject to a tax deferral arrangement, despite not being subject to a real risk of forfeiture;  - committing to an Exposure Draft process of the Bill to ensure the policy is accurately reflected in the application of the law, including consultation on a range of technical issues raised in submissions that will be contained in the Exposure Draft Bill; and  - supplementing this process by asking the Board of Taxation to consult with stakeholders, in particular interested members of the previous Consultative Group, to examine technical matters associated with the implementation of these reforms, and to report to Government in time to allow the Board's views to be taken into account in the draft legislation.   The upfront tax exemption will be means tested and tax deferral will only be accessible where there is a real risk that the shares or rights may be forfeited, such as due to performance hurdles or employment conditions. The pre-Budget use of cessation of employment as a taxing point will be retained and the maximum 10 year deferral period will be reduced to seven years.  A full reporting regime will also be introduced to significantly boost the integrity of the taxation of share schemes.  Further information is available on the [Treasury](http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/011.htm&pageID=003&min=njsa&Year=&DocType" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.16 SEC proposes measures to improve corporate governance including enhanced disclosure of corporate governance matters**   On 1 July 2009, the US Securities and Exchange Commission (SEC) voted on three measures that are intended to better inform and empower investors to improve corporate governance and help restore investor confidence.  The Commission proposed requiring public companies receiving money from the Troubled Asset Relief Program (TARP) to provide a shareholder vote on executive pay in their proxy solicitations. The Commission also voted to propose better disclosure of executive compensation at public companies in their proxy statements, and approved a New York Stock Exchange rule change to prohibit brokers from voting proxies in corporate elections without instructions from their customers.   **(a) Shareholder approval of executive compensation of TARP recipients**   The Emergency Economic Stabilization Act of 2008 requires shareholder approval of executive compensation during the period in which any obligation arising from financial assistance provided under TARP remains outstanding. The SEC is seeking public comment on proposed changes to Commission rules that would:   * Require public companies that are TARP recipients to provide a separate shareholder vote in proxy solicitations during the period in which any obligation arising from financial assistance provided under the TARP remains outstanding. * Clarify that the separate shareholder vote would only be required on a proxy solicited for an annual meeting (or special meeting in lieu of the annual meeting) of security holders for which proxies will be solicited for the election of directors. * Provide that registrants would be required to disclose in the proxy statement that they are providing a separate shareholder vote on executive compensation and to briefly explain the general effect of the vote, such as whether the vote is non-binding. * Clarify that the new rules do not require smaller reporting companies to include a compensation discussion and analysis section in their proxy statements.   The proposal is available on the [SEC](http://www.sec.gov/rules/proposed/2009/34-60218.pdf" \t "_new) website.   **(b) Proxy disclosure and solicitation enhancements**   The Commission proposed a set of rule revisions intended to improve the disclosure provided to shareholders of public companies regarding compensation and corporate governance matters when voting decisions are made. These new disclosures are designed to enhance the information included in proxy and information statements, and would include information about:   * The relationship of a company's overall compensation policies to risk. * The qualifications of directors, executive officers and nominees. * Company leadership structure. * Potential conflicts of interests of compensation consultants.   In addition, the proposals are aimed to improve the reporting of annual stock and option awards to company executives and directors as well as to require quicker reporting of election results. The Commission also proposed amendments to the proxy rules intended to clarify how they operate.   The proposal is available on the [SEC](http://www.sec.gov/rules/proposed/2009/33-9052.pdf" \t "_new) website.  **(c) NYSE Rule concerning discretionary proxy voting by broker-dealers**   The Commission voted to approve an NYSE proposal that would eliminate broker discretionary voting for all elections of directors, whether contested or not. Currently, NYSE Rule 452 and corresponding Listed Company Manual Section 401.08 permit brokers to vote on behalf of their beneficial owner customers in uncontested elections of directors if the customers have not returned voting instructions.    The Commission published the NYSE proposed rule change for public comment on 6 March 2009, and received 153 comment letters from issuers, transfer agents, institutional investors, proxy advisory firms and others.    The NYSE's proposal is designed to enhance corporate governance and accountability by helping assure that investors with an economic interest in the company vote on the election of directors. It also would address concerns that broker discretionary voting for directors has impacted election results.    Specifically, the NYSE proposal would add "election of directors" to the list of enumerated items for which a member generally may not give a proxy to vote without instructions from the beneficial owner. The proposal contains a specific exception for companies registered under the Investment Company Act of 1940. In addition, the NYSE proposes to codify two previously published interpretations that do not permit broker discretionary voting for material amendments to investment advisory contracts with an investment company.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.17 IOSCO consults on disclosure requirements for public offerings of asset-backed securities**  On 29 June 2009, the International Organization of Securities Commissions (IOSCO) Technical Committee published a consultation paper on 'Disclosure Principles for Public Offerings and Listings of Asset-Backed Securities' (ABS Disclosure Principles).    The Technical Committee has developed these ABS Disclosure Principles to provide guidance to securities regulators who are developing or reviewing their regulatory disclosure regimes for public offerings and listings of asset-backed securities (ABS). This will in turn contribute to enhancing investor protection by facilitating a better understanding of the issues that should be considered by regulators.    The principles were developed following a recommendation in the Technical Committee's Report on the Subprime Crisis, published in May 2008, that IOSCO develop international principles regarding the disclosure requirements for public offerings of ABS if it was found that IOSCO's existing disclosure standards and principles did not apply to such offerings.    The ABS Disclosure Principles will apply to listings and public offerings of ABS, defined as those securities that are primarily serviced by the cash flows of a discrete pool of receivables or other financial assets - either fixed or revolving - that by their terms convert into cash within a finite period of time.    The principles are based on the premise that the issuing entity will prepare a document used for a public offering or listing of ABS that will contain all material information, clearly presented, that is necessary for full and fair disclosure of the character of the securities being offered or listed in order to assist investors in making their investment decision. These would not apply to securities backed by asset pools that are actively managed (such as securities issued by investment companies or collateralized debt obligations) or that contain assets that do not by their terms convert to cash.    The disclosure topics highlighted in the ABS Disclosure Principles are intended as a starting point for consideration and analysis by securities regulators. Their principles-based format allows for a wide range of application and adaptation by securities regulators.   The proposed ABS Disclosure Principles for regulatory regimes outline the information which should be included in any offer document and these are:   * Parties Responsible for the Document * Identity of Parties Involved In the Transaction * Functions and Responsibilities of Significant Parties Involved In the Securitization Transaction * Static Pool Information * Pool Assets * Significant Obligors of Pool Assets * Description of the Asset Backed Securities * Structure of the Transaction * Credit Enhancement and Other Support, Excluding Certain Derivative Instruments * Certain Derivative Instruments * Risk Factors * Markets * Information about the Public Offering * Taxation * Legal Proceedings * Reports * Affiliations and Certain Relationships and Related Transactions * Interests of Experts And Counsel * Additional Information   The ABS Disclosure Principles will complement IOSCO's existing disclosure principles. The existing disclosure principles include International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers (1998); Principles for Ongoing Disclosure and Material Development Reporting by Listed Entities (2002); General Principles Regarding Disclosure of Management's Discussion and Analysis of Financial Condition and Results of Operations (2003); International Disclosure Principles for Cross-Border Offerings and Listings of Debt Securities by Foreign Issuers (2007); and Principles for Periodic Disclosure by Listed Entities (Consultation Paper published in July 2009).    The consultation report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD296.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.18 Bank for International Settlements annual report**   On 29 June 2009, the Bank for International Settlements (BIS) released its 79th Annual Report. It looks at the narrow path ahead leading out of the financial crisis. The Report underlines the need to focus clearly on the medium term and on sustainability when designing both macroeconomic and financial policy responses.   The crisis had both macroeconomic and microeconomic causes: large global imbalances; a protracted period of low real interest rates; distorted incentives; and an under appreciation of risk. There were market failures, and regulation failed to prevent the build-up of excessive leverage.   In September and October 2008, the financial crisis intensified, forcing monetary, fiscal and regulatory authorities both to expand their fight to restore the health of the financial system and to counter the threats to the real economy. The scale and scope of the monetary and fiscal policy measures are unprecedented.  Nevertheless, the balance sheets of many financial institutions have still not been repaired. Further steps are needed to address this.    The BIS Annual Report argues that financial instruments, markets and institutions all require reform if a truly robust system is to emerge. For instruments, it means a mechanism that rates their safety, limits their availability and provides warnings about their suitability and risks. For markets, it means encouraging trading and clearing through central counterparties and exchanges. For institutions, it means the comprehensive application of enhanced prudential standards that integrate a system-wide perspective. Above all, regulators and supervisors must adopt a macroprudential orientation. By focusing on the stability of the system as a whole, as much as on the viability of individual institutions, it would reduce the probability of joint failures that arise from common exposures and at the same time moderate the procyclicality inherent in the financial system.    But better regulation is not enough. Macroeconomic policies can and must play a role in promoting financial stability. For monetary policy, this means taking better account of asset prices and credit booms; for fiscal policy, it means putting a premium on medium-term fiscal discipline and long-term sustainability.   The report is available on the [BIS](http://www.bis.org/publ/arpdf/ar2009e.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.19 Strengthening the UK financial system**   On 26 June 2009, the Bank of England published its bi-annual Financial Stability Report. The Report assesses the current state of the financial system and discusses ways to strengthen the system in the future.   The Report states that market sentiment has improved recently, along with perceptions of banks' resilience. Funding conditions have also improved slightly. But banks inevitably remain vulnerable. Leverage is still high and wholesale and retail funding pressures remain. So banks in the UK and internationally remain sensitive to further adverse economic or financial sector developments, which could in turn affect economic recovery and flow back to the banking system.  In response to the events of the financial crisis, authorities internationally are working to strengthen financial system resilience over the medium term. The Report discusses five broad areas where policy changes are needed. A theme throughout is that policies should be based on their impact on the overall system, not just on individual firms.   The five policy areas discussed in the Report are:  **(a) Strengthening market discipline.**  Richer and more frequent public disclosures by banks are required. To control risk-taking, financial institutions need to face a credible threat of closure or wind down, via resolution regimes. And to encourage more effective market discipline on deposit-takers, the Bank supports a risk-based, pre-funded deposit insurance system.   **(b) Greater self-insurance by financial institutions.**  Institutions' own resources should be the first line of defence against financial pressures. That will require: higher levels of loss-absorbing bank capital and larger, high-quality liquidity buffers; a cushion to be built up to absorb future losses during the upswing of a cycle; reduced reliance on ratings agencies; contingency plans for accessing capital and funding in times of stress, and for restructuring or winding up an institution in the event of distress.  **(c) Improved management of risks arising from interactions among financial institutions.**  The authorities need better information on connections between institutions. Capital and liquidity buffers need to reflect the impact financial institution's distress or failure could have on the system as a whole, and so larger and more interconnected banks need to hold larger buffers. To prevent the build-up of financial imbalances, countercyclical instruments are needed. The Bank also supports greater use of central counterparties for standardised and liquid financial contracts and more trading of key financial instruments on exchanges or other open platforms.  **(d) Size and structure of the financial system compatible with maintaining financial stability.**   Banks should not be too big or complex. Authorities, domestically and internationally, should consider whether they need more actively to influence or constrain the future size and structure of the system to support stability. For groups providing economically critical functions, it has to be possible to supervise them effectively and if need be resolve them in the event of severe distress. Possible measures could include limiting the scope of banks' businesses to a narrower range of relatively low-risk activities, or imposing higher capital and liquidity charges on institutions that pose greater risks to the economy or taxpayer in the event of failure. Such measures ought to go hand in hand with improved resolution powers to wind down large and complex financial institutions in an orderly manner. Determining the optimal policy mix poses major challenges but merits further debate internationally.  **(e) Principles for future support from public authorities.**  When in future self protection fails, interventions to contain crises should be guided by explicit principles - for example, for acting as market maker or capital provider of last resort - to ensure that they do not encourage imprudent behaviour by financial institutions and minimise risks to the public finances.   The financial stability report is available on the [Bank of England](http://www.bankofengland.co.uk/publications/fsr/2009/fsrfull0906.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.20 FSA details the enhanced standards people can expect from all investment advisers**  On 25 June 2009, the UK Financial Services Authority (FSA) published proposals to build people's trust and confidence in the retail investment market.  The consultation paper on the FSA's Retail Distribution Review (RDR) sets out detailed proposals to implement the wide-ranging reforms it outlined in November last year. The changes, which will take effect from the end of 2012, will improve outcomes for savers and investors by enhancing the quality of advice they receive.  In particular, the FSA is consulting on rules to ensure that:   * Independent advice is truly independent and reflects investors' needs; * People can clearly identify and understand the service they are being offered; * Commission-bias is removed from the system - and recommendations made by advisers are not influenced by product providers; * Investors know up-front how much advice is going to cost and how they will pay for it; and * All investment advisers will be qualified to a new, higher level, regarded as equivalent to the first year of a degree.   The consultation paper on the RDR is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/CP/2009/09_18.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.21 Report on securitisation in the insurance sector**    On 25 June 2009, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) published a report on securitisation in the insurance sector. According to the report, securitisation mechanisms in the banking area have significantly contributed to the current financial crisis. The report explores insurance linked securities (ILS) as one part of the wider spectrum of alternative risk transfers, being an important tool for insurance undertakings to effectively transfer risks and tap new sources of capital market funding.   This report offers an overview of the ILS market, its development and the investor structure. The market has grown, especially over the last few years. However, the market for ILS has been affected by the financial turmoil.  ILS consists of two main classes, catastrophe bonds (cat bonds) and life bonds. Cat bonds transfer long tail risks from an insurance or reinsurance undertaking to an investor. They offer protection against extreme risks, such as earthquakes or wind storms. Life bonds transfer the risks arising from the insurance portfolio of a life insurer, which could be longevity and mortality risk, or can be used to fulfil financing functions.    The report also explores the prospects of ILS and the challenges and risks associated with it. ILS should have the positive effect of increasing the potential for absorption of massive losses. They could also reduce the costs of reinsurance as well as long-term costs of capital. For investors, a limited correlation with ordinary capital markets could be an argument for the ILS' market growth to pick up again in the long term.   Further information is available on the [CEIOPS](http://www.ceiops.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.22 IOSCO report on minority shareholder protection**   On 25 June 2009, the Technical Committee of the International Organization of Securities Commissions (IOSCO) published a report titled "Protection of Minority Shareholders in Listed Issuers". The report was produced by an IOSCO Task Force. The Task Force was composed of eighteen member jurisdictions: Australia, Brazil, Canada, Germany, Hong Kong, Israel, Italy, Japan, Mexico, the Netherlands, Poland, Portugal, Spain, Switzerland, Thailand, Turkey, the United Kingdom and the United States of America. The report is a summary of the information gathered by the Task Force, based on the responses provided by the eighteen jurisdictions that completed a questionnaire prepared by the Task Force.    In the report, the OECD Principles and Methodology on Corporate Governance were used as a reference point for framing the responses to the questionnaire across jurisdictions. The fact-finding exercise conducted by the Task Force to survey the protections afforded to minority shareholders in listed issuers provided insight into the corporate governance regimes of the eighteen participating countries. The main conclusion of the report is that although laws and practices vary across jurisdictions and continue to evolve, a robust corporate governance framework that provides protections to minority shareholders will generally incorporate measures relating to the transparency of corporate ownership and governance structures, the accountability of boards and management to shareholders and specific rights and protections granted to minority shareholders in specific circumstances.   The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD295.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.23 IOSCO publishes recommendations in response to the financial crisis in emerging markets**   On 24 June 2009, the International Organization of Securities Commissions (IOSCO) Emerging Markets Committee (EMC) published a consultation report titled 'Impact on and Responses of Emerging Markets to the Financial Crisis'.   The conclusions of the Report, which was prepared by the EMC Chairman's Crisis Task Force (Task Force), are drawn from the results of a survey of EMC jurisdictions which assessed the impact of the financial crisis on members' markets and their regulatory responses. It also includes recommendations designed to address current vulnerabilities in EMC members' jurisdictions and provide the basis for future sound regulatory approaches.    The Report provides an overview of the experiences of EMC members in responding to the financial crisis, given their different levels of development and the degree of impact of the crisis on their markets. The Report identifies the key regulatory and supervisory challenges facing EMC securities regulators in the current environment and sets out recommendations to address these challenges.  Further work and investigation by the Task Force will be required in a number of areas to form a more complete picture of the impact of the ongoing crisis. This will underpin the development of best practices and standards for EMC regulators.   **Recommendations**  The Report makes the following recommendations for securities regulators to follow in addressing the effects of the crisis:    **(a) Ensure regulatory frameworks conform to international principles**  Program such as those conducted by the World Bank and International Monetary Fund can assist in assessing the alignment of national regulatory frameworks against these principles;    **(b)  Enhance capacity and review approach to regulation**  Recent events have highlighted problems of regulatory governance and of operational risk in the supervisory processes of national regulators;    **(c) Promote greater inclusion of emerging market authorities on regulatory matters**   Emerging Market perspectives must be effectively considered in all aspects of international policy development ranging from standard-setting to global supervisory activities;    **(d) Ensure proper sequencing between local market development and international financial integration and liberalization**  Regulators need to ensure adequate financial supervision. For example, higher standards of prudential supervision should precede liberalization;   **(e) Improve prudential regulation and supervision**  Prudential regulation concerning the financial soundness of individual firms needs to be done in conjunction with supervision over how practices at firms may contribute to systemic risk. Rules must also come with appropriate sanctions and responses for deficiencies at critical risk levels; and    **(f) Work closely with industry groups concerning corporate governance and risk management**  Industry groups have an important role in dealing with the underlying causes of the crisis. It is unreasonable to expect supervisors to work alone in dealing with the underlying crisis. What is important is that industry groups work closely and openly with authorities to decide on necessary actions and standards to adopt.    The consultation report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD294.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.24 Improved rules for EU investment funds**   On 22 June 2009, the Council of the European Union adopted a directive on undertakings for collective investment in transferable securities (UCITS) (3605/1/09 REV 1 + 10824/09 ADD1), following a first-reading agreement with the European Parliament.  This directive seeks to update the regulatory framework applicable to European investment funds - undertakings for collective investment in transferable securities (UCITS) - which represent a market of around EUR 5 000 billion.  The aim of the directive is to modernise the regulatory framework applicable to these financial products in order to:   * offer investors a greater choice of product at lower cost through better integration of the internal market; * provide investors with suitable protection through high-quality information and more efficient supervision; and * maintain the competitiveness of European industry by adjusting the regulatory framework to developments in the market.   Against this background, the text is aimed at fulfilling the following objectives:   * improve investor information by creating a standardised summary information document: "key information for investors"; this is an innovative approach aimed at making it easier for the consumer to understand the product: thus a fine balance has to be struck between the document's readability and the amount of information required (too often consumers are deluged with information); the document will be tried out with consumers before it is finalised; * create a genuine European passport for UCITS management companies: a management company located in a Member State will be able to manage funds in other Member States; this should enable substantial economies of scale to be made (up to EUR 700 million per year, according to the Commission) and ensure greater transparency for consumers as to the location of the management company; it should make for greater diversity in the products offered to consumers, which is essential in view of increasing requirements concerning retirement saving; * facilitate cross border marketing of UCITS by simplifying administrative procedures: there will be immediate market access once the authorisation has been granted by the country of origin of the UCITS; the host country will be able to monitor the commercial documents but not to block access to the market; * facilitate cross border mergers of UCITS, which will make it possible to increase the average size of European funds; the information given to investors about the merger will be monitored by the supervisor, who will not authorise the merger unless it is satisfactory; authorisation will be assigned to a single supervisor, in conjunction with the other supervisor concerned, so as to make the procedures more efficient; * facilitate asset pooling by creating a framework for the system of "master-feeder" arrangements whereby a fund invests more than 85% of its assets in another fund; and * strengthen the supervision of UCITS and of the companies that manage them, by means of enhanced cooperation between supervisors: the Directive encourages the exchange of information between supervisors, harmonises the powers of supervisors, and allows for the possibility of on-the-spot investigation, consultation mechanisms and mutual-aid mechanisms for the imposition of penalties, in particular.   The directive is available [here](http://register.consilium.europa.eu/pdf/en/09/st03/st03605-re01.en09.pdf" \t "_new) and [here](http://register.consilium.europa.eu/pdf/en/09/st10/st10824-ad01.en09.pdf" \t "_new).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1)  **1.25 World Bank research on financial crisis responses**    In June 2009, the World Bank published three Crisis Policy Briefs. The following is a summary of the Briefs:  **(a) Dealing with the crisis: Taking stock of the global policy response**    The first in a new series of Crisis Response Policy Briefs, this paper provides an overview of the immediate financial sector policy responses to the financial crisis. While these immediate responses have succeeded in stemming widespread panic, the effort has generally been ad hoc and insufficient. Issues that remain include the resolution of problem assets, the restructuring of troubled, systemically important financial institutions, and the development of credible exit strategies.      **(b) The reform agenda: Charting the future of financial regulation**   The second Crisis Response Policy Brief reviews the crisis-induced shift toward a tighter and more macro-prudential approach to financial regulation. But the reform agenda still needs to address the role of supervisory (rather than regulatory) failures, while the institutional arrangements needed to implement the new framework remain to be worked out. For most emerging economies, the existing reform agenda - developing institutional and legal underpinnings for the financial system and promoting financial access - remains valid.      **(c) Smaller but safer? The shape of financial systems to come**   This third Crisis Response Policy Brief describes how global trends taken for granted in recent decades may reverse over the foreseeable future. In addition, the structure of financial systems, particularly in developed countries, will likely become oriented less toward capital markets and more toward traditional (and simpler) banking activities. The impact on economic growth and overall welfare is likely to be negative.   The Briefs are available on the [World Bank](http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTFINANCIALSECTOR/0,,contentMDK:22130225%7EpagePK:210058%7EpiPK:210062%7EtheSitePK:282885,00.html" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 ASIC seeks feedback on financial requirements and training requirements for margin lending facilities**  The Australian Securities and Investments Commission (ASIC) is seeking public comment regarding the training requirements and financial requirements for firms that offer or advise on margin lending facilities.  Under legislation recently introduced into the Australian Parliament, margin lending will be regulated as a financial product and supervised by ASIC.   On 13 July 2009, ASIC released two policy proposals, 'Margin Lending: Training of Financial Advisers' (CP 108) and 'Margin Lending: Financial Requirements' (CP 109), which outline how ASIC proposes to:   * apply training requirements to financial product advisers who advise on margin lending facilities; and * apply the financial resource requirements to Australian financial services (AFS) licensees who provide financial services in relation to margin lending facility products.   ASIC reminds current holders of an Australian financial services licence that they will need to apply for a variation to their existing licence if they intend to provide a financial service in relation to a margin lending facility.  ASIC's existing policies and regulatory documents on financial services and products, other than the training and financial resources requirements (which are the subject of CP 108 and CP 109 respectively) and Regulatory Guide 165 'Licensing: Internal and External Dispute Resolution' (RG 165) (which is the subject of a consultation paper that will be issued shortly), will generally apply to margin lending facilities and to licensees that provide financial services in relation to a margin lending facility.  The consultation paper titled: 'Margin Lending: Training of Financial Advisers' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP108_Submission_Margin%20lending%20-%20Training%20of%20financial%20advisers.pdf/$file/CP108_Submission_Margin%20lending%20-%20Training%20of%20financial%20advisers.pdf" \t "_new) website.  The consultation paper titled: 'Margin Lending: Financial Requirements' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP109_Submission_Margin%20lending%20-%20Financial%20requirements.pdf/$file/CP109_Submission_Margin%20lending%20-%20Financial%20requirements.pdf" \t "_new) website.    The regulatory guide titled 'Licensing: Internal and External Dispute Resolution' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg165.pdf/$file/rg165.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h2)  **2.2 ASIC consults on licensing requirements for credit licensees**  On 9 July 2009, the Australian Securities and Investments Commission (ASIC) released the first package of policy proposals on the implementation of the proposed National Consumer Credit regime.  The release of the proposals is the first step in an extensive consultation process that ASIC will undertake over the coming months as it prepares to implement the [National Credit Bill](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=107620" \t "Default), which was introduced into the Australian Parliament last month.  To assist industry and consumers in transitioning to the new regime, ASIC will publish a range of policy and guidance papers over the next six months. The licensing related papers will be finalised by November 2009 to allow prospective licensees sufficient time to prepare their applications.  These proposals outline how ASIC will approach the administration of the new general conduct obligations for credit licensees, and compensation and financial resources provisions under the National Credit Bill. This first package comprises two documents:   * Consultation Paper 110 - General conduct obligations for credit licensees attaching draft Regulatory Guide 104 Licensing: General conduct obligations for AFS and credit licensees; and * Consultation Paper 111 - Compensation and financial resources arrangements for credit licensees.   After the legislation has been passed by the Australian Parliament, ASIC will release regulatory guides, taking into account comments received on these consultation papers, describing the licensing obligations and compensation and financial resources requirements for credit licensees.  ASIC will continue to publish information on its website about the new regulatory framework including the legislation, licensing process, general obligations and the timeframe in which the changes will take effect.   Registration is due to commence on 1 November 2009. Subscribers will receive information about the registration process prior to this date. Information about the licensing requirements and process, and more general information about the implementation of the credit reforms, will also be provided via this subscription service.   Information and subscribe for regular updates are available on the [ASIC](http://www.asic.gov.au/credit" \t "_new) website.   The consultation paper titled 'General conduct obligations for credit licensees attaching draft Regulatory Guide 104 Licensing: General conduct obligations for AFS and credit licensees' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP110.pdf/$file/CP110.pdf" \t "_new) website.  The consultation paper titled 'Compensation and Financial Resources Arrangements for Credit Licensees' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP111_Compensation%20and%20financial%20resources.pdf/$file/CP111_Compensation%20and%20financial%20resources.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h2)  **2.3 Improved access to simple advice for superannuation fund members**  On 9 July 2009, the Australian Securities and Investments Commission (ASIC) released 'Regulatory Guide 200 Advice to super fund members', to enable super fund trustees and financial advisers to give more information and advice to members about the member's existing interest in their super fund.   ASIC has given conditional class order relief from the requirements of section 945A of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) where licensed super fund trustees give personal advice to members about their existing interest in a fund on certain limited topics.  The Regulatory Guide confirms that personal advice given under section 945A is scalable and that the concepts can be applied outside of the intra-fund context. This provides assurance to the financial planning industry, including outsourced financial advice providers of super fund trustees, that they are able to provide scaled advice within the boundaries of the current law.   The Regulatory Guide is supplemented by practical examples illustrating how super fund trustees and financial advisers can provide factual information and advice to members on issues like investment options, contributions, insurance and financial hardship.  **(a) What does the regulatory guide do?**  The Regulatory Guide 200 Advice to super fund members:   * discusses the conditional class order relief in CO 09/210 ASIC has given to licensed super fund trustees; * provides guidance on the boundaries between factual information, general advice and personal advice when super fund trustees and financial advisers (including outsourced providers) communicate with members about their existing interest in a super fund; and * describes how factual information and advice can be given to super fund members using a variety of delivery methods and channels.   **(b) Scope of relief and guidance**  ASIC's Regulatory Guide and Class Order [CO 09/210] deal specifically with advice about a member's existing interest in a super fund. Class Order [CO 09/210] applies only to super fund trustees or their authorised representatives. The guidance and relief applies in certain circumstances, and does not cover more complex personal advice about super, including switching, or retirement planning advice.   The relief applies to all super funds (other than self-managed super funds), but to rely on the relief, super fund trustees will need an Australian financial services licence with a personal advice authorisation. Those super fund trustees who do not meet the requirements of the relief must comply with section 945A when providing personal advice.  The regulatory guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RG200.pdf/$file/RG200.pdf" \t "_new) website.  The class order is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co09-210.pdf/$file/co09-210.pdf" \t "_new) website.   The explanatory statement is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ES-co09-210.pdf/$file/ES-co09-210.pdf" \t "_new) website.  The regulation impact statement is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/RIS-co-09-210.pdf/$file/RIS-co-09-210.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h2)  **2.4 Improving disclosure of securities lending**  On 3 July 2009, the Australian Securities and Investments Commission (ASIC) released consultation on guidance on disclosure of substantial holdings arising from securities lending or prime broking.   The consultation paper, 'Securities Lending and Substantial Holding Disclosure', seeks to improve disclosure of substantial holdings in practice and makes it clear that securities lending transactions and prime broking arrangements need to be taken into account in calculating a substantial holding.  Securities lending describes a market transaction where securities are transferred from one party (the owner or lender) to another party (the borrower). The borrower is obliged to return the securities to the lender on demand or at the end of the loan term.   Prime broking describes a package of services offered by an investment bank to its clients, with the services typically comprising custodial, execution, securities lending and financing.  The substantial holding provisions in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) are important for ensuring an efficient, competitive and informed market in quoted securities. A person must lodge a substantial holding notice when its relevant interests, together with the relevant interests of its associates, increase to 5 per cent or more of a listed entity or that interest changes by 1 per cent or more. The person must also lodge a notice when its interest drops below 5 per cent again. These obligations apply to parties that lend or borrow securities. Prime brokers may also need to provide a notice where they are entitled to borrow securities from their clients as part of the prime broking arrangement.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp107.pdf/$file/cp107.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h2)  **2.5 ASIC review of 30 June 2009 financial reports**  On 25 June 2009, the Australian Securities and Investments Commission (ASIC) highlighted a number of areas on which company Boards and those responsible for the preparation of financial reports should focus in the upcoming reporting period.  These issues are informed by ASIC's recent review of the full-year, and 31 December 2008 half-year, financial reports of over 100 listed entities, and ASIC's ongoing monitoring of market conditions.   ASIC also announced that its upcoming review will cover the 30 June 2009 financial reports of about 350 listed entities and unlisted entities with large numbers of users.  The following information summarises the key findings of ASIC's recent review and provides further guidance for the upcoming reporting period:  **(a) Going concern**  ASX reviews of half-year reports showed that the audit reports with emphasis of matter paragraphs or qualifications on going concern increased from 130 at 31 December 2007 to 407 at 31 December 2008.  Directors should continue to assess the appropriateness of the going concern assumption in preparing financial reports, particularly in regard to reduced liquidity and ability to refinance debt or raise new funds, and compliance with lending covenants.   The market should be kept informed where the ability of a disclosing entity to continue as a going concern is subject to negotiations with financiers.  Recoverability of deferred tax assets should be reviewed when going concern is in doubt. Where an entity is not a going concern, assets should be shown at realisable values less costs to sell.  **(b) Asset impairment**  From the financial reports reviewed, the write down of goodwill and indefinite life intangibles in the six months to 31 December 2008 averaged 5.8 per cent of the total value compared to less than 1 per cent for the 12 months to 30 June 2008.  As further write downs may be expected at 30 June 2009, directors should focus on asset values, particularly for more recently acquired assets.  ASIC's review found that some entities had not followed methods required by accounting standards for impairment testing, or used cash flow information or discount rates that did not appear reasonable having regard to historical cash flows, market information and future expectations. In view of this, directors should consider whether there is appropriate 'in-house' expertise to perform impairment calculations and apply requirements of the standards.  Assets should be allocated to cash generating units at the lowest levels to ensure that cash flows from one group of assets are not used to support the value of other assets. Cash generating units should not be larger than primary or secondary segments used for segment reporting. Further, goodwill should be measured at the lowest level of units or groups of units at which goodwill is monitored internally.  Cash flows or discount rates may need to be adjusted for risks and uncertainties. Discount rates and cash flows should reflect consistent price change assumptions. Value in use and fair value less costs to sell calculations should be compared to those, and only those assets and liabilities supported by the cash flows used.  Disclosure of key assumptions for value in use calculations, such as discount rates and growth rates, explanations of forecast periods beyond five years, and sensitivity analysis, are important for user confidence in reported asset values.   Although not mandatory until 31 December 2009, entities should disclose discount rates, growth rates and forecast periods for a cash flow projection used in determining fair value less costs to sell.  **(c) Fair value determination**  Assets held at fair values include financial assets and investment properties. Fair values less costs to sell may also be relevant in impairment testing of assets held at amortised cost.  Based on financial reports reviewed by ASIC, unrealised losses on investment property carried at fair value was about six per cent of the total asset value over six months. Further write downs may be expected at 30 June 2009 and regard should be given to the higher yields that may be expected from assets to cover risk, as well as impacts on rents, rental incentives and vacancy rates  Careful consideration should also be given to whether assets are traded in active markets. Most ASX-listed securities are actively traded, in which case, quoted prices should be used. Where markets are inactive, any valuation models should make maximum use of market inputs, model changes should be appropriate, and models used for actual transactions should be applied for financial reporting purposes. Key assumptions should be disclosed.   Available-for-sale financial instruments are valued at fair value. Movements in value are taken to a reserve, except that an impairment loss expense is recognised for the difference between cost and fair value where there is a 'significant or prolonged decline' in value. This backwards-looking test applies to each security and it is irrelevant whether those losses may reverse in the future. ASIC expects many ASX-listed stocks to have either significant or prolonged declines in value against cost for the year ending 30 June 2009.  Fair values of investment properties must reflect current market conditions - obtaining, or refreshing, external valuations should be considered. The best evidence of fair value is current prices in an active market for property in the same location and condition with similar lease and other contracts. Without an active market, adjusted prices in other active markets, similar recent sales adjusted for changed economic conditions, and discounted cash flows that reflect any uncertainties are used.  ASIC's review showed some property trusts did not disclose key valuation assumptions, included a narrative description, or referred to a separate unaudited document. The full year financial report must contain key assumptions such as capitalisation rates, expected vacancy rates and expected changes in future rentals.  Movements in fair values of assets of sponsored defined benefit superannuation funds can have a material impact on their sponsors and should be reviewed. ASIC reviews showed an average three per cent negative return on plan assets in the 12 months to 31 December 2008.  In regards to both asset impairment calculations and fair value determinations, ASIC reminds auditors to ensure that audit team members have sufficient skills to audit fair values and impairments; if not, they may need to engage their own expert. The scope of an expert's work must be adequate for audit purposes. The reasonableness of significant assumptions should be evaluated individually and as a whole, as well as the adequacy of evidence obtained and consistency with other audit evidence. Where there is significant uncertainty regarding values, a modified report may need to be considered.  **(d) Off balance sheet arrangements**  Directors should reassess the risks and benefits associated with any off-balance sheet arrangements, particularly in view of changed economic circumstances and possible future adverse conditions. The substance of arrangements involving special purpose vehicles, derecognised financial assets and liabilities, and lease arrangements should be carefully reviewed. The nature and scale of any off balance sheet arrangements should be disclosed, including an explanation of why they aren't on balance sheet.  Consolidation should be considered where the entity has an ownership interest close to 50 per cent and other interests are diversely held.  **(e) Financial instrument disclosures**  The adequacy of financial instrument disclosures should be reviewed in the upcoming reporting period. User information needs should be considered and meaningful disclosures made that provide a proper understanding of the business and risks faced, including information that is, or should be, used by management.  ASIC's reviews have identified use of boilerplate disclosures, and disclosures that didn't properly convey the risks associated with an entity's instruments and how those risks are managed. The extent of use of instruments was sometimes unclear. In addition, market risk disclosures and sensitivity analysis were sometimes net of the effect of hedging arrangements and there was no information on notional underlying amounts of derivatives. Hedging arrangements were sometimes poorly disclosed.   Disclosures of security for borrowings and debt maturity profiles, which are particularly important given reduced liquidity and debt refinancing opportunities, were sometimes omitted.  **(f) Other matters**  Further focus areas for those responsible for preparing the financial reports are:   * disclosure of specific information for significant accounting policies having most effect on the financial report, including measurement, and sources of estimation uncertainty; * current/non-current classification of assets and liabilities, with particular regard to agreements and lending covenants; * classifying instruments as debt or equity, having regard to their substance; * revenue recognition, particularly where services are still to be rendered, including contracts with multiple deliverables; * expense deferral, particularly whether definition and recognition criteria for assets are met, including requirements under the intangible assets standard; * related party transaction disclosures; and * treatment and disclosure of events after balance date, including asset value changes.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 ACH Clearing Rules and SFE Clearing Rules - PSNA amendments**   On 13 July 2009 the Australian Securities Exchange (ASX) amended the ACH Clearing Rules and SFECC Clearing Rules to clarify that ACH and SFECC, as approved netting markets, have the benefit of protections provided under the [Payment Systems and Netting Act 1998 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5859" \t "Default) in relation to novated market contracts (known under the Act as "market netting contracts").  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.2 Analysis of corporate governance disclosures**   On 10 July 2009, ASX Markets Supervision (ASXMS) released its latest review of reporting against the ASX Corporate Governance Council's Principles and Recommendations.  ASXMS reviewed the FY08 annual reports of 1,510 listed entities that reported with a 30 June 2009 balance date.  This review showed that listed entities, both companies and trusts, are continuing to improve their corporate governance reporting.   The full report is available on the [ASX](http://www.asx.com.au/about/pdf/mr_100709_corporate_gov_reporting_review.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.3 Monthly and quarterly market activity reports**   On 6 July 2009, ASX released its monthly activity report for June 2009 and its quarterly activity report for the fourth quarter of financial year 2009.    The monthly activity report is available on the [ASX](http://www.asx.com.au/about/pdf/ma_060709_monthly_activity_report.pdf" \t "_new) website.   The quarterly activity report is available on the [ASX](http://www.asx.com.au/about/pdf/asxms_060709_quarterly_june_report.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.4 CFTC approval for new ASX energy products**   On 1 July 2009 and in accordance with US Commodity Futures Trading Commission (CFTC) foreign terminal policy, CFTC gave their approval for SFE to make its new energy contracts available for trading through SYCOM terminals in the United States.  The listing dates for ASX's new energy products are as follows:   * Thermal Coal futures and options on 7 July 2009; * New Zealand Electricity futures and options on 14 July 2009; and * Victorian Wholesale Gas futures on 21 July 2009.   The SFE Operating Rules and determinations have been updated to include the new energy products.    The SFE Notice is available on the [SFE](http://www.sfe.com.au/content/notices/2009/notice2009_120.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.5 Listing Rules Guidance Note 15 - ASX schedule of listing fees**   On 1 July 2009, the updated Listing Rules Guidance Note 15 - ASX Schedule of Listing Fees was released.  In addition to the increased listing fees that were announced in June, the update included:   * Amendments to the initial fee payable by "successor" entities to reflect existing policy. * Clarification of the valuation of securities in the event of a takeover, merger or acquisition. * Introduction of a new fee structure for the quotation of debt securities. * An increase in the annual operating charge for CHESS.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.6 Austraclear - new billing structure and fee level for Issue administration fees**   On 1 July 2009, Austraclear Limited introduced a new Issue Administration Fee level and billing structure.  This includes the following changes:   * Pursuant to Austraclear Regulation 3.2, Issue Administration Fees will be imposed on the Austraclear Participant that is responsible for each issue rather than the issuer itself.  In many cases the Austraclear Participant that is responsible for each issue and the issuer are the same entity.  However, where an issuer appoints a third party agent as its Issuer Representative, the Issuer Representative, not the issuer, will be directly responsible for payment of Issue Administration Fees. * Austraclear Limited will be the billing entity for Issue Administration Fees.  However, Austraclear Services Limited (ACSL), in its capacity as billing agent for Austraclear Limited, will manage the invoicing process and send out appropriately detailed invoices on ACSL letterhead. * Issue Administration Fees increased by between 10 to 11% effective 1 July 2009.  These fees have not been materially increased since January 2006.  This increase supports the ongoing ASX investment in Austraclear System infrastructure.   The Austraclear Notice is available on the [SFE](http://www.sfe.com.au/content/notices/2009/notice2009_089.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.7 Review of trading by directors in 'blackout' period - Q1 2009**   On 1 July 2009, ASX released its latest review of securities trading by directors during the 'blackout' period.  The blackout period is defined as between the close of a listed entity's financial period and the announcement of its half-year or full-year results.  The ASXMS review examined trading by directors during this period for possible contraventions of the publicly disclosed trading policy of the entity concerned.   The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 January and 31 March 2009 (Q1 2009).   Further information is available on the [ASX](http://www.asx.com.au/about/pdf/mr_010709_blackout_trading.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.8 Results of 2008 Australian share ownership study**   On 23 June ASX released the results of the 2008 Australian Share Ownership Study.  The 2008 Study - the 11th in a series dating back to 1991 - was conducted nationally in November and December last year with a randomly selected sample of 2,400 adult Australians.  It highlights the incidence of share ownership among the population and offers insights into the attitudes, knowledge and behaviour of retail share market investors in Australia.  For the first time, the 2008 Study also measured the attitudes and behaviour of lapsed investors - 15% of all Australian adults used to own shares or listed investments but no longer do so, and almost half of these lapsed investors are keen to return to the market at some stage.   Approximately 6.7 million people or 41% of the adult Australian population own shares, either directly (via shares or other listed investments) or indirectly (via unlisted managed funds).  Internationally, Australia ranks among the leading share-owning nations in the world on a per capita basis.  Only the US, with 45% of share ownership among households, ranks higher.   The study is available on the [ASX](http://www.asx.com.au/about/pdf/2008_australian_share_ownership_study.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.9 Standard & Poor's assigns AA- credit rating to ASX Clearing Corporation Limited**   On 17 June 2009, ASX Limited (ASX) advised that its wholly owned subsidiary, ASX Clearing Corporation Limited (ASXCC), has been assigned an AA- credit rating (with stable outlook) by Standard & Poor's.  ASXCC is the intermediate holding company of the ASX group's central counterparty clearing subsidiaries, Australian Clearing House Pty Limited and SFE Clearing Corporation Pty Limited (the CCPs).   Further information is available on the [ASX](http://www.asx.com.au/about/pdf/ma_170609_asxcc_sp_rating.pdf" \t "_new) website.  The assignment of a credit rating to ASXCC and the Notes by Standard & Poor's is a necessary step in preparing for an approach to the US private placement market.    At this time there is no certainty that ASXCC will formally approach investors or proceed with an issue of Notes through the US private placement market. Any decision to proceed with such an issue and the timing of any actual refinancing will be subject to an assessment of the attractiveness of borrowing terms and conditions in that market.   Ratings information is available from the [Standard & Poors](http://www.standardandpoors.com/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3)  **3.10 Austraclear Services Limited - new agency arrangements**   In December 2007, Austraclear Services Limited (ACSL) announced that it had completed an internal review of its agency operations and would provide agency services for new and existing customers going forward.  At that time, ACSL foreshadowed that a number of changes to its operational setup would need to be implemented prior to accepting new business.  In June 2009 ACSL finalised those changes and is currently implementing new arrangements with respect to the provision of agency services with its customers.   ACSL's new Agency Arrangements will be applicable to all existing and new customers, including customers for whom ACSL currently provides "registry only" services.  The new arrangements include:   * Enhanced arrangements for customer relationship management; * Changes to service offering; * New form of agency agreement; and * Revised fees for some services.   The new form of agency agreement is available on the [ASX](http://www.asx.com.au/professionals/austraclear/business_documents.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  |  | | |  | | |  | | --- | | **4.1 Rey Resources Limited - Panel Decision**  On 7 July 2009, the Takeovers Panel accepted an undertaking from BBY Limited and declined to make a declaration of unacceptable circumstances in response to an application dated 22 June 2009 from Gujarat NRE Minerals Limited in relation to the affairs of Rey Resources Limited (see [TP09/49](http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=media_releases/2009/049.htm&pageID=&Year=" \t "_new)).   Gujarat announced a takeover bid for Rey on 3 June 2009. Rey announced a rights issue on 17 June 2009, underwritten by BBY. Gujarat submitted that the rights issue is a frustrating action and is likely to result in BBY obtaining a substantial interest (up to 12%) in Rey.   BBY informed the Panel that it had entered into agreements with sub-underwriters. The undertaking requires BBY to allocate any rights issue shortfall to those sub-underwriters. If BBY acquires or anticipates acquiring voting power in Rey of 5% or more, it is required to reduce its voting power in Rey to less than 5% by:   * using its best endeavours to find other sub-underwriters; and * to the extent that BBY is unsuccessful in finding other sub-underwriters, selling down its excess shares on market in the ordinary course as soon as practicable and in any event within 1 month of being issued the shares.   The Panel considers that the undertaking will address the circumstances complained of in the application and declined to make a declaration of unacceptable circumstances.  Further information is available on the [Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **5.1 A breach of directors' duties arising from a director authorising a bonus payment to himself**   (By Chloe Johns, Mallesons Stephen Jaques)   Diakyne Pty Ltd v Ralph [2009] FCA 721, Federal Court of Australia, Jagot J, 7 July 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fca721.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fca721.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**   Paul Ralph, a director of Diakyne Pty Ltd ("Diakyne") authorised payment of a bonus to himself.  He was subsequently removed from the board of directors.  The court ordered that Mr Ralph was not entitled to the bonus payment because, based on principles of construction, he had not satisfied the conditions that payment of the bonus was subject to.  The court also held that in ordering the payment of the bonus, Mr Ralph had breached his directors' duties.    This decision contains some useful judicial discussion outlining the principles relevant to interpreting the construction of a contract.  It also analyses the situation where a director has an honest belief that he is entitled to a bonus payment, however no reasonable person in the director's position would have authorised the payment of the bonus.   **(b) Facts**   This proceeding involved a bonus payment from the applicant, Diakyne, to the second respondent, Colorado Investments Pty Ltd ("Colorado"), on 30 November 2007.  The first respondent, Mr Ralph, is the sole director of and holder of 99% of the shares in Colorado.  From January 2006 to 4 December 2007 Mr Ralph provided the services of managing director to Diakyne pursuant to a contract between Diakyne and Colorado ("the Colorado contract").   The Colorado contract included a bonus payment clause, whereby in addition to Colorado's management fee, Diakyne would pay the performance bonus if Diakyne's shares were listed on a national stock exchange either via an IPO or a reverse take-over, or there was a trade sale of the Diakyne business, whereupon the consideration in cash or scrip paid was at least 120% of the value of shareholder capital in Diakyne within the first year, or 130% in the second year or 150% in subsequent years post the most recent capital raising by Diakyne.   Mr Ralph negotiated a deal with MediVac Ltd ("MediVac") as a result of which on 28 May 2007 MediVac acquired all of the shares in Diakyne in exchange for freshly issued shares in MediVac.  On 27 June 2007, MediVac and Diakyne shareholders executed a share sale agreement which resulted in Diakyne becoming a wholly owned subsidiary of MediVac and the shareholders in Diakyne becoming the majority shareholders in MediVac.  Additionally, MediVac elected Mr Ralph as its executive chairman.   On 30 November 2007, shortly before an annual general meeting of MediVac's shareholders, it became apparent that Mr Ralph would not be re-elected to the MediVac board, so he resigned from the board on 30 November 2007.   On the same day, Mr Ralph authorised and directed the payment of $110,000 from Diakyne to Colorado in purported satisfaction of the bonus provision in the Colorado contract.  Mr Ralph did not inform the directors of MediVac and Diakyne of this payment.   On 4 December 2007, an extraordinary general meeting of Diakyne's shareholders resolved to remove Mr Ralph as a director of Diakyne.  On 17 December 2007, Diakyne gave notice terminating the Colorado contract, and demanded repayment of the $110,000.   Diakyne claimed that:   * Mr Ralph was not entitled to the bonus payment; * he breached his duties as a director of Diakyne under sections 180(1), 181(1) and 182(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) by authorising and directing the payment of the $110,000; and * due to this breach of his directors' duties, Diakyne was entitled to terminate the Colorado contract without notice.   The respondents claimed that Colorado was entitled to the payment of the bonus, or alternatively, that it was reasonable for Mr Ralph to act as he did.   **(c) Federal Court's decision**   **(i) Was Colorado entitled to the bonus payment?**   Justice Jagot extrapolated the principles relevant to analysing the construction of a contract, in order to determine whether the clause in the Colorado contract had been triggered which would result in the payment of the bonus.    Her Honour concluded that whether Colorado was entitled to the bonus payment depended on whether the pre-conditions in the Colorado contract had been satisfied.     The first pre-condition was satisfied because Diakyne had engaged in a trade sale of the Diakyne business and assets.  The second pre-condition of the percentage requirements depended on the interpretation of the value of the shareholder capital in Diakyne.  Her Honour construed the bonus provision as a whole, and decided that, when analysing the terms of the share sale agreement between MediVac and Diakyne, the percentage requirement of the bonus payment clause was not satisfied.   Her Honour concluded that Colorado was not entitled to any bonus payment in accordance with the Colorado contract.  The provision was to be construed in a manner that recognised that its purpose was to provide Colorado with a reward for a particular service over and above Colorado's standard management fee.   **(ii) Did Mr Ralph breach his directors' duties under sections 180(1), 181(1) and 182(1)?**   In determining whether Mr Ralph breached section 180(1) of the Corporations Act, her Honour concluded that no reasonable person in Mr Ralph's position would have authorised the payment of the bonus on 30 November 2007, despite the existence of an honest belief on his part that the payment was due and owing to Colorado, because:   * Mr Ralph knew that he had a material personal interest in the making of the payment; * Mr Ralph also knew that $110,000 was a significant sum of money given Diakyne's financial situation; * any reasonable person in Mr Ralph's position at that time would have appreciated that Colorado's entitlement to the payment was at least arguable because of the ambiguities within the Colorado contract and the bonus provision; and * any reasonable person in the circumstances would have appreciated that if the payment was not made immediately, the board of Diakyne would be likely to debate or dispute the making of the payment.   Justice Jagot held that these facts combined established a breach of section 180(1) (care and diligence), and that these findings meant that Mr Ralph also breached sections 181(1) (good faith) and 182(1) (improper use of position) of the Corporations Act.  This is because in authorising the bonus payment, Mr Ralph did not act in good faith for the best interests of Diakyne and for a proper purpose and improperly used his position to gain an advantage for Colorado by ensuring that Colorado received the bonus without Diakyne having any opportunity to debate or dispute the making of the payment.   This breach of directors' duties entitled Diakyne to damages or compensation under section 1317H of the Corporations Act, because Diakyne had suffered damage by reason of the contravention.  Justice Jagot ordered that Colorado repay the $110,000 plus interest and costs.   **(iii) Was Diakyne entitled to terminate Mr Ralph's employment without notice?**   By reason of his breach of sections 180(1), 181(1) and 182(1) of the Corporations Act, Mr Ralph failed to provide the services with the standard of care and diligence required under the Colorado contract.  Diakyne was thus entitled to terminate the contract immediately, irrespective of the fact that it became aware of the bonus payment after having resolved to remove Mr Ralph as a director of Diakyne.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.2 The scope of derivative actions under the Corporations Act**  (By Robert Kelly, Mallesons Stephen Jaques)   Oates v Consolidated Capital Services Ltd [2009] NSWCA 183, New South Wales Court of Appeal, Spigelman CJ, Allsop P and Campbell JA, 3 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswca183.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswca183.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 deals with the attempt of a former director of two companies to bring derivative actions on behalf of those companies against current directors who had allegedly transferred business assets and shares from those companies to themselves in breach of duty.  One of the companies was incorporated in Australia, the other, a subsidiary of the Australian company, was incorporated in the UK.  This raised interesting issues as to the construction of sections 236 and 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) relating to derivative actions.   Ultimately, the former director's application for leave to bring a derivative action failed in relation to both companies, for different reasons.  The case determined that in order for leave to be granted under section 237 to bring a derivation action, the proceeding must be "on behalf a company" within the meaning of section 236(1).  The case also stands for the proposition, albeit stated in obiter that proceedings "on behalf of a company" cannot, as a matter of statutory construction, be proceedings brought by an officer or former officer of a holding company to vindicate rights of a subsidiary company.   **(b) Facts**   Oates, Hawkins and Tyne were associated with a business venture that, in the period of 2001 to 2004, was involved in the development and marketing of structured finance products in the United Kingdom and elsewhere in Europe.  The business venture was carried out using a group of three companies - Consolidated Capital Acceptances Pty Ltd ("CCL Ireland"), Consolidated Capital Services Pty Ltd ("CCL Australia") and Consolidated Capital Ltd ("CCL UK").  Oates, Hawkins and Tyne were each directors of the three companies.  Together, Oates, Hawkins and Tyne owned 90 percent of the shares in CCL Ireland.  CCL Ireland held all the shares in CCL Australia, which in turn held all the shares in CCL UK.   In August 2004, Oates resigned as a director of all three companies.  Shortly after, Hawkins and Tyne executed a CCL Reorganisation Deed ("the Deed").  It purported to transfer to Hawkins and Tyne various rights of CCL Australia, CCL UK and CCL Ireland.  The Deed referred to an investment banking business ("the Business") conducted by Oates, Hawkins and Tyne which was, according to the Deed, conducted through the medium of CCL UK.  For the consideration of releasing the companies from loan and guarantee agreements used to fund the Business, the Deed purported to transfer all rights, title and interest to any intellectual property of the Business from the companies to Hawkins and Tyne. It also transferred to Hawkins and Tyne all CCL Ireland's shares in CCL Australia and all CCL Australia's shares in CCL UK.   Oates claimed that, by the Deed, Hawkins and Tyne had appropriated for themselves certain commercial advantages that should have accrued to CCL Australia or CCL UK.  Those commercial advantages were, broadly, of the nature of intellectual property and business commercial opportunities that were the confidential property of CCL Australia and/or CCL UK.  Oates also claimed that the shares had been transferred without adequate consideration.  Oates therefore sought to cause CCL Australia, under section 236 of the Corporations Act, to bring proceedings against Hawkins and Tyne alleging that they had breached fiduciary and other directors' duties owed to CCL Australia.  He also sought to cause CCL Australia, in its capacity as a member of CCL UK, to bring litigation against Hawkins and Tyne alleging breach of fiduciary duties and other directors' duties owed to CCL UK.   **(c) The trial Judge's decision**   At first instance in the Equity Division of the Supreme Court of NSW, Barrett J dismissed Oates' application for leave under section 237.    It was common ground that Oates' standing to bring such an application was based on section 236(1)(a)(ii), which enables a derivative action in the name of a company to be brought by an officer or former officer of a company.  It was also common ground that CCL Australia was a company for the purposes of the section, while CCL UK was not.  Any action to vindicate rights of CCL UK would therefore have to be brought as a derivative action under the general law.  Under the general law, the only person with standing to bring such an action is a member of a corporation.    Barrett J found that, in relation to CCL Australia's rights, there was no serious question to be tried, which under section 237(2)(d) is required for leave to bring a derivative action to be granted.  This was because there was "no real doubt that all business dealings were, on their face, dealings by CCL UK".  His Honour rejected Oates' contention that CCL UK was acting as an agent of CCL Australia, largely because of the unlikelihood of a group of companies choosing to structure themselves in a way that would place valuable business assets in the highest taxing jurisdiction.  Hence, there was no foundation for a finding that CCL Australia owned the commercial advantages allegedly wrongfully diverted from them to Hawkins and Tyne.     Barrett J also found, in relation to CCL UK's rights, that no grant of leave under section 237 could have the effect of placing Mr Oates into a position where he could cause litigation to be brought that sued on breaches of duty owed to CCL UK.     The application was dismissed. Oates appealed to the Court of Appeal.   **(d) The Court of Appeal decision**   **(i) Enforcing the rights of CCL UK**   The Court of Appeal (Campbell JA, Spigelman CJ and Allsop P agreeing) upheld Barrett J's finding that Mr Oates could not cause CCL Australia to bring an action to vindicate any rights of CCL UK.  This was on the basis that:   * As a matter of statutory construction, section 237 is not a freestanding power - it is to be read with section 236.  If leave is to be granted under section 237 to bring proceedings, those proceedings must be proceedings "on behalf of a company" within the meaning of section 236(1). * Oates claimed that an action to enforce CCL UK's rights could be classified as "proceedings on behalf of" CCL Australia if Oates was granted leave under section 237 to bring proceedings on behalf of CCL Australia seeking leave (under the general law) for CCL Australia to bring or continue derivative proceedings for the benefit of CCL UK.  However, there is no requirement under the general law relating to derivative actions that leave has to be obtained before a plaintiff commences such an action.  Therefore, the question of whether such proceedings for leave would be "proceedings on behalf of" CCL Australia did not arise on the facts.  This finding disposed of the appeal in relation to CCL UK's rights. * The court went on to say that even if such leave proceedings were possible, they would not constitute "proceedings on behalf of" CCL Australia.  What Oates was proposing to do was in substance to bring a "double derivative" action - that is, he claimed that, as a former officer of the holding company, he was entitled to bring proceedings on behalf of the subsidiary company. However, as a matter of statutory construction, the term "proceedings on behalf of" a company should not be interpreted to allow officers or former officers of companies this ability.  Mitigating against such a construction was the history of the legislation and the fact that the standing to bring a derivative action of officers and former officers of a company under section 236(1)(a)(ii) has been drafted more narrowly than the standing of members of company under section 236(1)(a)(i) who are also permitted to bring actions on behalf of "a related body corporate [of a company]".  There was also the fact that any benefit from the action would accrue not to CCL Australia, but to CCL UK.   **(ii) Enforcing the rights of CCL Australia**   Campbell JA (Allsop P and Spigelman CJ agreeing) also held that Oates could not bring a derivative action to vindicate rights of CCL Australia.  The reasons for this were that:   * There was no reasonable case to be made that CCL Australia had "ownership" of the products and business opportunities allegedly misappropriated by Hawkins and Tyne.  Oates contended that it was in their capacity as employees of CCL Australia that he, Hawkins and Tyne produced the products and business opportunities which were later provided to CCL UK.  However, given that there was no evidence about the terms upon which services were provided to CCL UK, and that there was a certain implausibility to the prospect of the Business being structured in such a way as to hold valuable tangible assets in the highest taxing jurisdiction (Australia), Barrett J was not in error in finding that there was no serious question to be tried in relation to this issue. * Oates' arguments alleging that there was a serious question to be tried in relation to alleged breaches by Hawkins and Tyne of duties to CCL Australia under sections 181, 182 and 183 of the Corporation Act could not be heard on appeal as they were not argued at trial.  This was a key finding, as these alleged breaches did not rely on any ownership of property by CCL Australia.  They related rather to alleged misuse of position, and information obtained in their positions, at CCL Australia by Hawkins and Tyne.  Campbell JA offered no opinion on whether there would have been a serious question to be tried on these issues had they been raised at first instance. * Although the trial judge erred in failing to consider whether there was a serious question to be tried in relation to the transfer, by the Deed, of shares in CCL UK from CCL Australia to Hawkins and Tyne without sufficient consideration, this did not affect the outcome of the leave application.  This was because principles of reflective loss dictated that any action by CCL Australia for wrongful transfer of its shares in CCL UK would not yield a remedy worth having.  The same document that effected the transfer of the shares also stripped out of CCL UK those assets that had previously given the shares in CCL UK value.  The right to sue concerning the stripping of those assets out of CCL UK could only be asserted by CCL UK itself.  Thus, even if a court were to ultimately decide that there had been a legal wrong done to CCL Australia in relation to the transfer of its shares in CCL UK, the remedy would not have been substantial.  This position was the same at both common law and in equity.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.3 Court's approval for transfer of shares by liquidator nunc pro tunc and special leave granted for distribution of surplus nunc pro tunc**   (By Mark Cessario and Anita Vivekananda, Corrs Chambers Westgarth)   In the matter of Klaus Martin Pty Ltd (in liq); Maertin v Klaus Maertin Pty Ltd [2009] NSWSC 618, New South Wales Supreme Court, Austin J, 2 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc618.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc618.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc618.htm" \t "_new)  **(a) Summary**   The liquidator of Klaus Maertin Pty Ltd ("the company") sought orders under sections 468(1) and 488(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act"). Whilst a number of orders were sought, relevantly, the liquidator applied for orders:   * approving his registration of the transfer of shares in the company nunc pro tunc (for the court to make an order retrospectively) to the majority shareholder's three children; and * granting him special leave to make interim distributions nunc pro tunc.   Austin J was of the view that section 468(1) of the Act is available to be used by the court to validate nunc pro tunc share transfers that were dealt with by the liquidator two years ago.   His Honour held that the failure to obtain special leave under section 488(2) of the Act to make a distribution of a surplus does not limit the court's power to make an interim distribution of funds where there has been a failure to obtain the leave of the court. It is considered a mere defect or irregularity in the exercise of the court's jurisdiction.  **(b) Facts**  At the date of her death, Ida Maertin ("Mrs Maertin"), the mother of Sabine, Helmut and Philip Maertin owned 1806 of the 1808 issued shares in the company. Sabine and Helmut owned one share each and were directors with their mother. Mrs Maertin made a will whereby her ordinary shareholding would be distributed equally to her three children in their capacities as trustees for their respective family trusts.    A dispute subsequently arose between Philip on the one hand, and Sabine and Helmut on the other, which led to the court making orders for the winding up of the company and the appointment of a liquidator. The company was solvent at this time. The liquidator realised the company's real and intellectual property which resulted in funds of $13.5 million.    After the appointment of the liquidator, the executor of Mrs Maertin's estate forwarded to him signed forms transferring Mrs Maertin's shares in the company to Sabine, Helmut and Philip.     On several occasions, the liquidator advanced loans to Phillip, Helmut and Sabine, for $4.5 million. The loans were made as liquidator's loans in accordance with section 109NA of the [Income Tax Assessment Act 1936 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "Default) ("ITAA").    On 27 June 2008, some of the loans were repaid by the liquidator making a book entry in the financial records of the company and making a distribution to the members of the same amount, as a first and interim dividend in the liquidation.     Amongst other orders, the liquidator applied for orders from the court:   * approving nunc pro tunc, his registration of the transfer of 1806 ordinary shares in the company to Mrs Maertin's three children; and * granting him special leave, nunc pro tunc, to make an interim distribution to the shareholders as at 27 June 2008 of surplus funds in the liquidation of the Company.   **(c) Decision**   **(i) Approval of transfer of shares**   Prima facie, the liquidator had the constitutional power to deal with the share transfers because section 471(1A)(d) of the Act enables the court to grant an order that the liquidator exercise the relevant functions of the officers of the company (as such a power is usually exercised by the directors of the company).    However, section 468(1) of the Act (which has now been amended), provided that ". any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court is, unless the court otherwise orders, void".   Therefore, unless the court had power to make an order approving the transfers retrospectively, and in the exercise of its discretion made the order, the transfer of the shares would be void.  Austin J concluded that the court did have such power because:   * the language of the statute suggests that the court has power to exercise its power with respect to the transfer of shares "made" after the commencement of the winding up; * it would be inconvenient if the court's power could not be used to retrospectively approve the disposition of property.  This was because a company could continue to trade in good faith after the presentation of a winding up application and during that time, make payment for goods purchased by the company; and * if (as was suggested in some English cases and in commentaries) one of the reasons to make a post-winding up transfer of shares void was to prevent members from avoiding liability by transferring their shares, the court's ability to retrospectively use its power to validate such transfers would enhance the legislative policy of section 468(1) by contributing to certainty in cases where avoidance of liability cannot be an issue.   In making the retrospective order Austin J noted that the court should not make an order under section 468(1) unless it is satisfied that the order serves either the interest of the company or its creditors. On the facts, his Honour held that no one could have potentially been prejudiced as the winding up was nearing an end, the three transferees were identified as the only contributories of the company and the executor did not object to the transfer.  **(ii) Special leave to make distributions of 27 June 2008**   Section 488(2) of the Act provides that the "liquidator may distribute a surplus only with the court's special leave".  The liquidator failed to seek the court's leave before making the 27 June 2008 distribution, but Austin J accepted the liquidator's innocent explanation for that failure.   The question arose whether the court could grant special leave under section 488(2) nunc pro tunc.   As to the issue of "special leave", his Honour referred to Re DS Millard & Son Pty Ltd (1997) 24 ACSR 71, in which Young J said that "special leave" merely meant that a special application needed to be made to the court, rather than being dealt with as part and parcel of some other administrative procedure.   Austin J followed Emanuele v Australian Securities Commission (1997) 188 CLR 114 and held that where the distribution has been made without leave, this amounts to a mere defect or irregularity in the distribution. This may give an aggrieved party the right to apply to the court to set the distribution aside, as well as tracing and other rights, but the distribution is not void. Hence, the defect or irregularity of failing to obtain special leave before making a distribution of surplus assets can be cured by granting leave nunc pro tunc.    Austin J was of the view that the court should exercise its power to make an order nunc pro tunc under section 488(2) with caution where it prejudices the rights of third parties. However, in this case, the only rights that would be affected were those of the contributories who received the distribution in pro rata shares at their express request and therefore there was no prejudice to third parties such as creditors.    His Honour therefore concluded that it was appropriate for the court to exercise its power to grant special leave nunc pro tunc with respect to the distribution on 27 June 2008.    An important consideration that his Honour took into account in making that order was that the 27 June 2008 distribution was an interim dividend, capable of being adjusted, if necessary, in the final distribution.  Austin J doubted that he would have been prepared to grant special leave nunc pro tunc for a final distribution.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.4 A breach of duty owed to a company gives rise to a corresponding liability to account to the company only**   (By Ben Petrie, Clayton Utz)   Visnic v Sywak [2009] NSWCA 173, New South Wales Court of Appeal, Spigelman CJ, Campbell JA and Macfarlan JA, 1 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswca173.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswca173.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**   There must be a "sufficient connection" between a breach of fiduciary duty and any profit received before the profit is recoverable.   Where a company officer breaches duties owing to the company, and consequently profits only from that breach, any action for an account of profits is prima facie that of the company, notwithstanding any separate breach of duty owed to a shareholder.   **(b) Facts**   The respondent was registered on the ASIC database as the sole shareholder of four corporations. At first instance, Brereton J determined that the respondent held 50% of the shares in those corporations on trust for the benefit of the appellant, and that the respondent had breached his fiduciary duties by depriving the appellant of his shareholdings. Upon making orders for the shares to be legally transferred to the appellant, and for the registers to be amended accordingly, his Honour appointed a liquidator to wind-up each of the deadlocked companies.   At trial, no evidence was adduced that the appellant suffered any loss or damage other than being deprived of his shareholding. There were allegations however that the respondent had breached certain obligations owing to the companies. The appellant subsequently sought an order for an inquiry pursuant to Part 46 of the [Uniform Civil Procedure Rules 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default) for the purposes of quantifying a possible claim for an account of profits. Brereton J denied the appellant's application, noting that, without evidence of any damage arising out of the breach of duties as owed to the appellant, such an inquiry on the motion of the appellant only was unwarranted. His Honour asserted that any breach by the respondent of a duty owed to any of the companies would be a matter for the liquidator to pursue.    The appellant appealed on two points:   * that there was a sufficient connection between the breach of fiduciary duty as owed to the appellant and matters justifying an inquiry, namely, payments made by the respondent out of company accounts to his own superannuation fund; and * that Brereton J erred in stating that the conduct the appellant sought to investigate was in respect of duties owed to the companies.   **(c) Decision**   The appellant submitted that he was entitled to an account of profits because the appropriation of his shares enabled the respondent to control the company and make the impugned payments for his own benefit. Spigelman CJ, with whom Campbell and Macfarlan JJA agreed, noted that what is required to substantiate such a claim is a "sufficient connection (or 'causation') between breach of duty and the profit derived..."  Although there was evidence the respondent had breached his duties to the companies, and thereby unlawfully profited, it was held that the appellant failed to identify a causal link between those profits and the breach of fiduciary duty owed himself.   Spigelman CJ identified instances that may otherwise establish the requisite "sufficient connection" in the scenario posed, such as the payment of a dividend, or where the shareholding had been used to effect a members' voluntary winding-up with a subsequent distribution of assets. However, no dividend payments were made during the relevant period in which the appellant was deprived of his shareholding, nor was there any other evidence that the appellant had lost any profit or opportunity that his shareholding would have otherwise entitled him to.   It was stated by Spigelman CJ that in any determination of what relief is appropriate, it is necessary to focus upon the particular fiduciary relationship which has been established. The Court of Appeal noted that the breach of duty owing to the appellant was essentially a failure to transfer the legal title in the shares on demand. In this regard, his Honour reiterated the point made by Brereton J, that restoring the shares to the appellant was a sufficient remedy in the circumstances. Such relief was moreover within the "well developed body of rules" attaching to trust relationships, and that to argue otherwise would involve an "inappropriately high level of abstraction." The appeal accordingly failed on this point and no inquiry was ordered pursuant to Part 46 of the Uniform Civil Procedure Rules 2005.    As to the second ground of the appeal, the Court of Appeal held that, even if Brereton J had erred in taking into account an irrelevant consideration, this was unlikely to have affected the substantive outcome of the decision at first instance. Rather, Spigelman CJ noted Brereton J was correct in citing the reasoning in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, that a shareholder cannot recover damages "merely because the company in which he is interested has suffered damage." That is, any injury suffered by the company does not affect the shares.   Spigelman CJ also suggested in obiter that it would be more appropriate for the appellant to seek relief pursuant to section 233(1)(g) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the oppression remedy), or to seek leave to pursue a derivative action.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.5 Federal Court rejects CEMEX appeal against declaration of unacceptable circumstances by Takeovers Panel**  (By Brad Smorgon, Freehills)   CEMEX Australia Pty Ltd v Takeovers Panel [2009] FCAFC 78, Federal Court of Australia, Full Court, Ryan, Jacobson and Foster JJ, 30 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fcafc78.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fcafc78.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 Full Federal Court rejected an appeal by CEMEX in relation to a declaration of unacceptable circumstances made by the Takeovers Panel under section 657A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Significantly, the court held that the Panel can make orders that payments be made to a group of shareholders, without considering whether any individual shareholder is affected by the unacceptable circumstances. It held that the Panel correctly constructed CEMEX's announcement of its "best and final offer."  In any case, the construction of that statement was a question of fact, not of law.   **(b) Facts**   On 10 April 2007, CEMEX Australia Pty Ltd (CEMEX) made an increased takeover offer for Rinker Group Limited offering consideration of US$15.85 per share.  The announcement of the increased offer included a statement that the offer was "CEMEX's best and final offer, in the absence of a superior proposal." The bidder's statement stated that this amount was subject to reduction by the amount of any dividend.  On 17 April 2007, CEMEX sent a supplementary bidder's statement to the ASX, allowing shareholders to retain the A$0.16 interim dividend (record date 11 December 2006) without a reduction in the US$15.85 offer price.  On 27 April 2007, Rinker announced a A$0.25 per share final dividend with a record date of 8 June 2007.  On 7 May 2007, CEMEX announced an extension of its takeover offer.  The announcement included a statement that Rinker shareholders would be allowed to retain the final dividend even if they accepted CEMEX's offer.  That day, the Rinker share price increased by A$0.34. The Panel held that allowing shareholders to retain the final dividend was an improvement of CEMEX's offer consideration inconsistent with its "best and final" statement.  It ordered that "affected shareholders" (who sold Rinker shares while the market was relevantly misinformed) who lodged a claim form with ASIC be paid A$0.25 for each Rinker share sold between 10 April 2007 and 7 May 2007.   **(c) Decision**  Five grounds of appeal were rejected by the Full Court.  CEMEX submitted that:   * the Panel was bound to consider whether CEMEX contravened section 670A or section 1041H of the Corporations Act 2001.  Failure to do so was a failure to take into account a relevant consideration within the meaning of section 5(1)(e) of the [Administrative Decisions (Judicial Review) Act 1977 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "Default) ('ADJR Act') or was an improper exercise of power within the meaning of section 5(2) of the ADJR Act; * the Panel made an error of law within the meaning of section 5(1)(f) of the ADJR Act in its construction of "best and final offer." CEMEX had reserved the right to not receive the final dividend; * there was no evidence or other material from which the Panel could have been satisfied that the market was misinformed in any relevant way; * the Panel took no steps to satisfy itself and therefore failed to satisfy itself that loss was suffered by individual shareholders; and * the Panel made an impermissible delegation of power to ASIC to determine shareholder compensation claims.   **(i) The Panel was not bound to consider whether CEMEX had contravened section 670A or section 1041H of the Corporations Act for four reasons:**   * The express terms of section 657A(1) of the Corporations Act 2001 state that "the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act." * One or more criteria of section 657A(2)(a), (b) or (c) must be satisfied for the Panel to declare unacceptable circumstances.  Therefore, the Panel may find section 657A(2)(a) or section 657A(2)(b) satisfied without considering section 657A(2)(c). * Matters to which the Panel must have regard are set out in section 657A(3)(a).  These matters do not include section 670 of the Corporations Act 2001 (Cth), which forms part of Chapter 6B, not Chapter 6 (section 657A forms part of Chapter 6). * The Panel must look to commercial, policy and public interest factors in making a declaration of unacceptable circumstances, which requires an "opinion on the part of the Panel": *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542.  This is a factual issue, not a legal issue, and therefore is wider than a dispute about contravention of the Corporations Act 2001 (Cth).   **(ii) CEMEX did not reserve a choice or election to receive the dividend in making its "best and final offer"**  In any case the construction of "best and final offer" was a question of fact. The Panel considered the question as a matter of market practice, not merely a construction of a document or its terms.  Therefore, the question was one of fact, not of law, so was not subject to judicial review: *Collector of Customs v Agfa-Gavaert Ltd* (1996) 186 CLR 389, 395.   CEMEX's bidder's statement did not suggest a choice or election to receive the dividend. Section 8.1(c) of the bidder's statement gave CEMEX a contractual entitlement to dividends declared on Rinker shares.  Section 8.8(e) provided the machinery for CEMEX to receive benefit from that entitlement, not a suggestion that CEMEX could waive its rights to the dividend.  Waiver of an entitlement involves a variation, as recognised by CEMEX in filing a notice of variation.   **(iii) There was evidence upon which the Panel could have been satisfied that the market was misinformed**   An absence of material upon which the decision could be made would be sufficient to make out this ground: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.   The Full Court held the Panel may consider the effect on the market in the hypothetical situation where the market was differently informed. A Citibank advisor to CEMEX gave evidence that Perpetual Group had indicated that it would accept the offer if, amongst other things, it was allowed to retain the dividend.  Acceptances increased significantly after the announcement that shareholders could retain the dividend.  As the decision that the market was misinformed could reasonably be based on this evidence, the Panel's factual findings are immune from judicial review.   **(iv) The remedial order was open to the Panel under section 657D(2)**   In construction of section 657D(2), which sets out the orders that the Panel can make following a declaration of unacceptable circumstances, Stone J (the Judge at first instance) referred to the Explanatory Memoranda of the amendments to that section ([Corporations Amendment (Takeovers) Act 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=95468" \t "Default)).  Stone J found that the Panel could make any order it thought necessary to protect the rights or interests of a person or group of persons affected by unacceptable circumstances.  The Full Court found that this does not deal with CEMEX's submission that no individual shareholder was shown to have suffered financial loss.     Nonetheless, the Full Court held that section 657D(2) is not analogous to a [Trade Practices Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) section 82 claim.  The section confers a power on the Panel to make an order protecting rights, not an evaluation as an arbiter of a class action.  The power is broad, subject to the jurisdictional prerequisite of a declaration of unacceptable circumstances, which was satisfied.  Disgorgement orders are "protective" of shareholders: *Australian Securities and Investments Commission v Yandal Gold Pty Ltd* (1999) 32 ASCR 317, [161]. The Panel's power to protect shareholders had since its inception a power conferred on the court in similar terms to sections 737 and 739 of the Corporations Act 2001 (Cth), which allow for orders such as a curial remedy.   The Full Court distinguished *Glenmore International AG v Takeovers Panel* (2005) 220 ALR 495, because legislative amendments no longer require that the Panel determine whether the rights of any particular shareholder were affected by the unacceptable circumstances.  The Panel considered that a remedial order of $0.25 per Rinker share was "the most logical and best estimate" of the value of the lost opportunity.  The Full Court found that this was reasonable, based on the market response following the 7 May 2007 announcement.  This provided a rational basis for the compensation order made by the Panel. There was a causal link between the unacceptable circumstances and the rights or interests of affected shareholders.   **(v) The Panel did not improperly delegate its powers to make orders to ASIC under section 657D**  The Full Court found that the power delegated by the Panel to ASIC to process claim forms by affected shareholders was not a delegation of the power to determine the appropriate order to protect rights or interests of shareholders, as it was not necessary that ASIC reach the section 657D(2)(a) state of satisfaction in relation to each claim.  While the decision was made by the Panel, ASIC was delegated the mechanical function of determining whether claimants were entitled to be paid in accordance with orders made by the Panel, consistent with the wide powers conferred by section 657D.  Considering the constitution of the Panel and section 11(2)(a) of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default), it cannot be thought that the delegated powers would be exercised by members of the Panel.   Note CEMEX may seek special leave to appeal this decision to the High Court.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.6 Application of the duomatic principle, estoppel and section 1322**  (By Sarah Rogers, Freehills)   Bodikian v Sproule [2009] NSWSC 599, New South Wales Supreme Court, Austin J, 30 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc599.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc599.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The court held that the Duomatic principle allows the court to accept as valid a decision made by the unanimous assent of members, notwithstanding failure to adhere to formal requirements. However, the court held that the doctrine only extends to powers that members constitutionally possess and where members have consented to a specific and identifiable "matter".   The court held that a resolution purportedly passed at a meeting of members, where the persons voting are not in fact shareholders, is not a procedural irregularity that can be automatically cured by section 1322. In addition, a failure by directors to confirm within two months an appointment of a director by the board is not a procedural irregularity that can be automatically cured by section 1322.   **(b) Facts**   SBC Developments Pty Ltd (SBC) was a company formed for the purpose of buying, developing and selling property. The shareholding was divided into three portions, owned respectively by Mr Bodikian, Mr Cassar, and Mr and Mrs Sproule. Those four individuals were also directors.    The company purchased two properties; Ettalong Beach and Pearl Beach. However, Pearl Beach was purchased in the names of Mr and Mrs Sproule only since the directors had been advised that the weak financial position of Mr Bodikian and Mr Cassar may be an obstacle to the company obtaining finance for the purchase of Pearl Beach if they remained directors and shareholders of the company. The relevant ASIC form was lodged noting that Mr Cassar and Mr Bodikian had ceased to be directors and shareholders.   In November 2007, an ASIC form was lodged noting that Mr Cassar and Mr Bodikian had been appointed as directors of SBC and ordinary shares were issued to Mr Cassar and Mr Bodikian, giving each of them one third of the shares (leaving Mr and Mrs Spoule with one third of the shares together).   In April 2009, Mr Cassar gave notice to Mr Bodikian and Mr and Mrs Sproule, as shareholders, that, as a director of SBC, he was convening a meeting of members for the purpose of removing Mr and Mrs Sproule as directors of the company. He and Mr Bodikian attended at the appointed time and place. Mr and Mrs Sproule did not. In the meeting they resolved to remove Mr and Mrs Sproule as directors. They then purported to hold another meeting where they resolved to ratify the legal proceedings and the retainer by SBC of a firm of solicitors.   The defendants submitted that Mr Bodikaian and Mr Cassar were not validly re-appointed to the board of directors of SBC and shares were not validly issued to them. In addition, as Mr Cassar was not a director or shareholder when he purported to convene a meeting of members, the purported meeting was not validly convened and the resolutions purportedly passed at the meeting were invalid. The plaintiff submitted that the defendants are estopped from resiling from their representation that Mr Bodikian and Mr Cassar would be re-appointed as directors and two-thirds shareholders and are estopped from denying that Mr Bodikian and Mr Cassar have been directors and shareholders since November 2007. The plaintiff also submitted that Mr and Mrs Sproule agreed in November 2007 that Mr Bodikian and Mr Cassar be re-appointed as directors and shareholders by informal assent, which was as effective as a resolution by shareholders.   The case is an application for summary disposal of the proceedings.   **(c) Decision**   **(i) Issue**   The court considered whether summary disposal of the claims was appropriate in light of the Duomatic principle, the doctrine of estoppel and section 1322.   **(ii) Reasoning**   The court noted that if there is a real question to be tried, the matter is inappropriate for the entry of summary judgement. The relevant tests include statements such as that the matter is "so obviously untenable that it cannot possibly succeed", "manifestly groundless" or "would involve useless expense" (*General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69 (General Steel)).   **Duomatic principle**   The court held that the Duomatic principle allows the court to accept as valid, notwithstanding failure to adhere to formal requirements, a decision made by the unanimous assent of the members entitled to participate in the decision, whether or not they have actually met together. However, the doctrine does not give the members acting unanimously a power that they do not constitutionally possess. It was held that the Duomatic principle applies where the members unanimously consent to some "matter". The court found that the only relevant matter within the power of shareholders is the matter of determining to waive the pre-emption requirements of section 254D(1) (conferred on shareholders by section 254D(4)). However, the evidence did not suggest that Mr and Mrs Sproule unanimously assented to the exercise of that power. Even if they had exercised the power to waive the pre-emption rights in their capacity as shareholders, and they had exercised their power as directors to appropriate new shares to each of Mr Bodikian and Mr Cassar, there is no evidence that the issue of the shares was then effectuated by entry of the required particulars in the share register of the company (section 231).   The court noted that the matter put to Mr Sproule was that Mr Cassar wanted to re-appoint himself and Mr Bodikian as office holders and members. This was considered to be an expression of his desire, expressed in general terms and with no particularity about how that desire would be given effect. In particular, nothing was said by Mr Cassar about issuing new shares or that the shareholding would be one-third each to Mr Bodikian and Mr Cassar. The court held that the fact that Mr Cassar was so vague about the shareholding proposal indicates that everything he put to Mr Sproule was a proposal for some future implementation rather than a matter for immediate decision. Therefore, applying the General Steel standard, the court held that there was no scope for the application of the Duomatic principle on the facts.   **Estoppel**   The court considered whether estoppel by convention applied in this case. The court found that there was a relationship between the parties, adopted mutually, that Mr Bodikian, Mr Cassar, and Mr and Mrs Sproule, were directors and shareholders (on a one-thirds basis). The court was persuaded by the fact that Mr Bodikian and Mr Cassar were required to co-sign the notice of discharge of mortgage, along with Mr and Mrs Sproule, as directors on behalf of SBC and they were required to be the sole signatories, as directors on behalf of SBC, of the transfer of Ettalong Beach. In addition, the court was persuaded by the fact that expenses of the development of the properties were split in equal one-thirds. Mr Bodikian and Mr Cassar acted to their detriment in relying on the assumption by the contributions they made to expenses and by other work to achieve the sale of Ettalong Beach and the development of Pearl Beach. There was a common intention that they would be one-third shareholders, as well as directors.   The court then considered the application of equitable estoppel. The court held that two assumptions had been made. First, that Mr Bodikian and Mr Cassar would become co-directors and shareholders of one-third each when financing through the company was no longer necessary and, second, that after November 2007, they had become co-directors and one-third shareholders. The court found that the defendants induced the first assumption by what they had said (assurances that when finance was no longer needed the shareholdings would be held on a one-thirds basis) and the second assumption by conduct (causing them to act as directors in signing the transfer and the notice of discharge of mortgage and in requiring them to contribute two-thirds of expenses). Mr Bodikian and Mr Cassar were found to have acted in reliance on the first assumption by contributing work and payments and in reliance on the second assumption by signing the documents as directors and by making financial contributions in one-third shares. The court found that Mr and Mrs Sproule must have known and intended Mr Bodikian and Mr Cassar to contribute as co-venturers on the assumption that they would become directors and one-third shareholders when finance was no longer required and they knew that contributions were in fact made on that basis. The defendants failed to act to avoid that detriment by denying that Mr Bodikian and Mr Cassar were directors and shareholders.    The court held that the plaintiffs had an arguable case based on both estoppel by convention and promissory estoppel. The effect of estoppel (if established at trial) would prevent the defendants from asserting or relying on the invalidity of the resolutions purportedly passed by Mr Bodikian and Mr Cassar as directors and shareholders of SBC.    **Section 1322**   The court held that the meeting irregularities could not be cured under section 1322. First, the purported meeting and the invalidity of the resolutions purportedly passed was not a "procedural irregularity" since the invalidity arose from the fact that Mr Bodikian and Mr Cassar were not shareholders. Therefore, the resolutions purportedly passed were not automatically cured by section 1322(2). The court was not persuaded that the act of purportedly passing the resolutions was of a procedural nature, or that it would be just and equitable to make the order, or that no substantial injustice would likely be caused (section 1322(6)). Therefore, the court was unwilling to make a validating order under section 1322(4). In addition, the court noted that the failure by the directors to confirm within two months an appointment of a director by the board was not a procedural irregularity automatically cured by section 1322(2).   **(iii) Orders**   The notices of motion were dismissed and the court ordered the defendants to pay the plaintiffs' costs of the two notices of motion.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.7 The legal requirements to be met for an order under section 1322(4)(d) to be made**   (By Tom Kearney, Blake Dawson)   Blaze Asset Pty Ltd v Target Energy Ltd [2009] FCA 698, Federal Court of Australia, Barker J, 26 June 2009    The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca698.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca698.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**   Blaze varied a takeover bid it had made for Target, but the form was lodged late at ASIC after ASIC informed them that this would be acceptable. ASIC later informed Blaze the late submission meant the takeover period had expired.  The case provides analysis of section 1322(4)(d) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   **(b) Facts**   On 8 April 2009, Blaze announced on the ASX companies' platform its intention to make a takeover bid for Target.   The bidder's statement (lodged with ASIC and the ASX on 17 April 2009) specified that the offer closed at 5pm (Perth time) on 5 June 2009 unless it was withdrawn or extended.   On 5 June 2009 Blaze purported to increase the consideration offered under the takeover with the relevant supplementary bidder's statement (SBS) (thus extending the date the offer closed). Alexander McHenry, a consultant assisting Blaze, posted the SBS to ASIC by ordinary mail after being told by a representative of the ASIC Customer Call Centre that having lodged the SBS electronically with ASX Blaze had effectively notified ASIC and that he could thus send the SBS by mail.   On 8 June 2009, ASIC received the SBS. On 16 June 2009, ASIC advised the solicitor acting for Blaze that the SBS had been filed late and thus the offer period for the takeover had expired on 5 June 2009, and any subsequent variation of the takeover period was ineffective.   On 18 June 2009, Blaze commenced these proceedings. McHenry said that had he known the SBS needed to be received by ASIC before the close of business on 5 June 2009, he would and easily could have personally lodged the SBS at ASIC's Perth office before the close of business on 5 June 2009, in the same way he had personally lodged other documents to do with the takeover at ASIC's Perth office on earlier occasions.   Until the commencement of the proceedings all parties and the market in general had acted in the belief that the variation was valid. Target had issued statements to its shareholders based on this belief.   Blaze made its claims under section 1322(4)(d). The subsection allows the court to make "an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceedings".   **(c) Decision**   Justice Barker found in favour of Blaze, and set out orders extending the time for lodgement of Blaze's SBS until 8 June 2009 (the first order) and the requirement to lodge a notice of variation with ASIC was extended until 4pm on the day of judgment (26 June 2009) (the second order). Both orders were given under section 1322(4)(d).   **(i) Section 1322(4)(d)**   A two stage test applies to section 1322(4)(d) according to the court. First, the court needs to determine whether, having regard to the circumstances of the case and the general objects of the Corporations Act, it is appropriate to make an order extending a relevant period, or abridging a relevant period. Second, if those circumstances are made out then the court must address the question whether any substantial injustice has been or is likely to be caused to any person by the making of such an order.   In dealing with the first issue, questions of deliberate strategy and inadvertence may be raised for consideration; however, section 1322(4)(d) does not condition the exercise of the court's power on the applicant showing its conduct was due to inadvertence, but such a factor may be considered relevant. To the extent that inadvertence is of itself a relevant consideration to the exercise of the section 1322(4)(d) power, inadvertence generally means not properly attentive.   **(ii) The first order**   According to the court, McHenry had no ulterior purpose or design. He did not set out to deliberately defeat the requirements of the Corporations Act. Blaze was not guilty of undue delay in bringing this proceeding. It is difficult to see what substantial injustice had been caused or was likely to be caused by the first order. The order would simply be maintaining the status quo and ensured the parties and the market would continue to act with the certainty they had assumed to this point.   **(iii) The second order**   Justice Barker distinguished *Kilmory Developments* [2007] NSWC 943. In that case there were discretionary factors against granting relief and substantial injustice would be caused by the relief.   Without the second order any attempt by Blaze to lodge a notice of variation with ASIC like the one it lodged on 11 June 2009 would be ineffectual. Justice Barker had to determine if the court had the power to extend the time for lodging the proposed variation.   His Honour found that it would be an odd thing if the court's power to extend time did not permit it to do so in a case such as this. The second order would merely confirm what the market already understood the position to be.   His Honour found that no substantial injustice had been demonstrated and that it was difficult to discern how any was or could be caused to any person by the second order. Justice Barker imposed conditions under the second order.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.8 Inconsistency between state and federal laws - Duties of a liquidator in a voluntary winding-up**    (By Jodene Chia, DLA Phillips Fox)   Bow Ye Investments Pty Ltd (in liq) v Director of Public Prosecutions [2009] VSCA 149, Supreme Court of Victoria, Court of Appeal, Warren CJ, Buchanan JA and Vickery AJA, 22 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/june/2009vsca149.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/june/2009vsca149.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 was an appeal from a decision of a judge of the Trial Division of the Supreme Court of Victoria, dismissing an application to set aside orders made under the [Confiscation Act 1997(Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=11956" \t "Default) (Confiscation Act).    The threshold question was whether the orders gave an operation to the relevant provisions of the Confiscation Act which altered, impaired or detracted from the operation of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) and brought the former into direct inconsistency with the latter.  If direct inconsistency arose, the Constitution would operate to render the relevant provisions of the Confiscation Act invalid.   The court held that the state law did not alter, impair or detract from the operation of the federal law and no direct inconsistency existed between the two. The two Acts were capable of concurrent operation.   Accordingly, the court dismissed the appeal.   **(b) Facts**   Tat Sang Loo was convicted in the Magistrates' Court of Victoria at Dandenong on charges relating to the illegal sale of abalone in contravention of the [Fisheries Act 1995 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=1963" \t "Default).    On 19 November 1998, shortly after Mr Loo was charged, the County Court of Victoria restrained him and the present appellant Bow Ye Pty Ltd (Bow Ye) pursuant to section 18 of the Confiscation Act from disposing of two properties, one in Oakleigh and one in Melbourne city.   At all material times, Bow Ye, as trustee of the Loo Family Trust, was the registered proprietor of the Oakleigh and city properties. At the date of the restraining order, Mr Loo was the sole director, secretary and shareholder of Bow Ye.   The Director of Public Prosecutions (the Director) applied to the Supreme Court of Victoria for certain orders under the Confiscation Act. In particular, the Director sought an order for a declaration pursuant to section 70 of the Confiscation Act, that the Oakleigh and city properties be available to satisfy a pecuniary penalty order also sought under that Act.   Before this application could be determined, a meeting of creditors voted to place Bow Ye into liquidation with the sole director of Bow Ye (then the son of Mr Loo) holding proxies for all but one of the creditors.   The Director was granted leave by the Supreme Court of Victoria to proceed under section 440F of the then Corporations Law against Mr Loo. This section permitted, with the leave of the court, the enforcement process in relation to property of a company during administration.    In the course of the liquidation of Bow Ye, formal proofs of debt were lodged by five creditors of the company and debts totalling $218,219.03 were admitted by the liquidator.   The Director's application was adjourned and the court ordered that notice of the application be given to the creditors and to the beneficiaries of the Loo Family Trust.   Just prior to the resumption of the hearing of the Director's application, Mr Loo gave Notice of a Constitutional Matter under O 19 of the [Supreme Court (General Civil Procedure) Rules 2005 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=88231" \t "Default) (the Supreme Court Rules) stating that the proceeding involved a matter arising under the Constitution or involved its interpretation within the meaning of section 78B of the [Judiciary Act 1903 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "Default).    The Director's application was ultimately successfully appealed by Mr Loo. The Court of Appeal held that relevant provisions of the Confiscation Act did not prevail over the windup provisions in the Corporations Act. Consequently, the Court of Appeal set aside the orders of the trial judge and dismissed the Director's application.    On 18 July 2005, the Supreme Court of Victoria made orders setting aside restraining orders made on 19 November 1998, and made new orders under the Confiscation Act restraining the disposal of the Oakleigh and city properties and the payment of dividends the liquidator determined to be due to certain creditors. In particular, the court ordered that any dividends or surplus (other than amounts payable to certain government authorities) be paid to State Trustees Limited.   Bow Ye unsuccessfully applied to have the orders of 18 July 2005 set aside to the extent they concerned Bow Ye. Bow Ye was then granted leave to appeal and served a Notice of a Constitutional Matter in accordance with O 19 of the Supreme Court Rules.    The trial judge dismissed the application and held that whilst there was a potential inconsistency between the relevant voluntary winding up provisions of the Corporations Act and the relevant restraining order provisions of the Confiscation Act, there was ultimately no direct inconsistency between the operation of those provisions.    Bow Ye's main grounds of appeal were essentially as follows:   * That there was direct inconsistency between sections 14 and 18 of the Confiscation Act and Ch 5 of the Corporations Act through the operation of the orders made on 18 July 2005. * That there was direct inconsistency between the provisions on the ground that an application for a restraining order was an 'action or other civil proceeding' within the meaning of section 500(2) of the Corporations Act and could therefore be proceeded with or commenced with the leave of the court. * That there was direct inconsistency between the rights of creditors under the Confiscation Act and the Corporations Act.   **(c) Decision**  On the issue of inconsistency, Warren CJ noted two important distinctions between the decision of the Court of Appeal in favour of Mr Loo and the present case.    First, that the earlier order created a charge over the property in the Crown's favour, thereby removing the Oakleigh and city properties from the pool of assets available to the liquidator to meet the needs of the company, whereas the present order appealed by Bow Ye was in relation to dividends to be declared by the liquidator, who was not restrained from paying the monies.    Second, that the relevant pecuniary penalty order was made against Mr Loo and not the company Bow Ye, and therefore the relevant order caused the assets of a company to be used to meet the debts of an individual, forcing the unsecured creditors of Bow Ye to yield to the secured debt of the Crown and effectively changing the order of priority of debts.     Her Honour noted that the Corporations Act does not provide a guarantee that the creditors will in fact receive a dividend and as such held that the state law did not remove or interfere with a right, privilege or immunity conferred by the federal law.    Accordingly, her Honour held that the restraining order did not prevent the liquidator fulfilling his duties under the Corporations Act.   Turning to the test for inconsistency, her Honour noted that the relevant enquiry was whether the state law imposes a greater obligation on the liquidator in discharging the duties imposed by the federal law. If the state law prevented, or 'effectively precluded' the operation of the provision of the federal law, then the state law would be invalid to that extent.   Her Honour further noted that where a state law is found to be invalid by reason of inconsistency, it is rendered invalid by the operation of section 109 of the Constitution, not by the competing federal law.   Warren CJ held that the state law did not come into 'direct collision' with the federal law by imposing an obligation greater than that for which the federal law  provided. Further, the two Acts were capable of concurrent operation.   Her Honour further held that it was possible for debts to be admitted for the purposes of winding up, the restraint to operate in relation to the property and the liquidator to discharge his duties under the Corporations Act, thus avoiding impairing of the provisions of that Act.   Accordingly, her Honour found that none of the grounds of appeal were made out and dismissed the appeal.   Buchanan JA and Vickery AJA agreed with the reasons of Warren CJ.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.9 The general prohibition of commencement of litigation before the end of a takeover period does not preclude the seeking of remedial relief during the takeover period pursuant to s 1325A(2) of the Corporations Act**   (By Michelle Kwan, Blake Dawson)   In the matter of Venturex Resources Limited [2009] FCA 677, Federal Court of Australia, McKerracher J, 18 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca677.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca677.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The applicant, Venturex Resources Limited (Venturex), brought an application for relief by way of remedial order under section 1325A(2) of the [Corporations Act 2001(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) prior to the completion of a takeover bid in which it was involved.   Section 659B of the Act restricts the commencement of any court proceedings prior to the completion of a takeover bid period. However the relief under section 1325A(2) of the Act was granted by the Court as it was held that the specific operation of section 1325A(2) took precedence over the prohibition in section 659B which was general in nature.   Relief sought under section 1325A(2) of the Act will be granted if it would not frustrate the purposes of the takeover provisions of the Act.    **(b) Facts**   The applicant, Venturex, made an off market takeover bid to acquire 100% of the fully paid ordinary shares of CMG Gold Limited (CMG). The directors of CMG unanimously recommended acceptance of the offer and there was accordingly overwhelming acceptance of it by the shareholders of CMG.   Venturex subsequently failed to make an application to the ASX for admission to quotation of the shares within 7 days after commencement of the bid period, which constituted non-compliance with section 625(3) of the Act. After becoming aware of this non-compliance, Venturex immediately informed the ASX and ASIC and applied to the Court to rectify the failure under section 1325A(2) of the Act. Venturex brought the application before the completion of the takeover bid period.    Neither ASIC, the ASX nor CMG objected to the relief sought by way of remedial orders under section 1325A(2) of the Act.    **(c) Decision**   McKerracher J granted the relief under section 1325A(2) of the Act for the following reasons:   * the specific operation of section 1325A(2) of the Act takes precedence over the general prohibition contained in section 659B of the Act; and * the granting of such relief would not frustrate the purpose of the statute.   **(i) The specific operation of section 1325A(2) of the Act takes precedence over the general prohibition contained in section 659B of the Act**   Section 1325A(2) of the Act is a specific provision that allows a Court to make a remedial order to address deficiencies in the context of a takeover bid, namely where an application for admission to quotation of the shares is not made within 7 days after the start of a takeover bid. The commencement of an application for relief under section 1325A(2) of the Act prior to the completion of the bid period conflicts with section 659B of the Act which contains a general prohibition on the commencement of court proceedings in relation to a takeover bid during the bid period.   McKerracher J held that the specific operation of section 1325A(2) of the Act took precedence over section 659B by adopting the principle in *Tower Software Engineering Pty Limited* (2006) 154 FCR 150 that statutory provisions of general application give way to specific provisions in the event of a conflict between the two. In that case Goldberg J held that section 659B of the Act was a general provision and its operation did not preclude the court from considering specific relief under the Act. The case of *Ombudsman v Laughton* (2005) 64 NSWLR 114 lends further support to this principle in which it was stated that "where any conflict arises with the general words of another provision, the very generality of the words . indicates that the legislature is not able to identify every circumstance in which it may apply. [and] is not to have intended to impinge upon its own comprehensive regime of a specific character."    **(ii) The granting of such relief would not frustrate the purpose of the statute.**   McKerracher J stated that the purpose of section 625(3) of the Act is to ensure that investors who receive shares as consideration are not left with unlisted securities in circumstances where they were led to understand that the consideration to be offered to them would be listed on an exchange. If the order under section 1325A(2) were not made, the offers made under the takeover bid would be void. Therefore the granting of the order under section 1325A(2) of the Act would give effect to the purposes of the takeover provisions of the Act.   Further, in a takeover bid where the consideration offered includes securities, a key consideration is whether those accepting the offer will receive the benefit of that which they have accepted. In this case, no shares had yet been issued under the takeover bid and therefore no offeree would suffer any prejudice from granting the relief sought under section 1325A(2) of the Act.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.10 An order modifying the operation of reg 5.3A.07 is authorised by section 447A**   (By Kathryn Finlayson, Minter Ellison)  In the matter of Bosnjak Holdings Pty Ltd; Fexuto Pty Ltd v Lombe [2009] NSWSC 565, New South Wales Supreme Court, Austin J, 18 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc565.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc565.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**   Section 447A(1) permits an order to be made by a court to alter how Part 5.3A is to operate in relation to a particular company in particular circumstances. A modification of the statutory regime established by Part 5A is an order about how Part 5.3A is to operate, for the purposes of section 447A(1).   **(b) Facts**     The third to fifteenth defendants are companies comprising the Westbus Group, which operated private bus services in parts of western and north western Sydney as well as parts of the Hunter Valley in New South Wales. Each of the third to fifteenth defendants was subject to a separate though substantially identical deed of company arrangement executed in or about August 2005.     The deeds provided for the pooling of the available property of each of the companies into a single deed fund for distribution in a specified order of priority.  Additional funds were added to the deed fund by the sale of the assets and undertaking of the Westbus group and related companies and from the settlement of litigation to which one of the defendants was a party.    One proof of debt lodged by the majority shareholder of the third defendant and admitted in full by the deed administrator resulted in proceedings being brought by another shareholder of the third defendant.  The parties agreed to settle the proceedings on confidential terms, a consequence of which was that the administrator was able to pay in full all remaining admitted claims of creditors submitted pursuant to the deeds including the proof of debt the subject of the proceedings.   The administrator's opinion was that when the deeds were fully effectuated, each of the third to fifteenth defendants will be solvent and there will be a surplus of shareholders' equity in the deed fund.   The administrator made application as required by the deeds of company arrangement for an order under section 447A(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) which will have the effect that after ASIC is notified that the deeds have been fully effectuated:   * the companies will automatically pass into members' voluntary winding up without any special resolution of members; and * the applicant and his partner will be appointed liquidators of the companies.   The applicant submitted that the proposed orders would have the effect of dispensing with the formal requirements under Part 5.5 of the Corporations Act in relation to a members' voluntary winding up and avoid the unnecessary delay and costs that would be involved.  **(c) Decision**    Justice Austin ordered that Part 5.3A was to operate in relation to each of the third to fifteenth defendants as if regulation 5.3A.07 applied in a modified way. In particular, his Honour ordered that:   * in regulation 5.3A.07(1)(b), the words 'and the company is to be wound up' be deleted; * in regulation 5.3A.07(2)(b), substitute 'with' for 'without'; * regulation 5.3A.07(3) be deleted; and * an additional provision be inserted appointing the administrator as liquidators.   His Honour cited the High Court's decision in *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 as authority for the proposition that the scope of the court's power to make an order under section 447A(1) permitted an order to be made to alter how Part 5.3A is to operate in relation to a particular company in particular circumstances.  Justice Austin was satisfied that a modification of the statutory regime established by Part 5.3A such as that sought by the applicant was an order about how Part 5.3A is to operate in relation to the third to fifteenth defendants for the purposes of section 447A(1).   In His Honour's view, there was a strong case for the court in the exercise of its discretion to use the power available to it to put the companies immediately and automatically into a members' voluntary winding up, subject to the control of liquidators rather than directors, as soon as the deeds were terminated.  His Honour also relied on section 447A(1) to make consequential orders appointing the administrator and his partner as liquidators as the Corporations Act 2001 (Cth) no longer included a provision deeming the administrator to become liquidator in circumstances in which regulation 5.3A.07 applied.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.11 Deeds of company arrangement:  Buying of debts and unreasonable prejudice for the purposes of section 600A of the Corporations Act**    (By Laura Keily and Annabelle Wilson, Corrs Chambers Westgarth)   Grocon Constructions Pty Ltd v Kimberley Securities Ltd [2009] NSWSC 541, New South Wales Supreme Court, Barrett J, 16 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc541.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc541.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 proceedings were initiated by Grocon Construction Pty Ltd (Grocon) to challenge the adoption of the deed of company arrangement (DOCA) dated 21 April 2009 executed by the first defendant, Kimberley Securities Ltd (Kimberley).     Grocon's challenge was based mainly on sections 600A and 445D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). Ostensibly, Grocon was seeking an order from the court setting aside the resolutions of directors by which the DOCA was adopted on the basis that its adoption prejudiced a class of creditor.     The proceedings were brought against Kimberley (1st Defendant), John Vouris (2nd Defendant), Warren Panzer (3rd Defendant), Lohemi Pty Limited (4th Defendant), Gabriel Michael Lorentz (5th Defendant), Nathan Stoliar (6th Defendant) and Building Insurers' Guarantee Corporation (Supporting Creditor).   The court found that the substantive elements of Grocon's claim were made out.     It found that Kimberley (via related entity Selwan Property Holdings Pty Ltd (Selwan)), bought the debts of creditors and assigned those debts to third parties, in an attempt to control the meetings of creditors which led to adoption of the DOCA.  The effect was to force the creditors who voted against the DOCA (Opposing Creditors) to participate in the Deed Fund and have their debts extinguished, while allowing related party creditors to avoid participation in the Deed Fund and extinguishment of their debts.  It further prevented the Opposing Creditors from calling for Kimberley's winding up.   The court found that the buying of debts by Kimberley/Selwan amounted to a class of equitable fraud and caused the outcome of the creditors meetings to favour the DOCA.  It found further that these actions prejudiced the Opposing Creditors in the sense relevant to section 600A(1)(c).  It therefore ordered the setting aside of the resolution of creditors, termination of the DOCA and winding up of the company.     **(b)  Facts**   Kimberley was a property development company that went into Part 5.3A administration on 19 December 2008.  By resolution of the directors, Mr Vouris and Mr Pantzer (who were also Kimberley Directors) were appointed administrators.   Several creditors' meetings followed.  Relevantly, at a creditors' meeting on 20 March 2009, the administrators expressed the opinion that it would be in the best interests of creditors to accept the proposal for the DOCA contained in a supplementary administrators' report attached to the notice of meeting on the basis that "it may provide for a greater and more certain return to creditors than a winding up of the company".   At a reconvened meeting on 30 March 2009, the following resolution was passed:   "That the company execute a deed of company arrangement as detailed in the administrators' report to the creditors dated 20 March 2009."   Of the 22 creditors who voted on a poll, 17 (accounting for $13,585,530.11) voted in favour of the DOCA (Approving Creditors) and there were five Opposing Creditors (accounting for $5,557,864.89).  As a result, the resolution was carried.     A Deed Fund was established by the "Secured Creditor" which required the deposit of $180,000 on or before 30 June 2009 and $180,000 on or before 30 June 2010.  The "Secured Creditor" was Lohemi Pty Ltd (Lohemi).   Grocon brought proceedings on the basis that, despite the resolution being carried, 11 of the Approving Creditors were related parties of Kimberley within the section 9 Corporations Act definition (thereby related creditors within the meaning of section 600A(3) Corporations Act) and their votes were therefore to be disregarded.  Having disregarded the 11 related creditor votes, there were still six Approving Creditor votes, resulting in a majority in number in favour of the DOCA but a majority in value against it.  Thus, under regulation 5.6.21(4), it would have been open to the chairperson to exercise the casting vote.   The remaining unrelated Approving Creditors were made up of the Creditors who had had debts assigned to them by Selwan (Assignee Creditors).  The Assignee Creditors each appointed a Kimberley/Selwan director as proxy to vote at the creditors' meeting, thereby ensuring the adoption of the DOCA.   The question before the court was whether the prejudice operating against the Opposing Creditors was sufficient to allow the court to make an order under section 600A(2) settling aside the resolution.    To determine whether it was open to it to set aside the resolution, the court focussed on the effect of the purchase and assignment of the debts assigned to the Assignee Creditors.   **(c) Decision**  **(i) Buying of debts**    Each of the Assignee Creditors had been assigned a debt following the purchase of the debt from the original creditor and assignment of it by Selwan to the Assignee Creditor.  Selwan has the same directors and secretary as, and is a related party of, Kimberley.   The court found that the payments by Selwan to the creditors and the assignment of the debts was undertaken in an effort to ensure that the DOCA would be supported at least on the basis of a majority by number.  The court found that Selwan did not take the assignment of the debts itself, despite paying for them, as it was a related party.  If it had taken assignment of the debts, its vote would still have been disregarded on the basis that it is a related creditor and it would not have had the benefit of six seemingly unrelated votes.  The effect of purchasing and assigning the debts to six unrelated creditors was to control the meeting of creditors, at least to the extent that the vote would be in favour of the DOCA on numbers.   The Assignee Creditors were at no disadvantage, as they paid nothing for the assignment of the debt and incurred no financial risk.  Without exception, each unrelated Assignee Creditor had executed a proxy to one of the Kimberley/Selwan directors to vote at the Kimberley creditors' meeting.  While not strictly within the section 9 definition of related entity, the Assignee Creditors were aligned with the directors of Kimberley/Selwan, devoid of interests of their own and were in substance related entities.  The court found that the transactions by which the Assignee Creditors acquired their debts were an "artifice to give an air of arm's length independence to a device by which voting power by any meeting of creditors was put into the hands of the Kimberley directors, with mere nominees being made to appear to possess the voting power" [see paras 50 - 58].  In summary, "the directors and secretary of Kimberley, acting in the corresponding capacities within Selwan, implemented a strategy deliberately aimed at enhancing their changes of controlling, at the head count level, creditor voting that they already controlled at the value level because of the magnitude of the debt".     The court found further that, had all of the supporting votes, whether by related parties or Assignee Creditors, been ignored as required by section 600A(3), there would have been no votes in favour of adopting the DOCA and five votes against it.  The five Opposing Creditors would have been counted as arm's length creditors with substantial debts.    **(ii) Unreasonable prejudice and the matters in section 600A(1)(c)**  In applying section 600A(1)(c), the court likened the actions of the Kimberley/ Selwan directors to a species of equitable fraud.  It found that the passing of the resolution for the adoption of the DOCA entailed clear prejudice to the Opposing Creditors.  The Kimberley directors had exerted actual influence over the outcome of the resolution by masquerading as arm's length parties having "engaged in private and undisclosed dealings with certain creditors.in the lead-up to the Part 5.3A administration for reasons which obviously included . the enhancement of the voting power . at the meetings of creditors which would inevitably be held in the course of the administration" [see paras 77 and 78].  Further prejudice came from the fact that the Deed Fund was not available to related parties.  To this end, the debts of all related entities were to remain unextinguished and continue as undiminished obligations of Kimberley while the debts of the unrelated and Opposing Creditors would, for their aggregate claims exceeding $5.5 million, be confined to participation in the Deed Fund and have their debts extinguished while being prevented from calling for Kimberley to be wound up.     The court then considered whether the identified prejudice inflicted on the Opposing Creditors was "unreasonable" having regard to the matters referred to in section 600A(1)(c)(ii)(A), (B), and (C).  The court noted that generally, the question of unreasonableness boils down to whether the creditors are better off with the deed or with the liquidation.  The court found that it was not really necessary to undertake this objective inquiry, because the Opposing Creditors made it clear by their votes that they preferred winding up and wanted to avoid extinguishment of their debts.  The related Creditors wanted precisely the opposite outcome, because they clearly saw benefits to themselves in standing aside from the scheme of debt extinguishment and Deed Fund participation and would not have caused the DOCA to be adopted had they not seen those benefits.   The court found that if the objective inquiry was needed, there was very little difference between winding up and the DOCA.  In this case, there was negligible difference between the financial outcomes, although the administrators' report which detailed the likely outcomes of a DOCA and winding up did not include relevant information including amounts that might be recovered by a liquidator on account of unfair preferences, insolvent trading and other causes of action available to the liquidator alone.     The court also considered that certain undertakings made by Opportune Pty Ltd (Opportune) that Kimberley would remain a going concern (which may have induced creditors to rely on Kimberley's solvency) and certain actions by Lohemi in repaying Kimberley debts to Alcany Pty Ltd (Alcany) prior to the commencement of the administration (and the assignment of securities to Lohemi by Alcany previously granted to Alcany by Kimberley) would not be investigated if Kimberley adopted the DOCA in the same way as if it were to be wound up.   The court found that, in addition to the other prejudices operating against the Opposing Creditors, it was prejudicial to their interests that the Opportune undertakings and Lohemi debts and securities were to be left unexplored without "the more rigorous and independent scrutiny that a liquidator could bring to bear" [see paras 88 - 102].   Having satisfied itself that the Opposing Creditors were prejudiced for the purposes of section 600A(1)(c), the court set aside the resolution of 30 March 2009 under section 600A(2)(a), terminated the DOCA under section 600A(2)(d) and section 445D(1)(g) (which provides for the court to terminate a DOCA if satisfied that it should be terminated for some other reason) and further ordered that Kimberley should be wound up pursuant to section 600A(2)(a).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.12 When a Chairperson should exercise their casting vote to remove a liquidator and appoint an alternate liquidator**    (By Zsofi Paterson, DLA Phillips Fox)    Brisconnections Management Company Limited, In the matter of Thames Blund Holdings Pty Ltd (In Liquidation) [2009] FCA 626, Federal Court of Australia, Gordon J, 10 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca626.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca626.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**   Brisconnections Management Company Limited (the Applicant) made an application pursuant to sections 503 and 1321 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to have Paul Andrew Burness (First Respondent) and Con Kokkinos (Second Respondent) removed as liquidators of Thames Blund Holdings Pty Ltd (in liquidation) (the Company) and have alternate liquidators appointed.    The central question was whether the First Respondent, as Chairman, should have exercised his casting vote in favour of the Applicant's resolution to replace the Respondents as liquidators and appoint alternate liquidators.    Having regard to all of the circumstances, Gordon J held that the First Respondent should have exercised his casting vote in favour of the resolution so that the removal of the Respondents as liquidators and the appointment of Rodney Slattery as liquidator would have been carried.    **(b) Facts**   The Applicant was a creditor of the Company and had lodged a proof of debt for $12,603,070. The other two creditors were Community Investors Action Pty Ltd (in liquidation) (CIA), who had lodged a proof for $23,387 and DLC Consultants, who had lodged a proof for $1,000.    On 28 April 2009, the First and Second Respondents were appointed as liquidators of the Company following a members' meeting. A meeting of creditors was held on 8 May 2009 to consider the nomination and appointment of alternative liquidators.    The Applicant's solicitor, Mr Critchley, was appointed as the Applicant's proxy and attended the meeting. The First Respondent was appointed Chairman and tabled proxies by CIA and DLC Consultants in his favour.    Mr Critchley had the following resolution put to the meeting: 'That the nominated liquidators be replaced with Richard John Hughes and Timothy Bryce Norman'. (Rodney Slattery was later put forward as alternate liquidator if the Applicant was successful.) There was one vote in favour and two votes against. Mr Critchely called for a poll in respect to the resolution. The Chairman declined to exercise his casting vote, and the motion was declared lost. Mr Critchley made note that the majority creditor by value wished for the Chairman to vote in favour of the resolution.    At the meeting, the Chairman gave three reasons why the current liquidators should be retained:   * The current liquidators were competent to undertake the liquidation. * Messrs Hughes and Norman had disclosed that their firm Deloitte Touche Toumatsu had previously provided professional accounting services to the Applicant, while the current liquidators had no such relationship. * The current liquidators were less expensive than the proposed alternative liquidators.   These were also the reasons given by the Chairman in declining to exercise his casting vote.    Section 21.7.4 of the IPA Code of Professional Practice for Insolvency Practitioners (the Code) titled 'Use of the Casting Vote' provides guidance on when the casting vote should be exercised. Mr Critchley deposed in evidence an exchange between himself and the Chairman in which the Chairman indicated he did have regard to the Code although he did not have a copy the Code at the meeting and would not answer whether he could recall what the Code said.      The Code states that 'the Chairperson must weigh up all relevant factors and act honestly and according to what they believe to be in the best interests of those affected by the vote, and for a proper purpose'. It lists as some of the matters for consideration when exercising a casting vote the following:   * Do the creditors with a majority in value however not in number have an overwhelming interest over those in number? * What opinion, if any, was proffered by the Practitioner in support or opposition of the resolution? * Do any of those creditor(s) voting have a motive that serves their own interests, which may not be in the best interests of all creditors and/or contrary to the purpose and objectives of the appointment?   The Applicant brought the application pursuant to sections 503 and 1321 of the Corporations Act 2001 (Cth). Under section 503, the court may on cause remove a liquidator and appoint another liquidator. Under section 1321, the court may reverse or modify a decision of a liquidator or provisional liquidator and make such orders as it thinks fit.    **(c) Decision**  Gordon J held that having regard to all of the circumstances, the First Respondent should have exercised his casting vote in favour of the resolution.    There were two factors Gordon J relied on in reaching this decision:    **(i) Majority in value**   While there is no presumption in the Code or case law in favour of the majority in value, the exercise of the casting vote is most appropriate in circumstances where a creditor with a majority in value has such an overwhelming interest that it is inappropriate to allow a majority in number who do not have the same monetary interest to carry the vote.    Here, the Applicant accounted for 99.8% of the Company's indebtedness and thus, this was a situation where it was inappropriate for the majority in value not to carry the vote.    **(ii) Indemnity**   The Applicant was willing to provide an indemnity to Mr Slattery but not to the current liquidators. This was a factor that the Chairman should have taken into account in deciding whether to exercise his casting vote. Without an indemnity, it is difficult to see how the Respondents would have been able to undertake the necessary investigations involved in the liquidation.    **(d) Orders**   Gordon J made the following orders:   * that the decision of the First Respondent not to exercise his casting vote be reversed; * that the Respondents be removed as liquidators of the Company and Rodney Slattery be appointed as liquidator; and * there be no order as to costs.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/143%20July%202009.htm%23h5)  **5.13 Conduct of receivers in prolonging a receivership subject to scrutiny**   (By Laura Hawes, Clayton Utz)   Re S & D International (in liq) (rec & mgr apptd) [2009] VSC 225, Supreme Court of Victoria, Robson J, 9 June 2009   The full text of the judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/june/2009vsc225.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/june/2009vsc225.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 Receiver and Manager was appointed over two properties owned by S & D Pty Ltd ("S & D") by the holder of a first registered charge over all of the company's assets and undertaking.   The Receiver sold one of the properties, generating proceeds sufficient to discharge the secured creditor's debt and a surplus.  The Receiver neither accounted to the mortgagor or the holders of subsequent encumbrances in respect of the sale proceeds, nor retired.   Upon application by the Liquidator, the court ordered the Receiver to pay the entire sale proceeds into court, which he did.   The Liquidator subsequently applied to remove the Receiver, for a declaration that he held a lien for his costs incurred in making the first application and for orders to resolve the entitlements of the subsequent encumbrance holders to the sale proceeds.   The court found that the Receiver was not entitled to retain the sale proceeds as he had done and ordered that the Receiver be removed and that he deliver up to S & D the property in respect of which he remained in control.  The court further found that the Liquidator was entitled to a lien over the sale proceeds paid into court (which was limited to his costs incurred in making the application to require the Receiver to pay the sale proceeds into court) and ordered that an inquiry be held into the Receiver's conduct and the conduct of the appointing secured creditor.   **(b) Facts**   S & D was the trustee of a unit trust which carried on an Indian wholesale grocery business.  In 2000, it purchased two properties at Footscray and Hillside ("Properties"), which were mortgaged to the CBA (as first registered mortgagee) as security for a loan ("Mortgage").   In June 2005, the creditors of S & D resolved to wind up the company and appointed Stirling Horne and Peter Vince as Liquidators.  Also in June 2005, Colonel Naresh Malhotra paid out the CBA debt and took over the Mortgage.    On 11 September 2006, Col Malhotra assigned the Mortgage to MIG Property Services Pty Ltd ("MIG").  MIG failed to obtain documents from Col Malhotra to enable MIG to be registered as mortgagee and subsequently commenced litigation against Malhotra to restrain him from discharging the Mortgage and to get a registrable assignment of the security ("MIG Proceedings").  MIG also engaged an accountant, Mr David Mond, to carry out accounting work in relation to the amounts secured by the Mortgage.     On 25 October 2006, MIG appointed Paul Vartelas as Receiver and Manager of the assets and undertaking of S & D under the Mortgage.   In June 2007, a former director of S & D, Mr Dinesh Malhotra, challenged the appointment of Messrs Horne and Vince as Liquidators and obtained a court order to appoint Geoffrey Handberg as Liquidator in their stead.   In August 2007, Mr Vartelas entered into formal possession of the Properties.  At that time, the principal debt secured by the Mortgage was $242,540.38.   On about 19 September 2007, Mr Vartelas sold the Footscray Property at public auction for $1.36 million.  Settlement occurred on 18 October 2007 and, on 19 October 2007, the estate agent accounted to Mr Vartelas and MIG for the deposit.     At the time of the sale of the Footscray Property, both the Footscray and Hillside Properties were subject to a number of subsequent encumbrances. These included a caveat over the Footscray Property by the ANZ Bank claiming an equitable interest on the basis of an unregistered mortgage and mortgage debenture ("ANZ Securities").   Following the sale of the Footscray Property, MIG and Mr Vartelas did not account to S & D or the subsequent encumbrancers for the sale proceeds ("Sale Proceeds"), nor did they treat the Mortgage as satisfied in full.  Mr Vartelas and MIG retained the Sale Proceeds in full and failed to calculate what was owed.   At all times following the sale of the Footscray Property, including at trial, MIG and Mr Vartelas contended that the Mortgage remained unsatisfied and that they were entitled to retain the whole of the Sale Proceeds while they made investigations and inquiries into the merits of the subsequent interest holders.   MIG and Mr Vartelas obtained legal advice to the effect that section 77(3)(d) of the [Transfer of Land Act 1958 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=272" \t "Default) ("Act") (set out below) imposed upon them a duty to clarify the position of the holders of subsequent encumbrances over the Footscray Property before paying the surplus proceeds into court. They argued that they were entitled to the cost and expense of discharging that duty.     Following receipt of that advice, MIG and Mr Vartelas sought the consent of all subsequent interest holders that the ANZ be paid the monies owing to it under its unregistered mortgage.  The ANZ disagreed with this proposal and contended that section 77(3)(d) did not apply to unregistered charges, arguing that the surplus funds ought to be paid into court.   In September 2008, upon application by the Liquidators of S & D, MIG and Mr Vartelas were ordered to pay the Sale Proceeds retained from the sale of the Footscray property into court.    Mr Handberg (Liquidator of S & D) and S & D itself, as Plaintiffs, commenced proceedings seeking orders:   * that the Liquidator had first priority to the Sale Proceeds on the basis of a lien arising out of his efforts to preserve those funds from misuse by MIG and Mr Vartelas; * to resolve the entitlements of the subsequent encumbrance holders to the balance of the Sale Proceeds; * challenging the conduct of MIG and Mr Vartelas in retaining the Sale Proceeds.   At trial, the evidence showed that all bar $456 of the debt owed to MIG was paid on 29 October 2007.  **(c) Decision**   **(i) Retention of money**   MIG and Mr Vartelas argued that they had been entitled and, in fact, required to hold on to the money by section 77(3)(d) of the Act, which provides:   "(3) The purchase money received arising from the sale shall be applied ...   (c) thirdly in payment of moneys owing under or in respect of subsequent mortgages and charges in the order of their respective priorities; (d)  fourthly in payment of the residue (if any) to the mortgagor or into the Supreme Court under the provisions, so far as they are applicable, of section sixty-nine of the [Trustee Act 1958](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=312" \t "Default) and the rules referred to therein, or if the sale is made by a mortgagee and the land is charged with a subsequent annuity or if the sale is made by an annuitant, in payment of the said residue into an account on deposit at interest in an authorised deposit-taking institution within the meaning of the [Banking Act 1959](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "Default) of the Commonwealth in the joint names of the annuitant and the Registrar to satisfy the accruing payments of the charge and subject thereto for the benefit of the parties who are or become entitled to the residue of the deposited money."   MIG and Mr Vartelas argued that:   * section 77(3)(c) of the Act requires the selling mortgagee to pay the subsequent mortgagees whether registered or not; and * they were entitled to deduct from the Sale Proceeds the costs of the MIG Proceedings and the costs associated with engaging Mr Mond, as being costs incurred as mortgagee in protecting the Mortgages ("Costs").   The Liquidators contended that section 77(3)(c) did not apply to unregistered mortgages and that, following satisfaction of the Mortgages, MIG and Mr Vartelas were obliged to account to S & D for the surplus or pay it into court.  The Liquidators further submitted that the MIG receivership should have ended on 19 October 2007, when its Mortgage was satisfied and that MIG and Mr Vartelas were not entitled to any interest, costs, fees or expenses after that date.   The court found that section 77(3) of the Act included unregistered mortgages and charges.     The court noted that, in *Ex parte Australian Co-operative Development Society Limited* (1978) Qld R 395, upon which MIG and Mr Vartelas relied, it was said that the mortgagee may hold surplus money for a reasonable time pending the establishment of any claim which may be made to the monies.  The court held that the judgment merely said that the surplus may be held for a reasonable time while ascertaining whether there is a claim to the surplus and that it was not authority for calculating the surplus or for refusing to pay the money into court where the known claimants to the surplus requested that be done.          The court found that MIG and Mr Vartelas should have discharged the Mortgage on 19 October 2007 and paid the surplus monies into court forthwith.  It found that MIG and Mr Vartelas were not entitled to retain the surplus monies, as they had done, and to insist on resolving the entitlements, priorities and quantum of the subsequent encumbrances when those matters were in issue between the holders of those encumbrances.     The court held that the receivership should have ceased on 19 October 2007 and that MIG and Mr Vartelas should have delivered up the Hillside Property to S & D at that date.    As to the costs sought by MIG and Mr Vartelas, the court found that they were not entitled to any such costs.   Firstly, the costs of obtaining a registrable assignment of the securities arose from MIG's/Mr Vartelas' failure to take reasonable care in taking an assignment of the Mortgages from Col Malhotra which should not be the liability of the Mortgagor.  Secondly, Mr Mond was not entitled to charge for his remuneration for personal services in connection with the Mortgages.  In that regard, the mortgagor's liability extended only to costs, charges or expenses involving actual and genuine expenditure on the part of the mortgagee.   **(ii) Orders against MIG and Receiver**   The court ordered the removal of Mr Vartelas as Receiver under section 434B(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and an inquiry into his performance under section 423(1) of that Act in relation to the amounts and sums that should have been included in the account Mr Vartelas should have rendered to the Liquidator upon the sale of the Footscray Property.    The court held that  a complaint sufficient to raise the jurisdiction of the court to order an inquiry under section 536 need not be instituted by a formal application but could be done orally by Counsel appearing in a case dealing with another issue (applying *Hall v Poolman* (2009) 22 ACSR 139).   The court said that it was apparent that Mr Vartelas had not faithfully performed his functions as Receiver of S & D: he had failed to ascertain what his appointor was owed or to take proper care to ensure he did not prolong the receivership and he had taken inadequate steps to account to those for whom he held the surplus monies on trust.   The court also ordered an inquiry into MIG's conduct as mortgagee-in-possession under section 434 of the Corporations Act jointly with the inquiry into Mr Vartelas' conduct.   **(iii) Liquidator's costs**   The Liquidator argued that he should have a lien in respect of his costs over the Sale Proceeds paid into court. He argued that this was justified pursuant to the "salvage" principle.    The court pointed out that, whilst the Liquidator had not actually realised the fund, which was the work of MIG and Mr Vartelas, he had saved the fund from dissipation by MIG and Mr Vartelas.  The court found that, had the Sale Proceeds not been paid into court, they "would probably have been dissipated and lost by the unauthorised actions of MIG and Mr Vartelas in accessing and applying the moneys to the claimed mortgage debt and expenses."   Accordingly, the court held that the Liquidator was entitled to a lien in respect of the "costs of and incidental to the application taken in this court up until the court order made in September 2008 was complied with, including the liquidator's reasonable remuneration incurred exclusively for that purpose."  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