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| **Bulletin No. 129**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20129%20May%202008.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  |  |

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| **1.1 Survey regarding financial decisions by consumers**Almost one in two Australians believe that financial investments and superannuation are too complicated to understand properly, according to a report from the Australia Institute published on 20 May 2008. A similar proportion regard mobile phone contracts and private health insurance as too complicated.The findings are found in a new Discussion Paper, "Choice Overload: Australians Coping with Financial Decisions", by Institute Research Fellow Josh Fear.The research also revealed that many Australians, particularly older people and those on lower incomes, are uneasy about the increasing complexity of financial decision-making.The report recommends that governments should:* provide consumers with simple, independent information to compare
* superannuation and investment products;
* make financial advice more widely available to people who do not wish to use a commercial financial adviser;
* invest in basic literacy and numeracy; and
* focus on the needs of groups who tend to struggle with financial decisions, such as women, people with lower levels of education and Indigenous people.

The paper is available on [The Australia Institute's](http://www.tai.org.au/%22%20%5Ct%20%22_new) website.etailed Contents**1.2 Proposals to enhance the integrity and quality of the rating process**  On 19 May 20008, the Committee of European Securities Regulators (CESR) published its report titled "CESR's Second report to the European Commission on the compliance of credit rating agencies with the IOSCO Code. The role of credit rating agencies in structured finance" (Ref CESR/08-277). Following the European Commission's additional request for CESR to review several aspects of the rating process regarding structured finance instruments (Ref CESR/07-608), and after analysing the responses from market participants to CESR's Consultation Paper (Ref CESR/08-036), CESR has published its final report to the European Commission including CESR's policy proposal in relation to Credit Rating Agencies (CRAs).  The report includes CESR's proposals to enhance the integrity and quality of the rating process:1. CESR urges the Commission as an immediate step to form an international CRAs standard setting and monitoring body to develop and monitor compliance with international standards in line with the steps taken by IOSCO, using full public transparency and acting in a 'name and shame' capacity to enforce compliance with these standards via market discipline. This body should be formed of senior representatives of the investor, issuer and investment firms' communities and have an international nature. In addition, CRAs should also be part of the body when acting in its standard setting capacity but not when performing its monitoring activity. The members of the body would be appointed in the majority by the international regulatory community and would be accountable to those that appoint them.2. If international regulatory involvement cannot be achieved in the short term, CESR recommends that this body is formed at an EU level. CESR sees itself in a good position to play a key role in the process of regularly assessing whether the body is fulfilling its objectives. To this effect the body should report periodically.3. In the absence of support from market participants or failure of the body to meet the objectives of ensuring the integrity and transparency of ratings, CESR considers that this initiative would not add value and that the supervisory authorities should step in to ensure, probably through regulation, the integrity and quality of the rating process. The report emphasises that this proposal (either with an international dimension or with a European one) should be implemented within a short time period. To that end, CESR encourages the European Commission to prepare a calendar setting deadlines for the different steps to be followed and considers that unjustifiable lack of progress according to the timetable should lead the Commission to shift to the consideration of supervisory oversight structures (step 3). Besides the policy proposal, the report includes an introductory part and the following three additional sections. Section II contains a summary of the main initiatives in the international market in relation to the role of CRAs in the structured finance sector. Section III includes some recommendations (summarised below) in relation to the main areas analysed by CESR:* Transparency: CESR highlights the need for CRAs to take appropriate action on an ongoing basis to ensure that they communicate clearly regarding the characteristics and limitation of the ratings of structured finance products. CESR also believes further information should be provided on critical model assumptions to facilitate a greater understanding by market participants and that ratings should clearly label which methodology and version has been used. Where possible, CESR advocates that this information and information on rating performance should be provided in a standardised, publicly available format to support market participants in reaching their investment decisions.
* Human Resources: CESR urges CRAs to effectively resource themselves to ensure their ratings are, and remain, of a sufficient quality. CESR expects that CRAs improve the disclosure of selective human resources indicators to promote confidence that they are appropriately resourced and to ensure that remuneration structures are appropriate to promote independence and avoid conflicts of interest in the rating process.
* Monitoring of Ratings: CESR stresses the need for CRAs to effectively resource themselves to ensure that their monitoring remains effective and that rating action is taken in a timely manner.
* Conflicts of Interest: CESR acknowledges that a clearer international consensus over acceptable interaction between CRAs and issuers, what constitutes advisory practice and a definition of what constitutes ancillary business would be of benefit to the market. CESR also stresses the need for CRAs to be transparent in the disclosure of the fees they receive from issuers.

Section IV of the report provides an analysis of the changes in the CRA's codes of conduct. It builds on the work included in CESR's first report to the European Commission and contains, in a columnar format, an analysis of the changes on those provisions of the CRAs' codes that CESR identified last year as areas of non-compliance with the IOSCO Code. The conclusion of this analysis has been that, as already mentioned in CESR's first report, the four CRAs' codes comply to a large extent with the IOSCO Code. Some CRAs have implemented a couple of improvements in their respective code of conduct, but there are still areas or provisions where the CRAs' codes could be improved. Although there have been some changes introduced, CESR expected to see a more rigorous approach from CRAs in response to last year's report and, thus, CESR's expectations for improvement have been only partially met by the CRAs.Further information is available on the [CESR](http://www.cesr.eu/popup2.php?id=5050" \t "_new) website.etailed Contents**1.3 Government releases draft personal property securities Bill** On 16 May 2008, the Australian Attorney-General Robert McClelland released a draft of a comprehensive Commonwealth Bill for personal property securities (PPS) to replace over 70 pieces of Commonwealth, State and Territory law. PPS involves taking a security interest in all types of property other than real estate, such as for cars, boats and livestock. The Commonwealth PPS Bill will be underpinned by a national Register so security interests can be searched easily on one online database. A Request for Tender (RFT) to build this national Register is available at: [http://www.tenders.gov.au](http://www.tenders.gov.au/%22%20%5Ct%20%22_new) closing on 27 June 2008. The Bill is available at: [http://www.ag.gov.au/pps](http://www.ag.gov.au/pps%22%20%5Ct%20%22_new) and submissions are invited by 15 August 2008.etailed Contents**1.4 Reforms relating to review of administrative decisions made by APRA** On 16 May 2008, the Senator, Honourable Nick Sherry, Minister for Superannuation and Corporate Law, welcomed the passage of the [Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=100309" \t "Default), which reforms review mechanisms for administrative decisions made by the Australian Prudential Regulation Authority (APRA). The Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008 includes measures to:* Introduce a court-based process for the disqualification of an individual under legislation administered by APRA;
* Streamline APRA's directions powers;
* Remove the need for ministerial consent from certain matters; and
* Expand the availability of merits review for certain decisions.

etailed Contents**1.5 CESR and CEBS publish joint consultation paper on commodities** On 15 May 2008, the Committee of European Securities Regulators (CESR) and the Committee of European Banking Supervisors (CEBS) published a consultation paper (Ref.CP 3L3 08 02/ CESR/08-370) regarding the Joint Call for Technical Advice related to the review under Articles 65(3)(a), (b) and (d) of MiFID and Article 48(2) of the Capital Adequacy Directive (CAD III) issued by the European Commission in December 2007.Following up on previous work, CESR and CEBS have been asked to give advice to the European Commission on certain issues concerning the regulatory treatment of firms that provide investment services in relation to commodity and exotic derivatives. In particular, the views of the Committees were sought on whether the MIFID and CAD treatment of this type of firm continues to support the intended aims of market and prudential regulation. The consultation paper begins with an overview of the EU commodity derivatives markets and a look at products, trading venues and participants. This is followed by analysis of possible market and regulatory failures in commodity derivatives markets which provide a framework for the subsequent discussion of policy issues.The market failure analysis focuses on potential market failures linked to asymmetric information and negative externalities. Like in other financial markets, informational asymmetries can lead to abusive market conduct. In addition, the low levels of transparency in OTC commodity derivatives markets may give rise to concerns. Potential regulatory failures may arise where regulation is not sufficiently adapted to the specificities of the commodity derivatives market or due to different regulatory treatment across the EEA.The two final sections of the consultation paper examine whether the current regulatory framework as set out in the MiFID and the CRD adequately address the issues raised in the market and regulatory failure analyses or whether there is a need for amendments. A number of possible options are discussed.The public consultation aims to gather industry feedback on the conclusions drawn from the market and regulatory failure analyses, and on the options presented for a possible future regime for commodities derivatives markets.  Further information is available on the [CESR](http://www.cesr.eu/%22%20%5Ct%20%22_new) website.etailed Contents**1.6 SEC proposes new way for investors to obtain financial information on companies**On 14 May 2008, the US Securities and Exchange Commission (SEC) voted unanimously to formally propose using new technology to get important information to investors faster, more reliably, and at a lower cost.At the centre of the SEC proposal is "interactive data" computer "tags" similar in function to bar codes used to identify groceries and shipped packages. The interactive data tags uniquely identify individual items in a company's financial statement so they can be easily searched on the Internet, downloaded into spreadsheets, reorganised in databases, and put to any number of other comparative and analytical uses by investors, analysts, and journalists.The proposed rule would require all US companies to provide financial information using interactive data beginning next year for the largest companies, and within three years for all public companies.Since 2005, companies have voluntarily submitted to the SEC financial information in interactive data format. The proposed rules would require companies to provide this information according to a phase-in schedule.The SEC's proposed schedule would require companies using US Generally Accepted Accounting Principles with a worldwide public float over US$5 billion (approximately the 500 largest companies) to make financial disclosures using interactive data formatted in extensible Business Reporting Language (XBRL) for fiscal periods ending in late 2008. If adopted, the first interactive data provided under the new rules would be made public in early 2009. The remaining companies using US GAAP would provide this disclosure over the following two years. Companies using International Financial Reporting Standards as issued by the International Accounting Standards Board would provide this disclosure for fiscal periods ending in late 2010. The disclosure would be provided as additional exhibits to annual and quarterly reports and registration statements. Companies also would be required to post this information on their websites. The required tagged disclosures would include companies' primary financial statements, notes, and financial statement schedules. Initially, companies would tag notes and schedules as blocks of text, and a year later, they would provide tags for the details within the notes and schedules. Further information is available on the [SEC](http://www.sec.gov/spotlight/xbrl.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.7 European Commission issues recommendation to strengthen confidence in auditing** On 13 May 2008, the European Commission issued a recommendation on "external quality assurance for statutory auditors and audit firms auditing public interest entities". It provides guidance to Member States for establishing an independent and effective system of inspections on the basis of the Directive on Statutory Audit. In essence, this recommendation gives more responsibilities to the public oversight bodies, strengthens the independence of inspection teams and enhances transparency on the results of inspections of individual audit firms. The recommendation only deals with inspections of statutory auditors or audit firms auditing public interest entities, since co-operation between Member States is a priority with regard to audits of public interest entities. The main features of the Recommendation:* It recommends an active role of the public oversight authorities in inspections. Professional associations can still assist the public oversight authorities, but should be subject to important safeguards, including accountability to the public oversight authority.
* The recommendation invites Member States to clarify that practitioners from audit firms (peers) should no longer have a leading role in inspections system and inspections teams.
* It also recommends to Member States enhancing transparency on the outcome of the inspections in order to improve accountability of the inspection system to investors, companies and other stakeholders. The transparency reports published by audit firms should contain no misleading information in comparison to the findings of inspections. Major deficiencies in internal controls of audit firms should be disclosed if an audit firm does not address appropriately the recommendations for improving the audit quality.

The recommendation is available on the [Europa](http://ec.europa.eu/internal_market/auditing/communications/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.8 Call to rethink the AGM** Allowing shareholders to delay voting on resolutions put forward at an annual general meeting (AGM) for up to two weeks after the close of the meeting is one of several reforms proposed in a discussion paper on how to make the AGM more meaningful and useful to shareholders. The paper was published on 8 May 2008 by Chartered Secretaries Australia (CSA) and Blake Dawson. Other suggestions in the discussion paper, titled "Rethinking the AGM", include providing different meeting rules for publicly listed companies and unlisted public companies and extending the statutory time frame for holding an AGM.  The paper examines how splitting the reporting, discussion and questioning, that is, the deliberative function, from the voting function at an AGM could genuinely empower shareholders. Submissions are invited on all issues raised in the paper which is available on [CSA's](http://www.CSAust.com/DiscussionPapers%22%20%5Ct%20%22_new) and [Blake Dawson's](http://www.blakedawson.com" \t "_new) websites. The closing date for submissions is 2 July 2008.etailed Contents**1.9 Guide to sustainability reporting**  KPMG and the Group of 100, representing the senior finance officers of Australia's leading enterprises, have developed a good practice guide for companies and organisations engaged in the preparation of sustainability reports. The guide was published on 8 May 2008.The publication, titled "Sustainability Reporting: A guide" provides directors and senior executives with a timely and useful tool when addressing this rapidly evolving area of reporting. Concerns about global warming, atypical weather patterns and the proposed introduction of a national carbon trading scheme and community expectations have combined to make sustainability reporting a mainstream issue. The trend towards ESG (environmental, social, governance) reporting is driven by two key factors:* An increasing recognition of the potential for sustainability related factors to materially affect a company's long term economic performance.
* The need for the business community and individual companies to appropriately respond to issues of sustainable development to meet community expectations.

The guide should not be viewed as a reporting template or blueprint as different companies will have different approaches reflecting the business sectors they are in such as financial services, retailing or resources. However, key principles in the guide can be applied across all organisations.The report is available on the [KPMG](http://www.kpmg.com.au/Default.aspx?TabID=1278&KPMGArticleItemID=3062" \t "_new) website.  etailed Contents**1.10 Review of Australia's consumer policy framework** While Australia's consumer policy framework (including the framework for consumer credit) has considerable strengths, parts of it require an overhaul, according to a report of the Productivity Commission published on 8 May 2008.* The current division of responsibility for the framework between the Australian and State and Territory Governments leads to variable outcomes for consumers, added costs for businesses and a lack of responsiveness in policy making.
* There are gaps and inconsistencies in the policy and enforcement tool kit and weaknesses in redress mechanisms for consumers.
* These problems will make it increasingly difficult to respond to rapidly changing consumer markets, meaning that the associated costs for consumers and the community will continue to grow.

Addressing these problems will have significant direct benefits for consumers. Also, by better engaging and empowering consumers and furthering the development of nationally competitive markets, reform will enhance productivity and innovation. A set of clear objectives and supporting principles is required to anchor the future development of consumer policy. The overarching objective should be to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers can trade fairly and in good faith. A pressing need is to put in place institutional arrangements that are more compatible with the increasingly national nature of Australia's consumer markets and which will deliver more timely and effective policy change than the current regime.In keeping with many of the other key policies governing commerce in Australia, greater responsibility for consumer policy development and enforcement should reside with the Australian Government.  The first step in this process should be the introduction of a single generic consumer law applying across Australia, based on the consumer provisions in the [Trade Practices Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) (TPA), modified to address gaps in its coverage and scope.* The Australian Government, through the Australian Competition and Consumer Commission (ACCC), should be responsible for enforcing the product safety provisions nationally, though possibly with scope for States and Territories to implement, time limited, interim product safety bans.
* The remaining provisions should be jointly enforced by the ACCC and State and Territory consumer regulators, though individual States and Territories should have the option to refer their enforcement powers to the Australian Government.
* The new law should include a provision voiding 'unfair' contract terms that have caused consumer detriment.
* In addition to the enforcement tools currently in the TPA, it should provide for civil pecuniary penalties, banning orders and substantiation and infringement notices.

Responsibility for regulating the provision of consumer credit and related advice by finance brokers and other intermediaries should also be transferred to the Australian Government as soon as practicable, with ASIC as the primary regulator.COAG, in consultation with the Ministerial Council on Consumer Affairs, should oversight a general reform program for industry-specific consumer regulation to:* identify and repeal unnecessary industry-specific consumer regulation, with an initial focus on removing regulations that apply in only one or two jurisdictions;
* identify other areas of specific consumer regulation where divergent requirements and/or lack of policy responsiveness are particularly costly; and
* determine how these costs should be reduced, including explicit consideration of the case for transferring policy and, where appropriate, enforcement responsibilities to the Australian Government.

In addition:* Some particular regulatory requirements for consumer credit, utility services and home building should be modified.
* Consumers' access to remedies where they suffer detriment from breaches of consumer law, should be enhanced by consolidating some ombudsman arrangements; streamlining small claims courts' procedures; making it easier for regulators to bring representative actions; and increasing funding for legal aid and financial counseling services.
* Mandatory disclosure requirements should be improved by more 'layering' of the information provided to consumers and greater testing of its comprehensibility and relevance to them.
* Subject to appropriate governance arrangements, there should be additional public funding for consumer advocacy and for policy related research, including to enable the establishment of a National Consumer Policy Research Centre.

Though only very broad quantification is possible, the Commission states that the reforms could provide a net gain to the community of between $1.5 billion and $4.5 billion a year.The report is available on the [Productivity Commission](http://www.pc.gov.au/inquiry/consumer/docs/finalreport%22%20%5Ct%20%22_new) website.etailed Contents**1.11 Research regarding product disclosure statement** New research conducted by the Wallis Group for the Investment and Financial Services Association has gained a number of useful insights into the effectiveness, language and design of Product Disclosure Statements (PDSs) for financial products. The results of the research were published on 8 May 2008.  IFSA required the research to explore the information needs of consumers and to assess the suitability and relevance of existing PDSs and their role in educating investors about a range of superannuation funds. The research builds on a project which commenced in mid-2007, looking at how people use their superannuation documents. The aim was to identify which information was crucial to an investor's superannuation decision and to explore how PDSs could be shortened. These results showed that:* Investors had a clear preference for PDSs that were 15-20 pages long. At this length they were perceived to be a more manageable and useful document.
* The concept of referring to 'non essential' information was raised on an unprompted basis by the groups. 'Non essential' information includes generic information such as superannuation rules, dispute resolution and information regarding switching funds.
* Top of the preference list was that a shorter PDS include an easy to read contents page, a corporate statement, contact details and key features at a glance.
* Information considered essential by the focus groups includes a simple fee structure; a succinct, easy to understand statement about the investment options; past performance; and a checklist for the reader to tick boxes as they worked through the process. A glossary page and FAQs were also nominated.

Further information is available on the [IFSA](http://www.ifsa.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Research comparing management and employee pay** On 7 May 2008 the Hay Group published a report which analyses data on over 12 million employees to determine the difference between the average pay of management level employees and clerical level employees across 61 countries, and how that gap had changed from 2006 to 2007. Countries were then ranked in order of greatest to smallest pay gap. The pay gap in the US and Western Europe is relatively small compared to the rest of the world, with all of these more established, slower growth economies appearing in the bottom third of the pay gap rankings. Western European pay gaps are relatively stable, with less than 5% change year-on-year. However, the US has moved up the rankings from 50th in 2006 to 43rd place in 2007, representing an 18.4% increase.The report found that the gap between management and clerical employees was most pronounced in emerging economies, where the overwhelming demand for management talent is inflating senior salaries far beyond the local market for more junior roles.The top third of the list is populated with the faster growing developing economies. This trend is particularly true for the BRIC (Brazil, Russia, India and China) economies with China topping the list with a gap of 11.8 followed by the other countries coming in at 10th (Russia), 14th (India) and 17th (Brazil).The report is available on the [Hay Group](http://www.haygroup.com/downloads/ww/Hay_Group_global_pay_gap_press_release_US.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.13 Research on superannuation fund governance** On 8 May 2008, the Australian Prudential Regulation Authority (APRA) released the results of its recent research on the governance practices of APRA-regulated superannuation funds.  This research, part of a broader study of the reasons for differing performance between fund types, has been conducted under the auspices of the Council of Financial Regulators.  The research is published in the latest edition of APRA's Insight. The research, based on a detailed survey of superannuation trustees, found that there was little difference between the Corporate, Public Sector, Industry and Retail sectors in many areas of trustee policies and practices.  In some areas, however, there were statistically significant differences between the sectors, with Retail trustee practice more often different from that of the other sectors.Some of the findings of the research include:* Trustee directors of the large funds in the survey were typically well qualified, experienced and reasonably well trained in their trustee duties.
* Most boards (76 per cent) have both independent audit and regular self-assessment to review compliance with the [Superannuation Industry (Supervision) Act 1993](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default) and other regulations.
* Service providers are widely used in the superannuation industry, with the average fund using more than 13 service providers. Over 60 per cent of Retail directors have one or more associations with service providers, a figure that is double that for directors of Corporate funds and almost three times that for Public Sector or Industry funds.
* Relative to the other trustees, Retail trustees have fewer directors, shorter (but just as frequent) board meetings, and rely more on fund executives to take the initiative on most key decisions. By contrast, trustees in the other three sectors mostly make the decisions with the main input coming either from themselves or from their consultants.
* More than half of all Retail trustee directors are employed by related parties or by the fund itself, and very few are nominated by fund members. By contrast, many Industry, Corporate and Public Sector trustee directors are member-nominated.
* More than half of Corporate, Public Sector and Industry trustee directors are themselves members of their funds. About one in five Retail trustee directors are members of their funds.

The Insight publication is available on the [APRA](http://www.apra.gov.au/Insight%22%20%5Ct%20%22_new) website. etailed Contents**1.14 European Commission takes action to ensure that five Member States implement EU rules regarding company disclosure obligations** On 6 May 2008, the European Commission decided to address reasoned opinions to the Czech Republic, Hungary, the Netherlands and Poland over their failure to implement in national law within the prescribed deadlines the Directive on transparency obligations of listed companies. Additionally, the Commission has decided to bring a case before the European Court of Justice against Italy over its failure to fully implement the Directive setting out disclosure requirements in respect of listed and non-listed companies.  The Directive on transparency obligations of listed companies (Directive 2004/109/EC) requires issuers of securities in regulated markets within the EU to ensure appropriate transparency for investors through a regular flow of information by disclosing periodic and ongoing regulated information and by disseminating such information to the public throughout the EU. Regulated information consists of financial reports, information on major holdings of voting rights and information disclosed pursuant to the Market Abuse Directive. For this, shareholders, or natural persons or legal entities holding voting rights or financial instruments that result in an entitlement to acquire existing shares with voting rights, should also inform issuers of the acquisition of or other changes in major holdings in companies so that the latter are in a position to keep the public informed.  This directive was due to be implemented by 20 January 2007, although the deadline for the implementation of the Commission's implementing measures which supplement this text (Commission Directive 2007/14/EC of 8 March 2007) was 9 March 2008. The Commission is taking action against the four Member States (Czech Republic, Hungary, the Netherlands and Poland) which, as of 9 March 2008, had not yet transposed the directive on transparency obligations of listed companies. The Directive setting out disclosure requirements in respect of certain types of companies (Directive 2003/58/EC) modernised the so-called 1st Company Law Directive (68/151/EEC) notably by facilitating the electronic filing of documents by companies with the business/commercial registries. The Directive also allows interested parties to obtain copies of such documents from the register in electronic form. Member States were required to comply with this Directive by 31 December 2006. The Commission is bringing a case against Italy for failure to fully implement this Directive.  Further information is available on the [Europa](http://ec.europa.eu/community_law/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.15 International Working Group of sovereign wealth funds is established to facilitate work on voluntary principles** On 1 May 2008, the International Working Group of Sovereign Wealth Funds issued the following statement in Washington DC: "From 30 April to 1 May 2008, representatives of Sovereign Wealth Funds (SWFs) met at IMF Headquarters in Washington, DC. The meeting facilitated a useful exchange of views among the SWFs, recipient countries, and representatives from the Organization for Economic Cooperation and Development (OECD) and the European Commission. Participants agreed that SWFs invest on the basis of economic and financial risk and return related considerations. An International Working Group of Sovereign Wealth Funds (IWG) was formally established by the meeting to present by October 2008 a set of SWF principles that properly reflects their investment practices and objectives. The IWG is comprised of representatives from 25 IMF member countries, and is co-chaired by a senior representative of the Abu Dhabi Investment Authority (ADIA) and the Director of the IMF's Monetary and Capital Markets Department who were selected by the participating SWFs. The IWG aims to agree on a common set of voluntary principles for SWFs, drawing on the existing body of principles and practices, to help maintain the free flow of cross-border investment and open and stable financial systems. The creation of the IWG also responds to calls by the International Monetary and Financial Committee (IMFC) in October 2007 and in April 2008. The IWG will conduct working level meetings over the coming months. The IWG will provide SWFs with opportunities to give and receive feedback and will strive to enhance good mutual understanding among its members and other parties. Throughout this effort, the IMF will provide the secretariat to facilitate the group's discussions and meetings".etailed Contents**1.16 Bank of England financial stability report** On 1 May 2008, the Bank of England published its Financial Stability Report. Rising US sub-prime defaults have triggered a broad-based re-pricing of risk and deleveraging in credit markets. An adjustment was needed after the credit boom and was bound to have costs, but it is proving even more prolonged and difficult than anticipated. Prices in some credit markets are now likely to overstate the losses that will ultimately be felt by the financial system and the economy as a whole, as they appear to include large discounts for illiquidity and uncertainty. Conditions should improve as market participants recognise that some assets look cheap relative to credit fundamentals. But with sentiment still weak, the Bank has announced a special scheme to improve the liquidity position of the banking system and to increase confidence in financial markets.This report sets out:* The reasons for the re-pricing of credit risk and deleveraging being so protracted.
* Why market-based estimates of the costs of the crisis are likely to overstate ultimate losses.
* Prospects for financial stability.
* Measures to help contain the length and costs of the turmoil and to prevent its recurrence.

The report 'Financial Stability Report', Issue 23 is available from the [Bank of England](http://www.bankofengland.co.uk/publications/fsr/2008/fsrsum0804.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.17 Joint Forum release of "customer suitability" paper** On 30 April 2008, the Joint Forum released a paper entitled "Customer suitability in the retail sale of financial products and services". The customer suitability report considers how supervisors and regulated firms across the banking, securities and insurance sectors deal with risks posed by the sale of unsuitable retail financial products. The Joint Forum reviewed both the disclosure of information to retail investors and requirements on firms to determine whether recommended investment products are suitable for such investors. The report focuses exclusively on requirements related to retail customers and products with a significant investment component. The Joint Forum evaluated investment-based or investment-linked insurance products, but not those insurance contracts that insure only against risk. The Joint Forum was established in 1996 under the aegis of the Basel Committee on Banking Supervision, IOSCO, and the IAIS to deal with issues common to the banking, securities and insurance sectors, including the supervision of financial conglomerates. The paper is available on the [BIS](http://www.bis.org/publ/joint20.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.18 Average 2007 SOX compliance cost is US$1.7 million** On 30 April 2008, the Financial Executives International (FEI) announced the results of its seventh Sarbanes-Oxley compliance survey, which found that section 404 compliance cost Corporate America less in year four of adoption than in each of the first three years. FEI polled 185 companies to gauge experiences in complying with section 404. The responding companies had average annual revenues of US$4.7 billion. According to the FEI survey, which included 168 "accelerated filers" companies with market capitalisations above US$75 million, total average cost for section 404 compliance was US$1.7 million during fiscal year 2007. While a direct comparison cannot be made from 2006 costs, as the respondent pool varies year to year, the results show a continued decline in compliance costs. The survey also revealed that total audit fees for US accelerated filers averaged US$3.6 million, representing a slight (1.8%) increase from the previous year. **(a) Lowering costs: Fewer internal and non-auditor external hours indicate less time spent on compliance**In the fourth year of section 404 compliance, accelerated filers managed to reduce costs within direct control of their companies, reporting drops in both internal and external people hours, and well as auditor attestation fees.* Companies reported requiring an average of 11,100 people hours internally to comply with section 404 in 2007, representing a decrease of 8.6% from the previous year.
* Companies reported requiring an average of 1,244 external people hours to comply with section 404 in 2007, representing a decrease of 13.7% from the prior year of compliance.
* Auditor attestation fees paid by accelerated filers in 2007 constituted 23.7% of the accelerated filer's total annual audit fees and averaged $846,000, representing a 5.4% decrease from 2006.

**(b) Centralised operations more cost-effective**Similar to the previous year, the survey found that respondents with centralized operations had lower total costs of compliance in 2007 than did those respondents with decentralised operations.* Total average 2007 compliance costs for companies with centralised operations were $1.3 million;
* Total average 2007 compliance costs for companies with decentralised operations were $1.9 million, 30.1 percent higher than for those with centralised operations.

**(c) Some increase in confidence but sentiment still split**In year four of compliance, the survey showed that responding companies have increased confidence in the value of section 404 over last year's respondents.* 50.3% agreed that financial reports are more accurate; up from 46% in 2006.
* 56.0% agreed that financial reports are more reliable, up from 48% in 2006.
* 43.6% agreed that compliance with section 404 has helped prevent or detect fraud; up from 34% in 2006.
* 69.1% agreed that compliance with section 404 has resulted in more investor confidence in their financial reports, up from 60% in 2006.

Respondents also noted improvements in their 2007 audit for a number of areas related to section 404:* 71.3% reported more integration of section 404 and the financial statement audit
* 69.8% reported more auditor use of a risk-based approach to section 404 audits
* 68.5% reported that less key controls were identified
* 58.4% reported increased use of judgment by auditors (vs. "check the box" approach)
* 68.5% reported greater auditor reliance on the work of others.

etailed Contents**1.19 Strategies to tackle market abuse** On 29 April 2008, the UK Financial Services Authority (FSA) published Market Watch 26, which focuses on market conduct and transaction monitoring issues. Market Watch 26 is a general review of the FSA's strategy to tackle market abuse, in particular insider dealing through credible deterrence, and also contains the market cleanliness statistics for 2006 and 2007. One of the most significant components of credible deterrence is ensuring that there is a genuine fear that wrongdoing will be identified and that the punishment received will be meaningful. Market Watch 26 therefore expands on the FSA's enforcement approach, reiterating that sanctions will be imposed against wrongful behaviour that will be severe enough to have a deterrent effect. To this end the FSA has enhanced its in-house criminal investigation and prosecution skills and has begun a criminal insider dealing prosecution. It also states that there will be increased financial penalties in cases pursued through the civil route.The FSA measures market cleanliness through informed price movements (IPM).  In 2006 and 2007 FTSE100 merger and acquisitions announcements were accompanied by IPMs in 28.6 per cent and 28.7 per cent of cases respectively, an increase from 23.7 per cent in 2005.  It is easy to misinterpret what these statistics show and they are often reported as suggesting the level of IPMs is a direct match for the level of insider dealing, but this is an inaccurate misrepresentation. Rather than solely indicating insider dealing, IPMs can also denote the following: 1. Abnormal trading ahead of announcements, due to circumstances such as financial analysts and the media correctly assessing which companies are likely takeover targets.
2. A deliberate 'strategic' leak of information by a company to position a deal in the marketplace.
3. Trades by 'informed' traders who picked up on and derived information from insiders' trades.

The newsletter also details work undertaken to prevent insider dealing, in particular the M&A project commenced in 2007, advances in detection techniques and obtaining market intelligence, and tools available to the FSA for the investigation of market abuse. In light of market rumours that circulated in March 2008, the Market Watch mentions that the FSA will undertake a thematic review of firms' policies in relation to the dissemination of rumours.Market Watch 26 is available on the [FSA](http://www.fsa.gov.uk/pubs/newsletters/mw_newsletter26.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.20 Amendments to the Trade Practices Act** On 28 April 2008, the Australian Government announced a series of amendments to the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) (the Act). The Government's amendments will:* clarify that in determining whether a corporation has taken advantage of its market power under section 46 of the Act, the court may have regard to whether the corporation's conduct was:
	+ materially facilitated by its substantial degree of market power;
	+ engaged in, in reliance on its substantial degree of market power;
	+ likely to have been engaged in if the corporation lacked a substantial degree of market power; or
	+ otherwise related to its substantial degree of market power
* clarify that a corporation can have a substantial degree of market power under section 46 of the Act even though there is no proof that the corporation is able, or will be able, to recoup losses incurred from pricing below cost;
* amend subsection 46(1AA) of the Act so that, rather than prohibiting a corporation with a substantial share of a market from engaging in sustained below-cost pricing for a prohibited purpose, it would prohibit a corporation with a substantial degree of power in a market from taking advantage of that power in any market by supplying, or offering to supply, goods or services for a sustained period below cost, where the conduct is engaged in for one or more of the anti-competitive purposes presently prescribed in subsection 46(1AA);
* amend section 86 of the Act to extend the jurisdiction of the Federal Magistrates Court to include matters arising under section 46;
* amend section 155 of the Act to enable the Australian Competition and Consumer Commission (ACCC) to use, or continue to use, its powers under that section after applying for an injunction to stop suspected breaches of the Act, and to clarify that it may continue to utilise such powers until it commences substantive proceedings;
* amend the Act to require that at least one of the Deputy Chairperson positions at the ACCC must have knowledge of, or experience in, small business matters; and
* repeal the $10 million threshold that applies to actions under section 51AC of the Act for unconscionable conduct in business transactions, with duplicate amendments made to the equivalent provisions of the [Australian Securities and Investments Commission Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) ('the ASIC Act') which apply to transactions involving financial services.

etailed Contents**1.21 EU report on prevention of payment fraud** On 28 April 2008, the European Commission published a report on the actions undertaken on prevention of payment fraud between 2004 and 2007 following an action plan on this matter. This report shows that the security of means of payment and payment systems is a necessary condition for improving consumer confidence and trust in new payment services. From a regulatory point of view, the security of means of payment has been addressed in recent legislation, namely in Payment Services Directive, and also the third Money Laundering Directive by means of the "know your customer" obligations. The development of the Single Euro Payments Area (SEPA) by industry will provide an opportunity to build on the legislative framework to increase both security and trust. Even if it affects a minority of users, fraud undermines general confidence in payments systems. A study conducted for the Commission in 2007 shows that user trust in certain authentication methods for cashless payments could be improved. Maintaining or enhancing user confidence does not necessarily require new legislation but rather the commitment of the parties involved to achieve this goal. Increasing public awareness and education is crucial in this context. This study was part of an Action Plan implemented by the Commission over the 2004-2007 period concerning payment fraud prevention. This action plan included other initiatives, such as specialised conferences, with a view to raising awareness about this threat.  Further to the action plan measures, recently adopted European legislation in the financial services area contains provisions which directly or indirectly address the prevention of payment fraud and contributes to the creation of a more robust legal environment at EU level in this area: (i) the directive on the prevention of money laundering (2005) requires the implementation of a sound "know your customer" policy by financial institutions; and (ii) the new payment services directive (2007) contains specific rules aimed at reducing the risks and consequences of unauthorised payment transactions. Payment fraud is a moving target and, inevitably, new threats appear, such as identity theft/fraud and, more generally, cyber crime. In 2007, the Commission announced its policy objectives regarding cyber crime and will continue to closely monitor developments in this area.The report is available on the [Europa](http://ec.europa.eu/internal_market/payments/fraud/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.22 Joint Forum release of "risk concentrations" paper**On 25 April 2008, the Joint Forum released a paper titled "Cross-sectoral review of group-wide identification and management of risk concentrations". The paper has also been included in the Joint Forum submissions to the Financial Stability Forum to contribute to its work related to the market turmoil.The Risk concentrations paper builds upon prior work conducted by the Joint Forum on risk integration and aggregation. It assesses the progress made by financial conglomerates in identifying, measuring and managing risk concentrations on a firm-wide basis and across the major risks to which these firms are exposed. The paper also includes observations and lessons drawn from the market turmoil that began in mid-2007.The paper is available on the [International Organization of Securities Commissions](http://www.iosco.org/%22%20%5Ct%20%22_new) and the [International Association of Insurance Supervisors](http://www.iaisweb.org/%22%20%5Ct%20%22_new) websites.etailed Contents**1.23 European Commission proposes amendments to settlement systems** On 24 April 2008, the European Commission issued a proposal to amend the Settlement Finality Directive and the Financial Collateral Directive to strengthen the protection of settlement systems and financial collateral arrangements. Directive 98/26/EC on settlement finality in payment and securities settlement systems (SFD) and Directive 2002/47/EC on financial collateral arrangements (FCD) are the two main Community instruments in the area of clearing and settlement and financial collateral. The SFD provides protection to both payment and securities settlement systems in case of default of a participant to those systems and thus seeks to minimise systemic risk, whereas the FCD regulates and facilitates the cross-border use of collateral.The Commission evaluated the two directives in 2005 and 2006 respectively. Following extensive consultation, the Commission concluded that both directives work well and that Member States, market participants and other stakeholders strongly support them. The Commission therefore does not propose any substantial changes to the two directives; it simply proposes amending them in limited areas in order to bring them in line with regulatory and market developments that have occurred since they were originally drafted and adopted. The main changes in the proposal concern, firstly, the explicit protection of the SFD as regards night-time settlement and linked systems. Pursuant to Directive 2004/39/EC on markets in financial instruments (MiFID) and the industry-sponsored European 'Code of Conduct for clearing and settlement', systems are expected to become increasingly linked.  Secondly, the proposal seeks to broaden the scope of the protection provided by both directives by including credit claims eligible for the collateralisation of central bank credit operations in order to facilitate their use throughout the Community.Lastly, this proposal seeks to introduce a number of other simplifications and clarifications to facilitate application of the FCD and SFD. Whilst the Commission started preparing the proposal in early 2007, i.e. before the onset of the current financial turmoil, the latter provides an additional argument in favour of the proposal: it would strengthen the existing tools for managing such situations. For example, the establishment of a harmonised legal framework for the use of credit claims as collateral in cross-border transactions would enhance market liquidity.  The Commission's proposal is available at:[http://ec.europa.eu/internal\_market/financial-markets/settlement/index\_en.htm](http://ec.europa.eu/internal_market/financial-markets/settlement/index_en.htm%22%20%5Ct%20%22_new) and[http://ec.europa.eu/internal\_market/financial-markets/collateral/index\_en.htm](http://ec.europa.eu/internal_market/financial-markets/collateral/index_en.htm%22%20%5Ct%20%22_new)etailed Contents**1.24 US CEO pay study** The largest US companies are relying more heavily on performance plans to tie executive pay to long-term company performance, according to results from The Wall Street Journal/Hay Group CEO Compensation Study, released on 14 April 2008.  The year 2007 marked a major milestone in the history of CEO pay, according to the study. For the first time, performance-based plans overtook stock options as the most popular form of long-term incentive compensation, with 129 of the companies using a performance plan, up 5% from 2006. The two more traditional equity vehicles of stock options and time-vested restricted stock showed significant declines in 2007, with options declining 7% to 128 companies, and time-vested restricted stock plans declining 14% to 63 companies. Performance plans tie the level of a CEO's pay directly to how the company performs relative to key business goals and strategic priorities. In most plans, if the company fails to achieve a certain level of performance, the awards will be worth nothing to the CEO. The 2007 study focused on 200 companies with more than US$5 billion in annual revenue that filed their proxy statements after 1 October 2007. Hay Group researched these public filings, examining all primary components of CEO compensation. Despite a poor fourth quarter for many companies, companies in the study showed a median increase in net income of 7.9% and a 9.0% total shareholder return in 2007. Pay increases followed suit, with base salaries increasing 4% to US$1,050,000 at median, and total cash compensation increasing 4.7% to US$2,939,000. When including the value of long-term incentives granted, total direct compensation increased 3.5% to US$8,848,000. However, the study results show a marked change in the way in which companies are compensating their chief executives for long-term performance. On average, performance plans made up 47% of total long-term incentive value in 2007, up from 41% in 2006. Emphasis on stock options declined to 37% from 42% in 2006, while time vested restricted stock remained constant at 16% (from 17% in 2006). etailed Contents**1.25 FSR Conference** Monash University and Macquarie University are presenting the Third Annual Financial Services Reform Conference at the Macquarie downtown campus in Sydney on Friday 18 July 2008. The conference will be opened by the Minister, Honourable Senator Nick Sherry, and speakers are drawn from accounting, academic, ASIC, ASX, compliance, financial services, FPA, insurance, legal and regulation. Enquiries to Paul.Latimer@buseco.monash.edu.au or Andrew.Dahdal@law.mq.edu.au.Further information and registrations are available on the [Monash University Faculty of Business and Economics](http://www.buseco.monash.edu.au/blt/tlpri/fsr-seminar-2008.html%22%20%5Ct%20%22_new) website. etailed Contents**1.26 New book - Varieties of Capitalism, Corporate Governance and Employees** Member of the Centre for Corporate Law and Securities Regulation at the University of Melbourne are contributors to a new book titled "Varieties of Capitalism, Corporate Governance and Employee", edited by Richard Mitchell, Shelley Marshall and Ian Ramsay. The Varieties of Capitalism approach begins from the premise that economic and business systems are organised in different ways in different countries. These systems include liberal market economies and co-ordinated market economies. The literature comparing types or 'varieties' of capitalist economies has much to say about corporate governance and employment systems. While the varieties of capitalism debate generally ranges across a broad spectrum of different questions and topics, the issues of corporate governance and labour management, and the relationship between them, appear crucial in how different systems are characterised and typified.  Can it be said that Australia's industrial relations and corporate governance systems - two institutions which influence the variety of capitalism of a national economy - now belong more clearly in a group with the US and the UK rather than with other OECD countries such as Germany, Sweden or Japan? While this is often assumed to be the case, very little work has been conducted which systematically investigates Australian evidence. This book brings together contributions by leading Australian academics in the area, which together provide the most systematic response to the question to date.  The authors examine the question from a number of different perspectives, drawing on a range of academic disciples. The book brings together corporate law and labour law scholars, comparative employment relations and human resource management academics and political economists. Some of the chapters are concerned with changes to corporate ownership or financing; tracking any associated shifts in corporate priorities. They consider the impact of corporate ownership and corporate governance on workplace practices and attitudes. They also examine the implications for employment practices of the increasing prominence of institutional investors, such as mutual funds and superannuation funds, as owners of Australian companies.  Other contributions examine the issue of where Australia fits on the international spectrum of varieties of capitalism from an employment relations perspective. Labour law scholars map the effects which the Australian government's labour law changes over the last decade have brought about concerning partnership relations between employers and employees, and compare these labour law changes with recent pro-partnership reforms in the UK.  Industrial relations specialists examine whether the Australian variety of capitalism acts as an impediment to the co-operative implementation of innovative work systems in Australian workplaces.The book is published by Melbourne University Publishing and is available for purchase on the [Melbourne University Publishing](http://www.mup.unimelb.edu.au" \t "_new) website.etailed Contents |

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| **2. Recent ASIC Developments** |  |  |

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| **2.1 ASIC approves new financial services complaints scheme**On 20 May 2008, the Australian Securities and Investments Commission (ASIC) announced it had approved the new Financial Ombudsman Service (FOS).FOS will represent the merger of the three biggest complaints schemes operating in the financial services industry - the Financial Industry Complaints Service (FICS), the Banking and Financial Ombudsman Service (BFSO) and the Insurance Ombudsman Service (IOS). Together, FICS, BFSO and IOS deal with most consumer complaints about financial services and cover the vast majority of retail financial services providers, including banks, life and general insurance companies, stockbrokers, investment managers and financial planners. Between them, the schemes dealt with about 10,000 consumer disputes in the last reporting period and over 100,000 telephone enquiries. FOS will be operational from 1 July 2008. In the first instance, FOS will continue to operate the rules and procedures of the three existing schemes, with a view to operating under a single set of rules no later than 1 January 2010.etailed Contents**2.2 ASIC publishes results of its stakeholder survey**On 16 May 2008, the Australian Securities and Investments Commission (ASIC)  released the results of the stakeholder survey that was one of the main external inputs in shaping the outcomes of its recently completed Strategic Review.The ASIC Strategic Review drew on the views of the 1250 external respondents to the stakeholder survey to identify what ASIC did well and where it needed to improve. Conducted by the Allen Consulting Group, stakeholder responses were collected through three separate surveys of businesses, consumers and ASIC staff. The Allen Consulting Group's ASIC Stakeholder survey is available on the [ASIC](http://www.asic.gov.au/strategicreview%22%20%5Ct%20%22_new) website.etailed Contents**2.3 ASIC extends disclosure relief for rights issues**On 15 May 2008, the Australian Securities and Investments Commission (ASIC) announced it has given class order relief ensuring that non-traditional rights issue structures are covered by the prospectus and PDS disclosure exemption for rights issues, an issue identified by ASIC's Retail Investor Taskforce work to increase the opportunities for retail investors to participate in fundraising offers. The ASIC class order recognises that issuers have adapted the traditional rights issue structure to meet different fundraising needs. An example of a non-traditional rights issue is an accelerated offer to institutions e.g. a 'jumbo'.ASIC considers that any rights issue should fall within the disclosure exemption where it provides an equal opportunity to all holders to participate and does not compromise retail investor protection.ASIC has released Regulatory Guide 189: Disclosure relief for rights issues (RG 189). This regulatory guide explains the relief ASIC has given in Class Order (CO 08/35) Disclosure relief for rights issues. This includes relief:* for accelerated offers to institutions;
* from the requirement to lodge multiple cleansing notices;
* for disposal of a shortfall (e.g. through a book-build); and
* to make offers of shares to convertible security holders.

CO 08/35 also gives technical relief in relation to the treatment of foreign holders, offers of stapled securities and rounding of entitlements.**Background**The disclosure exemption for rights issues was introduced by the [Corporations Legislation Amendment (Simpler Regulatory System) Act 2007](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=97385" \t "Default), allowing listed entities to conduct a rights issue without a prospectus or PDS. The disclosure exemption is limited to quoted securities or interests because continuous disclosure facilitates informed decisions on the rights issue by holders. ASIC published [Consultation Paper 91: Non-traditional rights issues](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/CP_91_Non-traditional_rights.pdf/%24file/CP_91_Non-traditional_rights.pdf%22%20%5Ct%20%22_new) (CP 91), released on 28 September 2007, seeking comments on its proposed relief to extend this disclosure exemption to accommodate current practices in rights issue structuring. Responses to the consultation paper were generally positive and suggested that the proposed relief would be likely to facilitate retail participation in capital raisings and make the legislative provisions more accommodating to market adaptations of traditional rights issues. The class order will commence after it has been gazetted and recorded on the Federal Register of Legislative Instruments (FRLI) in electronic form. The FRLI may be accessed [here](http://www.frli.gov.au" \t "_new).The Regulatory Guide 189: Disclosure relief for rights issues is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg189.pdf/%24file/rg189.pdf%22%20%5Ct%20%22_new) website. The Class Order (CO 08/35) Disclosure relief for rights issues is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co08-35.pdf/%24file/co08-35.pdf%22%20%5Ct%20%22_new) website. The Report 128: Report on submissions to CP 91 Non-traditional rights issues is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP_128.pdf/%24file/REP_128.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.4 ASIC announces results of its strategic review**On 15 May 2008, the Australian Securities and Investments Commission (ASIC) announced it had completed the strategic review, which will better position it for the challenges of the next three to five years.The key changes ASIC is making are:* additional investment in market research and analysis;
* the appointment of an experienced External Advisory Panel drawn from a variety of sectors of the economy in order to advise ASIC's Commission on market developments and potential systemic issues;
* abolition of the four current 'silo' directorates of ASIC and replacing them with 17 outwardly-focused stakeholder teams covering the financial economy (e.g. teams for retail investors and consumers, investment managers, investment banks, superannuation funds and financial advisors);
* additional resources directed to the supervision of brokers and intermediaries and to operators of exchange-traded products and to surveillance of exchange-traded markets; and
* a better balance between national and regional initiatives (e.g. more resources into Perth and Western Australia).

The development of skills and credentials will be boosted through:* secondments;
* the introduction of an ASIC Academy;
* greater workplace training through mentors and network leaders; and
* recruitment from the market for senior positions.

With the introduction of stakeholder teams, ASIC will reduce two layers of management (Executive Directors and Directors) to a new single level of 'Senior Executive Leaders'. This move involves:* a reduction of 54 senior positions to 41 with increases in remuneration levels for the new positions; and
* a process of opening these positions to internal and external applicants. In other words, all new positions will be subject to an across the board appointment process.

ASIC will now have six main enforcement or deterrence teams (instead of one large directorate). Each team will be tasked with specific responsibilities such as insider trading, major fraud, and international fraud and teams for other significant misconduct.ASIC will retain current staff levels of 1600 and while the mix of staff may change, the numbers overall will not. ASIC will carry out the restructure within its current budget and has not asked the Government for additional resources for the 2008/09 financial year.The new arrangements take effect from now and will be fully implemented during the next four months. etailed Contents**2.5 Investor research report**On 24 April 2008, the Australian Securities and Investments Commission (ASIC) released the findings of research relating to Australian consumers' understanding of investments and their levels of financial literacy.A survey of 1,200 Australian investors and several focus groups showed:* less than half of the investors (47%) had a long-term financial goal and a plan to reach that goal. Many (37%) had neither a plan nor a goal;
* around half of the investors (49%) had only one type of investment (eg shares only). The mean number of investment types was 2.19; and
* investors often came to invest due to external, life-stage pressures such as divorce, inheritance, redundancy or retirement, rather than a proactive plan to become an investor.

The research also found that while the concepts of risk and return were among the most important factors investors considered, only half of those surveyed (51%) were able to select correctly from a multiple choice list the 'reasonable' rate of return to expect from a fixed interest product over a ten-year period. Even fewer investors were able to do this for other asset classes (46% for shares and 35% for property and growth super).Similarly, while most investors had heard of 'diversification' (78%), over a third had difficulty applying the concept, with 36% saying that investing 100% of their money in Government bonds was good diversification.The research also showed that:* investors tend to believe that property investments are inherently safe;
* women are more likely to be at risk of underinvestment.
* high interest savings accounts are the only investment type that women are more likely to have than men;
* men are over-represented among those attracted to risky investments; and
* SMSF investors:
	+ are the most likely to choose the least diversified option in a diversification scenario;
	+ have the most trouble calculating adviser fees; and
	+ are more than twice as likely as all other investors to be unable to give a tip about avoiding fraud/scams.

ASIC will use the findings of this research to help inform its thinking on retail investor issues going forward.The report 'Australian investors at a glance' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep_121_Australian_investors_at_a_glance.pdf/%24file/rep_121_Australian_investors_at_a_glance.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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| **3. Recent ASX Developments** |  |  |

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| **3.1 ASX supervisory role**ASX has refreshed its website to include an explanation of ASX's supervisory role. Further information is available on the [ASX](http://www.asx.com.au/supervision/supervisory_role/index.htm%22%20%5Ct%20%22_new) website.etailed Contents**3.2 Guidance Note update** On 16 May 2008, ASX, ACH and ASTC released a new Guidance Note: "End-Clients using Margined Financial Products - Risks for Market, Clearing and Settlement Participants" - being new ASX Market Rules Guidance Note No. 36, ACH Clearing Rules Guidance Note No. 17 and ASTC Settlement Rules Guidance Note No. 14. The Guidance Note seeks to bring to the attention of ASX Market Participants, ACH Clearing Participants and ASTC Settlement Participants potential settlement risks when acting for end-clients using margin lending accounts.  The Guidance Note also specifically reflects on the lodgment and release of Collateral for Options CCP Contracts in the context of such risks.etailed Contents**3.3 Consultation paper to consider foreign exempt companies for index inclusion** On 6 May 2008, Standard & Poor's Index Services (S&P) and the Australian Securities Exchange (ASX) released a consultation paper seeking market feedback on a proposal to make Foreign Exempt companies listed on ASX eligible for index inclusion. Under the proposal, Foreign Exempt companies listed on ASX will be eligible for index inclusion, provided the primary listing of the stock is on a major exchange within a developed market. Foreign Exempt companies will still be required to meet all the standard index inclusion criteria in the S&P Index methodology.Companies with a Foreign Exempt classification are obligated to immediately provide ASX with all information that is both supplied to their home exchange and that is public. The classification seeks to avoid regulating companies in areas that are already well regulated by the rules of the overseas primary market. Current index methodology extends index eligibility to Foreign Domicile companies, but Foreign Exempt companies are not eligible. The ineligibility of Foreign Exempt companies - due to previously held concerns about the nature and timing of disclosure of corporate actions - is an anomaly for companies listed on developed markets whose disclosure requirements for corporate actions are comparable with those of ASX. The change is not expected to have an immediate impact on the index constituency but it will create a more favourable environment for the listing of international companies in Australia, giving Australian investors access to broader investment opportunities on the local market. Should the proposal be adopted, an amendment would be made to index methodology to state that "Foreign Exempt ASX-listed companies will be eligible for index inclusion provided their primary overseas listing is from a developed market exchange." Market feedback will be sought until 31 May 2008, with final arrangements announced to the market in late June. Any change would not take effect until September 2008.The consultation paper is available on the [Standard & Poor's](http://www2.standardandpoors.com/portal/site/sp/en/au/page.home/home/1%2C1%2C1%2C1%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0%2C0.html%22%20%5Ct%20%22_new) website and the [ASX](http://www.asx.com.au./%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **4.1 Programmed Maintenance 02 - Declaration of unacceptable circumstances and orders** On 2 May 2008, the Panel announced that it had made a declaration of unacceptable circumstances and final orders in relation to an application dated 28 April 2008 by Spotless Investment Holdings Pty Ltd in relation to the affairs of Programmed Maintenance Services Ltd (TP 08/35). **(a) Background** Spotless made an off-market takeover bid for all the shares in Programmed dated 2 April 2008.   On 16 April 2008, Programmed lodged an investor presentation with ASX.  The investor presentation included charts which disclosed Programme's calculations of the takeover premium for the bid, based on 6 month and 12 month Volume Weighted Average Prices ending 26 March 2008 of Programmed and the closing price of Spotless on 2 April 2008, being the date of lodgment of the bidder's statement (and made comparisons with premiums in other bids).  On 22 April 2008, Programmed sent a letter to shareholders and lodged a copy with ASX.  A leaflet that accompanied the letter contained a number of media and analysts quotes in relation to the bid. **(b) Declaration**The Panel considered that the following circumstances were unacceptable having regard to their effect on the control or potential control of Programmed, or the acquisition of a substantial interest in Programmed, and were otherwise unacceptable having regard to the principles in s602 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default):1. Where a target (or bidder) selects a particular presentation of the premium implied under an offer, it needs to be prepared to explain the basis upon which that presentation has been selected. In this instance, there was insufficient disclosure of why the target chose 6 month and 12 month Volume Weighted Average Prices of its share price ending 26 March 2008 and compared it with the bidder's closing price on 2 April 2008 in calculating the premiums on page 5 of the investor presentation.
2. Where a target sends material to its shareholders in advance of its target's statement, that material should be prepared to the same standard as if it were included in the target's statement. For instance, where correspondence addresses questions of value, the correspondence should set out any underlying assumptions or material limitations on the analysis presented. If this material includes a quote from another person, the target directors are effectively adopting that statement as their own and, as such, should be prepared to corroborate and substantiate it. In this instance, the Panel considered that the following media comments in the leaflet were made without sufficient substantiation from the target:

(a) An extract from an article in The Business Spectator on 16 April 2008 by Stephen Bartholomeusz that: "The directors are probably right when they say in today's vigorous rejection of the bid, that the Spotless offer, which includes a range of mix and match options involving both cash and shares, undervalues Programmed".(b) An extract from an article on 28 March 2008 in the Australian Financial Review by Michael Smith that:  "As the Spotless share price sank another 8 per cent following the $556 million tilt yesterday, it could be argued Programmed is better positioned to play the role of suitor".The Panel did not consider it against the public interest to make the declaration, and in making it has had regard to the matters in s657A(3). **(c) Orders**The Panel has made orders to the effect that Programmed send a clarification letter to shareholders in a form approved by the Panel. If the letter is not sent out with the target's statement, then the target's statement must be accompanied by a copy of this media release and the letter sent separately.Further information is available on the [Panel](http://www.takeovers.gov.au/%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **5.1 Determining whether converting notes could be redeemed otherwise than by the prescribed payment and application of the principal amount** (By James Williams, DLA Phillips Fox) In the matter of HIH Insurance Ltd (in liq) [2008] FCA 623, Federal Court of Australia, Graham J, 8 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca623.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca623.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The case involved a claim and a cross claim relating to converting notes ('Notes') issued by HIH Holdings (NZ) Limited (In Liquidation) ('HIH NZ'). Pursuant to the conditions of issue ('Conditions of Issue') contained in the trust deed ('Trust Deed'), in the event that the Notes were not redeemed by HIH NZ by the expiration of a stipulated period ('Conversion Period'), HIH NZ was to apply the redemption monies payable to the noteholders ('Noteholders') to subscribe for ordinary shares in HIH Insurance Limited (In Liquidation) ('HIH'). However, HIH NZ was unable to pay the redemption monies payable upon the expiration of the Conversion Period and the question arose as to whether HIH NZ could redeem the Converting Notes otherwise than by the prescribed payment. Graham J held that the contracts between HIH NZ and the Noteholders ('Notes Contracts') were repudiated by HIH NZ by virtue of its failure to pay the redemption monies and therefore the Notes Contracts could be terminated. **(b) Facts** Perpetual Trustee Company Limited ('Perpetual') was the trustee under the Trust Deed. In addition to the Trust Deed, HIH made a deed poll ('Deed Poll') which stated the fact that HIH agreed to issue the requisite number of ordinary shares as required pursuant to the Conditions of Issue. LM Nominees Pty Limited ('LM Nominees') was issued with 200,000 Notes upon and subject to the Conditions of Issue. HIH NZ and HIH were both wound up prior to the end of the Conversion Period. It was accepted that at the end of the Conversion Period, HIH NZ was unable to apply the redemption monies payable to the Noteholders to subscribe for ordinary shares in HIH. The fact that HIH continued to possess the power to issue shares following the winding up was also not in dispute. Five months after the expiration of the Conversion Period, Perpetual, in its capacity as trustee under the Trust Deed, sought to terminate the Notes Contracts. Perpetual stated that HIH NZ's continued failure to redeem each Note for an amount equal to its face value, and then apply the redemption monies payable to the Noteholder to subscribe for ordinary shares in HIH meant that it had repudiated each of the Notes Contracts and that therefore, Perpetual and the Noteholders were entitled to terminate the Notes Contracts. The Trust Deed failed to adequately define the words 'convert', 'conversion', 'redeem' and 'redemption' and therefore, the question arose as to whether HIH NZ could redeem the Notes otherwise than by the prescribed application of the redemption monies payable to the Noteholders. The initial claim involved HIH seeking a declaration that the Notes had automatically converted into ordinary shares in HIH and that the liquidator of HIH was therefore entitled to issue and allot the requisite number of shares in HIH to the Noteholders in accordance with the Conditions of Issue. The cross claim made by Perpetual and LM Nominees sought a declaration that the Notes Contracts were validly terminated and that as a result of the termination, HIH NZ was not entitled to redeem the Notes, or apply the monies payable on redemption of the Notes in subscribing for ordinary shares in HIH.**(c) Decision** Graham J cited a number of authorities and concluded that in relation to the redemption of matters such as shares, the general meaning to be afforded to 'redemption' is 'to pay them off'. Further, in analysing the meaning of the definitions of 'convert' and 'conversion' contained in the Trust Deed, Graham J accepted that the Trust Deed contemplated a two-stage conversion process involving the redemption of the Notes, and then HIH NZ applying the principal amount of the Notes in subscription for shares in HIH.  Therefore, Graham J held that HIH was not entitled to discharge its conversion obligations otherwise than by applying the redemption monies payable to the Noteholders in subscription for ordinary shares in HIH. Graham J concluded that the Notes Contracts were repudiated by HIH NZ as a result of its failure to redeem and convert the Notes upon the expiration of the Conversion Period as required under the Conditions of Issue, and therefore Perpetual and the Noteholders were entitled to terminate each of the Notes Contracts.etailed Contents**5.2 Shareholder's right to inspect company documents**(By Mark Cessario and Nicole Parrish, Corrs Chambers Westgarth) Rowland v Meudon Pty Limited [2008] NSWSC 381, New South Wales Supreme Court, Bryson AJ, 2 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc381.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc381.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** Shareholders in Meudon Pty Limited ("Company") had rights equivalent to ownership of units in a residential building. The Company was a defendant in an action by a shareholder challenging the grant of permission to another shareholder to develop the roof garden of the building. The Company was unsuccessful in defending the action and in addition to its own legal expenses, was bound by a costs order requiring it to pay the legal costs of the plaintiff in that action. In order to raise the necessary funds, the Company imposed 'legal levies' on the shareholders. Ms Rowland, also a shareholder in the Company and opposed to its defence of the proceedings, had concerns that the actions of the Company in the proceedings were not founded on sound legal advice nor entered into for a proper purpose or in good faith. Despite numerous requests to the board of directors ("Board") to inspect documents relating to its decision to enter into and continue the proceedings, the Board refused to provide such information. Ms Rowland therefore applied to the court for an order under section 247A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act') authorising access to the documents. His Honour considered it relevant that Ms Rowland was applying for access in relation to a specific dispute, rather than a general dissatisfaction with management. It was also significant that Ms Rowland had considerable personal interest in the matter, as the subject matter was her home and she was affected by a heavy and unquantified financial burden. There was no question that Ms Rowland was acting in good faith and for a proper purpose. Bryson JA therefore made an order under section 247A of the Act authorising Ms Rowland to inspect documents recording matters taken into account by the directors in the defence of the relevant proceedings, reserving liberty to apply with respect to legal professional privilege. **(b) Facts** The case involves an arrangement whereby a shareholding in the Company gave shareholders rights in a residential building similar to ownership of home units. Mr Baker, the owner of shares associated with the penthouse unit, was granted permission by the Board to develop the roof garden. In previous litigation, resident shareholders Mr and Mrs Wilson opposed Mr Baker's right to carry out the building works on the roof garden and were ultimately successful on appeal ('Wilson litigation'). As a result of that litigation, the Company incurred expenses and, along with Mr Baker, was bound by a costs order.  Having exhausted the litigation fund available, the Company imposed 'legal levies' on shareholders pursuant to powers in the Company's Constitution. Ms Rowland, also a shareholder of the Company, had consistently opposed the proposed development of the roof garden and was expressly against the Company taking a combative approach in the Wilson litigation. Having been charged near $29,500 in 'legal levies', Ms Rowland contacted the Board to request access to materials which founded their decision to proceed with the defence in the proceedings.   Despite repeated requests, the Board was not forthcoming with the materials or any useful information. There were also references made to the possibility that Ms Rowland would forfeit her shares if the levies remained unpaid. Ms Rowland had concerns that the Company had entered the Wilson litigation without good reason, for improper purpose or not in good faith. The current proceedings were therefore commenced seeking an order under section 247A of the Act authorising Ms Rowland to inspect documents recording matters taken into account by the directors of the Company in relation to the Wilson litigation, particularly those concerning prospects of success and advices in relation to the proceedings. **(c) Decision** Pursuant to section 247A of the Act, a member of a company can apply to the court for an order authorising inspection of the company books. The court may make the order if satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose. Bryson JA considered this section a statutory expression of a right previously recognised by the common law, while it preserves the court's discretion by the application of the tests of 'good faith' and 'proper purpose' to the facts of each case.   Bryson JA referred to the long established basic rule of company law; that a shareholder should not generally be permitted to use the courts as a forum to challenge a managerial decision of its directors. His Honour considered it important for the protection of efficient corporate operation that this principle of the non-involvement of shareholders in company management should be respected. It was noted, however, that the involvement of a management decision should not necessarily prevent a shareholder's access to documents.   The decision remains in the discretion of the court, though where a matter involves managerial decisions the discretion should be exercised conservatively. Further, the statute should not be used as a strategy to avoid claims of legal professional privilege, or as a substitute for the processes of discovery and interrogatories. Bryson JA held that the following principles set out in Re Claremont Petroleum NL (1990) 2 Qd. R 31 regarding an equivalent provision under Queensland statute should also apply to section 247A of the Act:* the legislation states or clarifies the common law approach, however the common law does not state 'conditions' or limit the discretion of the court to make an order;
* in deciding whether to grant access, it is relevant that there is a specific dispute rather than a general dissatisfaction with management, although a grounding of an application on such a general dissatisfaction should not necessarily cause an applicant to fail;
* in deciding whether to grant access, it is relevant that the applicant is personally interested, as is the extent and value of his or her interest; and
* the applicant's interest need not be separate and distinct from the general body of members.

Bryson JA considered that Ms Rowland's dissatisfactions had spanned many years and been continuously expressed without any explanation from the Company. It was clear that she was significantly personally interested as the subject matter was the building containing her dwelling, and she was bound by the large and unquantified financial burden of the 'legal levies'. Bryson JA was also guided by a statement of McPherson J in Re Claremont Petroleum NL (No 2) (1990) 8 ACLC 548, that the relevant section:".is intended to enable a member of a company to inspect its books in order to obtain information about matters that, as a member or shareholder in the company, he ought to be informed of by the company."His Honour held that information that 'ought to be' given is not equivalent to information that a party is legally obliged to give, otherwise the statutory requirements of good faith would be inappropriate.   On the facts, Bryson JA considered that the requested information was information that Ms Rowland 'ought to be informed of by the company'. His Honour was also satisfied that she was acting in good faith and that the inspection was to be made for a proper purpose. His Honour therefore made an order authorising Ms Rowland to inspect documents recording matters taken into account by the directors in the defence of the Wilson litigation, in particular deliberations concerning the prospects of success, advices in relation to the proceedings and considerations as to costs of the proceedings. His Honour reserved liberty for the Company to apply regarding claims of legal professional privilegeetailed Contents**5.3 Determining whether claims made against a bankrupt constituted claims for provable debts** (By James Williams, DLA Phillips Fox) Auto Group Ltd v England [2008] NSWSC 402, New South Wales Supreme Court, Bryson AJ, 2 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc402.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc402.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** A number of companies ('Plaintiffs') sued Mark England ('Defendant') for damages for the tort of deceit committed when the defendant, acting in his capacity as Managing Director of the first plaintiff, fraudulently directed payment of funds of one of the plaintiffs for purposes of his own. As the defendant was bankrupt, the question was whether the Plaintiffs' claims fell within the parameters of section 58(3) of the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default) ('Act'), which restricts a creditor from commencing legal action in respect of a provable debt against a bankrupt. Bryson AJ held that the claims did constitute provable debts by virtue of the fact that they were in the nature of liquidated damages and arose by reason of contract, and therefore that the proceedings could not be disposed of in the absence of leave of the Federal Court required under section 58(3)(b) of the Act.  **(b) Facts** The Plaintiffs sought damages from the Defendant on the basis that as Managing Director of the first Plaintiff, he had committed the tort of deceit by virtue of misdirecting amounts of money of one of the Plaintiffs in payment of false invoices and payroll ghosts. The Defendant was bankrupt and therefore the question arose as to whether section 58(3) of the Act applied in the circumstances. Section 58(3) of the Act prohibits a creditor from taking action against a bankrupt in respect of a provable debt unless leave of the court has been obtained. No such leave had been obtained, or applied for, in the present case. Section 82(1) of the Act sets out the following definition of provable debts, ".all debts and liabilities, present or future, certain or contingent, to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy, are provable in his or her bankruptcy." However, section 82(2) of the Act represents an exception to the definition of provable debts contained within section 82(1). It states that "[d]emands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in bankruptcy." Therefore, the applicability of section 58(3) of the Act to the Plaintiffs' claims depended on whether the proceedings commenced by the Plaintiffs were in respect of a provable debt; or rather fell within the exception contained within section 82(2) of the Act. **(c) Decision** Bryson AJ analysed the proper application of section 82(2) of the Act. His Honour noted that such an analysis requires at least two categorisation exercises, one relating to the nature of the damages and one relating to the reason for which the demand arises. In discussing the first categorisation exercise, Bryson AJ established the fact that damages are liquidated where their assessment is substantially a matter of calculation as a result, usually, of some contractual provision which establishes the amount of damages to be paid in some event and does not leave damages for assessment. His Honour established that the Plaintiffs' claims, while being couched in terms of a claim for tort damages, were in substance a claim for restitution of the misappropriated money. Bryson AJ concluded that equity obligations of restitution where moneys are fraudulently obtained by fiduciaries are treated in equity as debts, and as liquidated debts, as opposed to unliquidated damages. In relation to the second categorisation exercise, Bryson AJ noted that often the underlying transaction can be categorised in a number of ways. His Honour employed the example of an underlying transaction which could be equally categorised as a claim under tort law for fraud and deceit, and a claim in equity for breaches of fiduciary duty. However, his Honour stated that while there may be several true categorisations, the correct decision is whether the demand arises by reason of a contract, promise or breach of trust, or arises otherwise than by reason of a contract, promise or breach of trust. His Honour embarked on an excursus on what is meant in section 82(2) by "breach of trust". His Honour first established the fact that the Defendant's conduct constituted conduct in breach of the fiduciary duty owed by the Defendant to the first plaintiff. After discussing a number of relevant authorities, Bryson AJ held that the reference to "breach of trust" in section 82(2) needs to be afforded its ordinary meaning and therefore only applies where there is an identifiable trust, trustee, equitable owner and trust property. His Honour concluded that therefore the words "breach of trust" did not apply in the present case to a liability arising for breach of fiduciary duty by a fiduciary who is not also a trustee. However, his Honour held that while the claims could be categorised as claims for damages for torts, they did arise by reason of breaches of fiduciary duty which occurred in a contractual context.  Therefore, coupled with his Honour's earlier finding that the demands were not in the nature of unliquidated damages, Bryson AJ held that the Plaintiffs' claims did not fall within the exception contained in section 82(2) of the Act, and thus the Plaintiffs were not competent to bring the present proceedings by virtue of section 58(3) of the Act without having first obtained leave of the court.etailed Contents**5.4 Creditors application for appointment of a special purpose liquidator during voluntary winding up**(By Justin Fox and Rebecca Best, Corrs Chambers Westgarth)  Lo v Nielsen & Moller (Autoglass) (NSW) Pty Ltd [2008] NSWSC 407, New South Wales Supreme Court, Barrett J, 2 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc407.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/may/2008nswsc407.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary** This case involved an application by a creditor for the appointment of a special purpose liquidator to investigate certain financial dealings of the company. The company already had a liquidator appointed to it, following the conclusion of a voluntary administration. Ms Lo sought to appoint an additional liquidator to investigate dealings involving certain creditors who had influenced the appointment of the incumbent liquidator. The court found that section 511 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) empowered the court to order the appointment of an additional special purpose liquidator in a voluntary winding up, if it is 'just and beneficial' to do so. **(b) Facts** Nielsen & Moller Autoglass (NSW) Pty Ltd (Nielsen & Moller) was subject to a form of creditors' voluntary winding up, following voluntary administration under Part 5.3A of the Act. Ms Lo was an unsecured creditor of Nielsen & Moller.  Mr Wyke was appointed by the company as administrator and was subsequently appointed as liquidator on 31 January 2008.  Several creditors of the company, including Ms Lo had sought to have Mr Wyke replaced, however that motion was defeated. In this application, Ms Lo requested appointment of a special purpose liquidator in addition to the existing liquidator, to investigate certain financial dealings of the company which took place before the administration commenced. Ms Lo claimed that those dealings warranted investigation as to whether there was a "scheme to have Nielsen & Moller avoid paying debts of certain creditors and to avoid prospective claims against its directors". The details of those arrangements are complex and the court expressed no view on them, other than to agree with Ms Lo, that they point to a "need for investigation by the liquidator of Nielsen & Moller and indicate a possibility that various recovery proceedings might be pursued or, at least, considered by the liquidator in the interests of creditors". The liquidator, Mr Wyke, had indicated in his report to creditors pursuant to section 438D of the Act that Nielsen & Moller may have traded whilst insolvent and also that directors may be liable pursuant to section 588G of the Act. Furthermore, Mr Wyke indicated that Mr Rankine, as director, may have breached his duties to Nielsen & Moller, but that there were no funds immediately available to pursue any recovery action. In her application, Ms Lo expressed concern that the motion to remove Mr Wyke as administrator had been defeated by parties who may have been involved in the dealings which were under scrutiny, whereas the creditors who voted for his removal were all arms length creditors. Ms Lo therefore refused to fund Mr Wyke to investigate the issues raised in her application. Ms Lo did not wish to fund an application to remove the liquidator which would be contested by Mr Wyke. Instead, she sought to appoint a special purpose liquidator to investigate the relevant dealings. She also agreed to fund that appointment. **(c) Decision** Barrett J concluded that, based upon Mr Wyke's findings, and the evidence before the court, there appeared to be a possibility that proceedings should be pursued on behalf of Nielsen & Moller in liquidation, in the interest of the creditors. It was held to be in the interest of creditors that these matters be thoroughly investigated. Barrett J noted that it is established law that liquidators can be appointed for special purposes, although this is generally done at the point of application for winding up, or upon the removal of existing liquidators (see Re Eastern Properties Pty Ltd [1981] 1 NSWLR 499). The court noted that appointment of an extra, special purpose liquidator, once liquidation has commenced has been ordered during a court-ordered winding up (see Re Obie Pty Ltd (No 4) (1984) 8 ACLR 967 at 971). At issue, however, was whether the court had this power in a voluntary winding up.   Barrett J acknowledged that there is no specific power under the Act to appoint an additional liquidator in relation to voluntary winding up, except pursuant to section 502 of the Act where there is no liquidator acting, or section 503 of the Act, where a liquidator is removed or replaced.  Neither of those circumstances applied to the current application, where the liquidator was continuing to act. Barrett J held, however, that the source of the power to appoint a special purpose liquidator during voluntary winding up, once liquidation has commenced, was section 511 of the Act. That section, so far as relevant, provides that: 1. The liquidator, or any contributory or creditor, may apply to the court:(a) to determine any question arising in the winding up of a company; or(b) to exercise all or any of the powers that the court might exercise if the company were being wound up by the court.
2. The court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on application as it thinks just.

Barrett J noted that the court clearly had power to appoint a special purpose liquidator in the case of winding up by a court. Section 511 therefore empowered the court to make a similar determination in a voluntary winding up, if the court determines that it is 'just and beneficial' to do so. In the circumstances of the application, Barrett J concluded that it would be 'just and beneficial' to appoint a special purpose liquidator (citing Re Cobar Mines Pty Ltd (unreported, NSWSC, Santow J, 22 June 1998). This was because the matters which the special purpose liquidator would investigate substantially affected creditors' interests and because the existing liquidator, Mr Wyke, had stated that he did not have the financial capacity to undertake these investigations (the company having no finances and Ms Lo refusing to finance Mr Wyke).etailed Contents**5.5 Construction of securities lending agreement- whether plaintiffs held equitable interest in transferred shares**  (By Gillian White, Freehills) Beconwood Securities Pty Ltd v ANZ Banking Group Ltd [2008] FCA 594, Federal Court of Australia, Finkelstein J, 2 May 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca594.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/may/2008fca594.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The Federal Court was asked by the plaintiffs to make an order, in accordance with order 29 of the [Federal Court Rules 1979 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "Default), in response to the following question:"Does a Lender of Securities 'loaned' to a Borrower under the Securities Lending and Borrowing Agreement (SLA) have an equity of redemption or other equitable estate or equitable interest in those Securities or in Equivalent Securities immediately upon or after the 'loan' of those Securities by the Lender to the Borrower (the terms Borrower, Equivalent Securities, Lender and Securities are defined in the SLA)." Finkelstein J answered this question 'no'. His Honour held that the securities lending agreement between the plaintiffs and the second defendant could not be characterised as a mortgage, in which the plaintiffs held an equitable interest. Further, the plaintiffs did not hold any other equitable interest in the shares which were transferred by the second defendant to the first defendant, in accordance with the terms of the securities lending agreement.  **(b) Facts**In 2007 the plaintiffs, Beconwood Securities Pty Ltd and Beconwood Limited, entered into a Securities Lending and Borrowing Agreement (SLA) with their broker, Opes Prime Stockbroking Limited (the second defendant).  Under the SLA, Beconwood Limited transferred shares to Green Frog Nominees Pty Ltd, a company related to the second defendant, in return for funds. The funds were sourced from ANZ (the first defendant). At the direction of the second defendant, Beconwood Limited transferred a number of parcels of shares to Green Frog Nominees between 31 July 2007 and 8 January 2008. Shortly after each transfer of shares to Green Frog Nominees, the shares were transferred to ANZ Nominees (the fifth defendant), and held for the first defendant. Subsequent to the share transactions, receivers and managers were appointed to manage the affairs of the second defendant. The dispute, which was the subject of these proceedings, relates to the shares transferred to ANZ Nominees that were still held by ANZ Nominees at the time of hearing. The plaintiffs claimed that they had an equitable interest in those shares and that this equitable interest had priority over the first defendant's title (a priority of interests matter that could be determined in later proceedings).   **(c) Decision**  Beconwood claimed that it had an equitable interest in the shares transferred to ANZ Nominees either because:(a) the legal effect of the SLA was to create a mortgage of its shares in favour of the second defendant; or (b) the plaintiffs had an equitable charge over the shares transferred to ANZ Nominees.Finkelstein J held that Beconwood did not have an equitable interest over the relevant shares on either of these grounds. His Honour noted that it was suggested that the first defendant had made a number of representations to the plaintiffs at the time of entry into the SLA, however, it was not relevant to consider the existence or nature of these representations in these proceedings. **(i) SLA could not be construed as a mortgage**Finkelstein J held that it was not possible to conclude that the SLA could be properly characterised as a mortgage for a number of reasons. First, the express terms of the SLA indicated that the SLA was not a mortgage. The agreement specified that unencumbered title in the lent securities and collateral passes on delivery. A mortgage cannot involve an outright sale, without any right to redeem: Re George Inglefield Ltd [1933] 1 Ch D 1. In addition, the SLA did not include any obligation to hand back the actual securities initially lent, or to return the collateral actually provided. Instead, the agreement obliged the borrower to deliver the same number and type of securities and collateral. His Honour also concluded that the fact that the SLA included netting and set-off provisions which came into effect on default, confirmed that no equitable property rights existed over the securities because "if such rights existed, they could not simply be converted by contract to monetary obligations". Secondly, Finkelstein J rejected the plaintiffs' argument that the agreement between the plaintiffs and the second defendant should be characterised differently to other share lending agreements. The SLA was a modified version of a standard industry agreement, and the plaintiffs argued that it should be construed differently because it was made in the 'retail market' rather than the 'institutional market'. Finkelstein J rejected the argument that different share lending agreements can be made in different markets, and therefore, have different meanings. His Honour held that the meaning of a contract cannot depend on the subjective motivations of those who enter into it, and in addition, he did not accept that the plaintiffs were unsophisticated investors that needed the court's special protection.  Finkelstein J suggested that the plaintiffs' characterisation of the SLA as a mortgage may be more 'attractive' if the court could construe a contract by reference to its economic effect. His Honour stated that 'while the economic substance of the transactions (mortgage and securities lending) may be similar, the legal mechanism by which they are effected is fundamentally different'. His Honour concluded that the character of a transaction must be determined by reference to its legal nature: Chow Yoong Hong v Choong Fah Rubber Manufactory [1962] AC 209. **(ii) The plaintiffs held no other equitable interest in the shares** The second basis on which the plaintiffs argued that they held an equitable interest in the securities was that under the SLA the second defendant had an implied obligation to hold or retain an interest in any shares that met the SLA's definition of 'equivalent securities'. The plaintiffs suggested that they had a charge or equitable interest over those 'equivalent' shares until the shares were transferred back, and legal title passed back to the plaintiffs. Finkelstein J dismissed this argument. His Honour held that the plaintiffs had not satisfied the test for implying a contractual term: BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 226.  Instead, 'the term is sought not so much to make the SLA work, but to help convert it into a mortgage or charge'. Further, the SLA sets out that the second defendant could decide how and from whom it obtained securities that satisfied the definition of 'equivalent securities'. Consequently, Finkelstein J held that the rule which applied in this situation was that 'until property which is previously unidentified is appropriated to an agreement, neither a legal nor an equitable interest in that property can be created by that agreement': Hoare v Dresser (1859) 7 HLC 290 [11 ER 116); Citizens' Bank of Louisiana v First National Bank of New Orleans (1873) LR 6 HL 352. **(iii) Other issues** Finkelstein J also considered the argument that the netting provision in the SLA had been activated because an 'event of default' had occurred. The argument was that the appointment of a receiver, or the appointment of an administrator under Part 5.3A of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) was analogous to the appointment of a liquidator - which is an 'event of default' under the SLA. The plaintiffs accepted that if this were correct, then it would have lost any equitable interest that it held in the shares.    Finkelstein J concluded that the netting provision had not been activated. His Honour said there is an important distinction between administrators and liquidators and they could not be considered analogous. A party-appointed receiver takes control of a company for the single purpose of discharging debts due, whilst a liquidator's role is to wind up a company. In reaching his decision, Finkelstein J gave some useful background on the securities lending industry and US case law on securities lending agreements. His Honour stated that the conclusions he had reached on the effect of the SLA were in line with the US authorities, including the US Supreme Court decision in Provost v United States (1926) 269 US 443. Finkelstein J said that 'if there is one constant theme across the cases, it is that agreements made using industry-standard documentation should be honoured according to the practices and expectations of the securities industry; to do otherwise would be to risk impairing the efficient functioning of national and international capital markets'.etailed Contents**5.6 Ownership of shares used in particular margin lending arrangements** (By Sandy Mak and Ciara Yeo, Freehills) Melewar Steel Ventures Limited v ANZ Nominees Limited; Terpu v ANZ Nominees Limited [2008] NSWCA 68, New South Wales Court of Appeal, Spigelman CJ, Mason P and Hodgson JA, 21 April 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswca68.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswca68.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This case concerned an appeal of interlocutory proceedings over the question of the ownership of shares used in particular margin lending arrangements. The issue was whether the broker and the respondent misrepresented the effect of the security lending and borrowing agreements and led the applicants to believe they retained beneficial ownership in the securities they had 'lent'. The securities were validly acquired by the respondent from the broker under separate securities lending arrangements. Ultimately the New South Wales Court of Appeal determined that the agreements clearly transferred title to the broker leaving the applicants with no legal or equitable interest in the securities. Furthermore, there was a lack of fraudulent intent and there is no authority to support the argument that innocent misrepresentation can lead to an equitable right against a third party in whom the property has transferred validly. On the balance of convenience, injunctive relief was refused, as damages were an adequate remedy.  In obiter, Spigelman CJ and Hodgson JA mentioned that there was a serious question to be tried against the respondent as to whether they were aware of the true nature of the agreements between the broker and the applicants.**(b) Facts**  Melewar Steel Ventures Limited ("Melewar") and Terpu both brought applications for leave to appeal against a decision of the New South Wales Supreme Court ("NSWSC"). The NSWSC had dissolved an interlocutory injunction restricting ANZ Banking Group Limited ("ANZ") from disposing of shares in Conquest Mining Limited ("Conquest") and Gindalbie Metals Limited ("Gindalbie") on the balance of convenience.  These cases involved two separate but similar arrangements that were the subject of dispute. In 2005, Mr Terpu and his company Valleybrook Investments Pty Limited, entered into a Securities Lending and Borrowing Agreement with the broker, Opes Prime Stockbroking Limited ("Opes Prime"). The contract was contained within an agreement brochure. About 5% of the issued capital in Conquest was transferred from Mr Terpu and his company to Opes Prime.  Melewar entered into a Global Masters Securities Lending Agreement with Opes Prime in 2007. Melewar transferred 7.25% of the issued capital in Gindalbie Metals Limited to Opes Prime. The two security lending and borrowing agreements ("Agreements") were not identical, but their substantive terms were of similar effect. The Agreements stipulated that if a lending and borrowing of securities occurred, title to those securities would pass absolutely from one party to the other free and clear of any liens, claims, charges or encumbrances or any other interest of the transferring party. The Agreements also conferred on each party conditional rights to terminate a security loan in which event Opes Prime was obliged to 'redeliver equivalent securities'.  On 27 March 2008, ANZ appointed receivers and managers over the assets of Opes Prime. ANZ acquired the securities from Opes Prime under separate securities lending arrangements in which Opes Prime was the lender of the securities and ANZ their borrower and became the legal owner of the securities.  For the purposes of the applications, the judges assumed that Opes Prime was insolvent and therefore unable to perform its obligation to 'redeliver equivalent securities' to Melewar and Terpu.  **(c) Decision** **(i) Misrepresentation by Opes Prime** Melewar and Terpu claimed that Opes Prime had misrepresented the legal effect of the Agreements . They were misled by the brochure containing the Agreements (in Terpu's case) and Opes Prime's website (in Melewar's case) and by oral representations from Opes Prime which suggested that investors would retain beneficial and economic ownership in any securities lent and would be entitled to redeem the securities upon repayment of the loan. Mason P found that there was no evidence of fraudulent intent on the part of those responsible for the agreement brochure and website. The Agreements expressed in clear language that the shares were to became the property of Opes Prime. The court also noted that while the Applicants may have personal claims against Opes Prime to 'redeliver equivalent securities', it was unaware of any authority to support an argument that innocent misrepresentation could lead to an equitable right against a third party who has received property transferred validly. The recent decision in Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89 suggests that the High Court is reluctant to extend the principles in Barnes v Addy (1874) LR 9 Ch App 244. **(ii) ANZ on notice of misrepresentation** It was also argued that ANZ Global was on notice that the brochure contained misleading statements about investors retaining beneficial and economic ownership of lent stock as ANZ Global was named in the brochure as "Bankers and Custodian Bank" along with a copy of its logo. However, the court found that there was not enough evidence to make good any claim to rescind the signed agreement on the basis of notice of misrepresentation.**(iii) Rights equivalent to those vested in a mortgagor seeking to redeem**As an alternative cause of action, Melewar and Terpu argued that they were in a position to repay Opes Prime the moneys due under their facilities. This ability to demand redemption of their security meant that they had an equitable interest equivalent to the right of a mortgagor, which would take priority over ANZ.  Mason P rejected this argument. His Honour found that the Agreements indicated that the securities 'lent' became the property of Opes Prime or its nominee. Melewar and Terpu could not rely on their subjective belief to the contrary. They do have personal rights against Opes Prime to deliver 'equivalent securities' however this is not a continuing legal or equitable interest in the securities in favour of Melewar and Terpu. **(iv) Injunction vs damages** Melewar and Terpu asserted that the parcels of shares they held were controlling and strategic, meaning that damages were inadequate as a remedy. Terpu further argued that allowing a disposal of the shares in Conquest would increase the possibility of a takeover of Conquest by Goldfields (a competitor), the amount owed by Terpu to Opes Prime was $500,000 compared to the $7 million value of the shares, Mr Terpu's position as managing director of Conquest would be prejudiced and damages would be difficult to assess in light of these considerations. It was held that on the balance of convenience, the court would not award injunctive relief as damages would be an adequate remedy to satisfy any claims that were viable against ANZ.  **(v) Serious question to be tried** Hodgson JA agreed with Mason P but in obiter noted that there was a serious question to be tried as to whether ANZ was aware of the contents of the Agreements and whether Opes Prime represented the documents as one in which finance would be provided on the security of shares rather than an outright transfer of shares for money. Spigelman CJ also agreed with Mason P and in his judgment discussed the comparative detriments to the applicants and to the respondents in the application of the balance of convenience test. The detriment to ANZ is substantial due to the volatility of the securities and the significance of liquidity to a financial institution. Conversely, given that the shares are in publicly listed companies with a widely dispersed shareholding, the detriment to Melewar and Terpu is less as they may be able to acquire shares on market if damages are eventually awarded. His Honour noted that there may be certain special reasons which would render damages to be inadequate and would be given significant weight in assessing the balance of convenience. The example cited was where a shareholder has a strategic shareholding that is not readily replicable (in this case, this was not true). Additionally, where the applicants are able to direct the broker as to how those shares should be voted, this would be given some weight, although not determinative weight.etailed Contents**5.7 Can derivative actions under Part 2F.1A be instituted if the company is in liquidation?  Court does not decide but allows derivative action on alternative grounds** (By Jonathan Mackie, Mallesons Stephen Jaques) Ragless v IPA Holdings Pty Ltd (in liq) [2008] SASC 90, Supreme Court of South Australia (Full Court), Debelle, Sulan & Vanstone JJ, 11 April 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/april/2008sasc90.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2008/april/2008sasc90.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** The case involved an appeal against an order of the Master to grant leave pursuant to section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act') for a shareholder to bring proceedings in the name of the company. The court considered whether the requirements for granting leave under section 237(2) had been established.   The decision is of most importance in the considerations relevant to a company in liquidation. In particular, the court was able to sidestep the unresolved debate on whether sections 236 and 237 applied where the company was in liquidation, by using the court's inherent power to authorise a creditor or contributor to sue in the name of the company under sections 477(6) and 511(1) of the Act. These statutory powers were unaffected by the enactment of sections 236 and 237. **(b) Facts** IPA Holdings Pty Ltd (Holdings) was incorporated on 30 June 1982.  The two directors of the company were Clive Lindsay Ragless (Ragless) and Daron Jon Carnie (Carnie). Both Ragless and Carnie were also the secretaries of the company and each held one of the two fully paid ordinary shares.  Holdings acted as trustee of the Industrial Pyrometers (Aust) Pty Ltd Unit Trust (IPA Trust). The IPA Trust was established on 1 July 1982 with two issued units.  One unit was held by IPA Manufacturing Pty Ltd (Manufacturing), controlled by Ragless. The other unit was held by Onetemp Pty Ltd (Onetemp), controlled by Carnie. Holdings was a joint venture on the part of Ragless and Carnie. A partnership was formed in 1970 to manufacture and sell pyrometers, a device used for measuring and controlling temperature in an industrial environment. Their business arrangement was restructured in 1982 when they incorporated Holdings to conduct the business. Although a corporate trust structure was adopted, in essence they continued to carry on the business as a partnership.  The Trust Deed provided that the IPA Trust would terminate and the business would be wound up on 1 June 2003. Upon termination, it was intended that the assets and goodwill of the business be sold and the proceeds distributed to unit holders. Either unit holder was at liberty to purchase from the other the assets and goodwill of the IPA Trust. In 1990, the parties agreed to divide the business into manufacturing and selling divisions, and effect was given to this intention in February 1991.  Ragless and Manufacturing took over the manufacture of sensors and Carnie and Onetemp took over the sales of sensors and controllers. This agreement was not reduced to writing until a deed was executed on 25 June 1999 (1999 Deed). Ragless and Carnie conducted their business according to the 1990 agreement. **(i) 1999 Deed** The 1999 Deed provided for:* the lease of the manufacturing assets and sales assets to Manufacturing and Industrial Pyrometers (Aust) Pty Ltd (later renamed Onetemp) respectively and a licence to each respectively to manufacture sensors and to sell sensors and controllers;
* the payment by each company of $75,000 per annum to Holdings for the lease and licence;
* the goodwill of the business to remain in the possession of Holdings;
* the arrangement to remain on foot for a period of 2 years from 1 July 1997; and
* termination of the agreement by either party on three months notice in writing, on expiry of the term.

On 8 December 1999, Industrial Pyrometers and Carnie gave notice terminating the agreement. The notice expired on 8 March 2000, at which point both parties continued to conduct their separate businesses. This led to further disputes between them. The trust vested on 1 June 2003 so that it was necessary for the business to be wound up pursuant to the terms of the Trust Deed. That did not occur and had led to further disputes affecting the management of Holdings.**(ii) Winding up** On 28 November 2005 an order was made in the South Australian Supreme Court winding up Holdings on the just and equitable ground and appointing a liquidator, on the application of Ragless. Disputes between Ragless and Carnie affected the winding up of the company. The liquidator believed that Holdings may have potential claims against both Onetemp and Manufacturing, however he was not in a position to proceed with such a claim due to a lack of funding. The solicitor for the liquidator later wrote to the solicitor for both Ragless and Carnie informing him that the liquidator proposed to sell the assets of Holdings and offering them an opportunity to purchase the assets within 14 days. Neither Ragless or Carnie accepted the offer. On 6 September 2006 Ragless replied that it was his intention to seek leave of the court to bring an action on behalf of Holdings for the recovery of earnings made by any party due to the unauthorised use of Holdings' assets, the interest on those earnings and any other damage caused to Holdings as a result of the unauthorised use of the assets. **(iii) Statutory derivative action** Ragless sought leave pursuant to section 237 of the Act to bring proceedings in the name of Holdings. Ragless asserted that Holdings had claims against Onetemp in relation to breaches of the 1999 Deed and, in particular, for the failure of Onetemp to return sales division assets to it and account for profits realised from those assets while it unlawfully retained possession of them contrary to the terms of the 1999 Deed.   On 2 July 2007 the Master ordered that Ragless be granted leave pursuant to section 237 to commence proceedings in the name of Holdings against Onetemp. **(iv) Appeal** Carnie appealed to the court against the order of the Master, alleging that none of the pre-requisites listed in section 237(2)(a), (b), (c) and (d) of the Act had been satisfied. **(c) Decision** Debelle J first examined whether the pre-requisites to the granting of leave under section 237(2) of the Act had been satisfied. **(i) The company will not itself sue** The court held that there was no basis for interfering with the Master's decision under section 237(2)(a) of the Act. There were clear facts from which the Master could properly infer that the liquidator would not cause Holdings to commence proceedings. Section 237(2)(a) required the applicant to establish only that it was probable that the company will not itself bring proceedings. It required no more than that. The effect of Carnie's contention was to add to section 237(2)(a) another matter to be established by an applicant for leave, namely, that the applicant was not willing to provide funds to the liquidator to conduct the proceedings. The court could not add to the criteria specified by Parliament. The evidence established that the liquidator was familiar with the dispute between Ragless and Carnie and their respective contentions. The liquidator had investigated the potential claim that Holdings may have pursuant to the agreement embodied in the 1999 Deed and considered that Holdings may have claims against Onetemp as well as Manufacturing.Carnie's contentions failed to give any weight to the fact that a liquidator had been appointed and that the liquidator had gained a knowledge of and a familiarity with the issues to the point of recognising the respective claims and proposing a remedy. There was clear evidence that the liquidator did not have any financial resources and certainly not sufficient resources to commence legal proceedings.  It was proper for the Master to infer that the liquidator would not institute proceedings. The absence of evidence of a clear cut and authoritative refusal by the liquidator in answer to a request to bring proceedings did not necessarily mean that the requirements of section 237(2)(a) had not been established. **(ii) Good faith** The court held that the Master's conclusion in respect of the requirement of good faith under section 237(2)(b) of the Act should be upheld.  In general, a court will have regard to at least two interrelated factors when determining whether the applicant has satisfied the requirement of good faith:* whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success; and
* whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process.

Debelle J stated that one instance of conduct satisfying the requirement of good faith was where the application is made by a current shareholder of a company who has more than a token shareholding and the derivative action seeks recovery of property so that the value of the applicant's shares would be increased. In this case Ragless and Carnie were each in a position to exercise control over one half of the shares in the company. Ragless had a substantial shareholding and was seeking to add value to his shares. The evidence clearly established that Ragless honestly believed that he had a good cause of action and reasonable prospects of success. It also established that he was not seeking to abuse the process of the court but rather seeking to bring the action with the legitimate objective of breaking what had become a deadlock between him, Carnie and their respective companies. The exception to the rule in Foss v Harbottle (1843) 2 Hare 461; 67 ER 189 was intended to assist in the resolution of disputes between those holding a minority interest and those holding a majority or controlling interest. Debelle J took the view that the principle applied with equal force when control of the company was divided between the only two shareholders and they were locked in a dispute which had reached a stalemate because neither would agree to the proposal of the other to resolve the dispute. The wide powers of the court under section 241 of the Act enabled it to address the conflict of interest Ragless clearly had and to determine the matter fairly between the two shareholders. Those powers enabled the court to order that Ragless and Manufacturing account to Holdings in accordance with the undertakings Ragless had given.**(iii) Best interests of the company** The court held that Carnie had failed to demonstrate any error on the part of the Master in relation to section 237(2)(c) of the Act. The effect of the requirement in section 237(2)(c) is that the court must be satisfied that it is in the best interests of the company that the applicant has leave to proceed on behalf of the company. It required that the court be satisfied, not that the proposed derivative action may be, appears to be, or is likely to be, in the best interests of the company but, rather, that it is in the best interests of the company.   That inquiry would normally require the applicant to adduce evidence on at least the following matters:* the character of the company, that is to say, the nature of the company's operations;
* the business of the company so that the effects of the proposed litigation on the conduct of the business may be appreciated;
* whether there are other means of obtaining the same redress so that the company does not have to be brought into litigation against its will; and
* the ability of the defendant to meet at least a substantial part of any judgment in favour of the company so that the court may ascertain whether the action would be of practical benefit to the company.

Debelle J noted that joint venture companies in which no one shareholder has a controlling interest have a real potential to become bogged down in a stalemate because the shareholders cannot agree how to conduct the business of the company.  Despite suggestions in Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR 313, that the procedure for granting leave is not suitable in the case of a joint venture company with deadlocked controlling interests, Debelle J was of the view that decisions in Meytor Inc v Queensland Electronic Switching Pty Ltd [2003] 1 Qd R 186 and Fiduciary Ltd v Morningstar Research Pty Ltd (2005) 53 ACSR 732 established that a grant of leave was a suitable means by which to resolve deadlocks of that kind. It was appropriate to apply the reasoning in Meytor Inc and Fiduciary Ltd as Holdings was initially a joint venture company established as a means by which the parties could continue their partnership. Although the manufacturing and selling assets were separated in 1990, Holdings retained an interest, the subject of the current dispute. Ragless and Carnie were in a stalemate in which neither would agree to resolve the issues affecting Holdings or any means by which those issues might be resolved, and further, the differences between the parties were frustrating the liquidator's capacity to wind up the company. Those facts coupled with the powers available to the court under section 241 of the Act demonstrated that the stalemate could be resolved in the best interests of the company and in a way enabling the liquidator to proceed with the winding up. There was no other suitable means of remedying the position. Where a company is being wound up, the question what is in the best interests of the company would, as a general rule, be answered by having regard to what is in the best interests of creditors. As Holdings had no creditors, the question was what was in the best interests of the two contributories, that is, the two shareholders. It was plainly to their advantage to resolve the issues and to have Holdings' assets distributed to them once the liquidator's costs were deducted. **(iv) A serious question** Section 237(2)(d) of the Act requires that the court must be satisfied that there is a serious question to be tried. The court must determine whether the applicant has demonstrated that there is a real question to be tried, that is to say, whether the applicant is able to identify the legal or equitable rights to be determined at trial in respect of which the final relief is sought. What is meant by whether there is a serious question to be tried is that the applicant must show a sufficient likelihood of success to justify the preservation of the status quo pending the trial. The court held that Ragless had a sufficient likelihood of success to justify a grant of leave. Carnie submitted that there was no opinion or other evidence to assist the court in assessing the prospects of success of Ragless in this action and the Master therefore, could not determine whether there was a serious question to be tried. The court rejected this contention as it failed to have regard to the view of the liquidator, expressed in his solicitor's letter, that there may be claims against both Onetemp and Manufacturing. **(v) Application to a company in liquidation** Debelle J noted that there had been debate as to whether sections 236 and 237 of the Act applied to a company in liquidation, but found it unnecessary to decide the matter as there was another route to the conclusion that Ragless should be granted leave.  As a general rule, the liquidator of a company in liquidation is the person in whom is vested the authority to bring legal proceedings on behalf of the company. However, the court has an inherent power to authorise a creditor or contributor to sue in the name of the company. Sections 477(6) and 511(1) of the Act both allow any contributory or creditor to apply to the court. These statutory powers are unaffected by the enactment of sections 236 and 237, and the court, therefore, had power to grant leave to Ragless as a contributor to prosecute the action in the name of Holdings. **(vi) Orders** It had not been demonstrated that the Master had erred in his conclusion and therefore the court ordered that the appeal be dismissed.etailed Contents**5.8 Can derivative actions under Part 2F.1A be instituted if the company is in liquidation?  No says court** (By Matt Bernardo, Mallesons Stephen Jaques) Chahwan v Euphoric Pty Ltd trading as Clay & Michel [2008] NSWCA 52, New South Wales Court of Appeal, Beazley, Tobias & Bell JJA, 8 April 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsca52.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsca52.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This was an appeal against the decision of the New South Wales Supreme Court (NSWSC).  The appellant sought leave under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) to bring proceedings on behalf of a company in liquidation.The New South Wales Court of Appeal (NSWCA) dismissed the appeal, holding that:* Part 2F.1A did not apply to a company under the control of a liquidator;
* the appellant was not acting in good faith within section 237(2)(b) of the Act; and
* it was not in the best interests of the company that the appellant be granted leave within the meaning of section 237(2)(c) of the Act.

**(b) Facts**The appellant sought a declaration that Bycoon Pty Ltd (Bycoon) held property (lots 39 and 40) upon trust for the appellant (the appellant had provided funds for Bycoon to purchase the lots). Euphoric Pty Ltd (Euphoric) held a registered mortgage over lot 40, which was granted by Mrs Ayoub in breach of her general law duties (which she owed to Bycoon as its director). Euphoric asserted it also had a caveatable interest in Lot 39, which it sought to protect by lodging a caveat against its title.The appellant sought declarations that the mortgage over lot 40 and any equitable charge over lot 39 arose by reason of Mrs Ayoub's contraventions, and since Euphoric had knowledge of those contraventions, they held the mortgage and the caveatable interest as constructive trustee for Bycoon, who in turn held its interests under that constructive trust upon trust for the appellant.In order for the appellant to enforce against Bycoon his alleged interest in the properties, Bycoon first had to establish that Euphoric held its interests in the properties as trustee for Bycoon.  Bycoon was in liquidation and the liquidator declined to be involved in proceedings against Euphoric, so the appellant sought leave under section 237 of the Act to bring the proceedings in the name of Bycoon.Part 2F.1A of the Act provides a statutory derivative action whereby certain people can seek leave of the court to bring proceedings on behalf of a company.  The court can only grant the application if it is satisfied, amongst other things, that:* the applicant is acting in good faith in making the application for leave (section 237(2)(b) of the Act); and
* it is in the best interests of the company that the applicant be granted leave (section 237(2)(c) of the Act).

Barrett J in the NSWSC held that the derivative action in Part 2F.1A was available when the company was in liquidation, but refused the application because the appellant failed to establish the 'good faith' and 'best interests' requirements.  The applicant appealed to the NSWCA, which had to consider the following issues: * whether the derivative action in Part 2F.1A is available if the company is in liquidation;
* whether the applicant acted in good faith within the meaning of section 237(2)(b); and
* whether it was in the best interests of the company that the appellant be granted leave within the meaning of section 237(2)(c).

**(c) Decision****(i) Whether derivative actions are available when the company is in liquidation**Barrett J in the NSWSC held that Part 2F.1A applies to companies in liquidation. This was so because the purpose of Part 2F.1A was to abolish the rule in Foss v Harbottle (1843) 2 Hare 461; 67 ER 189 and its exceptions pursuant to which the ability to bring a derivative action was confined to the shareholders of a company as being the only persons who could represent the interests of the company as a whole. As section 236(3) provides that 'the right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished', section 236(1) significantly extended the categories of persons who may apply for such leave.However, on appeal, Tobias JA disagreed with this finding. After considering the conflicting case law in this area, Tobias JA held that the context as well as the extrinsic materials identifying the mischief which Part 2F.1A was intended to remedy (namely the restrictions relating to the exceptions to the rule in Foss v Harbottle) indicated an intention that the statutory derivative action was meant to apply only to a company as a going concern, not one under a liquidator's control. This was so because the rule in Foss v Harbottle and its exceptions did not apply and were irrelevant to a company in liquidation.Furthermore, Tobias JA explained that the lack of any discretion in the granting of leave under Part 2F.1A made it inappropriate to apply those provisions to a company in liquidation. If the requirements of section 237(2) are satisfied, the court has no discretion to grant leave. This gives rise to a potential conflict with the regime established by Chapter 5 where the court has overriding control over the whole of the winding up process of an insolvent company, including the conduct of the liquidator. That control would be lost given the mandatory terms of section 237(2) if it applied to companies in liquidation.In addition, if the company is in liquidation, only the liquidator can decide whether to bring proceedings on behalf of the company. If the liquidator decides not to institute proceedings (notwithstanding their power to do so under s477(2)(a) of the Act), then if Part 2F.1A otherwise applied to companies in liquidation, the provisions of section 237(2)(a) would be satisfied and the liquidator's opposition to the bringing of proceedings would be irrelevant, since the granting of leave is mandatory once section 237(2) is satisfied. As such, if Part 2F.1A derivative actions could be brought where the company was in liquidation, the liquidator's views would not be given proper weight and consideration. **(ii) Whether the applicant acted in good faith**The onus rests on the applicant to satisfy the court that they are acting in good faith in applying for leave to bring proceedings.  Tobias JA held that this enquiry was not confined to a consideration of the two factors identified by Palmer J in Swansson v Pratt (2002) NSWSC 583; (2002) 42 ASCR 313, namely:* whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success; and
* whether the applicant is seeking to bring the derivative suit for a collateral purpose in circumstances that would amount to an abuse of process.

Rather, it extends to a consideration of whether the applicant was in reality seeking to further their own personal interests other than as a current or former shareholder of the company, rather than the interests of the company as a whole.Tobias JA held that an applicant will only be acting in good faith for the purpose of section 237(2)(b) where, as a current or former shareholder or director of the company, they would suffer a real and substantive injury if a derivative action were not permitted, provided that the injury was dependent upon or connected with the applicant's status as such shareholder or director.  On the facts, the primary purpose of the appellant in seeking leave was to relieve the properties of the burden of the mortgage in favour of Euphoric, and obtain a declaration that Bycoon held the properties on trust for himself. He sought to take all the proceeds of the claim for himself personally, and neither Bycoon nor its creditors would receive any benefit whatsoever. If his claim was successful, it would only benefit himself in a capacity unrelated to his status as a former shareholder or director of Bycoon.  Hence the appellant was not acting in good faith.**(iii)  Whether it was in the best interests of the company that the appellant be granted leave** Tobias JA agreed with the decision of Palmer J in Swansson so far as it held that the requirement in section 237(2)(c) of the Act (that it be in the 'best interests of the company' that leave be granted) was a relatively high standard. It was also noted from the outset that the existence in the applicant of a personal interest is not ordinarily a significant factor given that few (if any) actions would be brought but for their personal interest.However, on the facts, the personal interest of the appellant was such that it would preclude Bycoon and its unsecured creditors from obtaining any benefit from the successful prosecution of its claim against Euphoric regarding the mortgage. For the purposes of section 237(2)(c) of the Act, the interests of Bycoon are the interests of its creditors. The interests of Bycoon's creditors would not be advanced by Bycoon having to honour its obligations as a trustee of the properties in favour of the appellant. If the appellant's claim succeeded, Euphoric would become an unsecured creditor, diminishing the interests of Bycoon's other unsecured creditors. If there were assets of Bycoon other than the lots to which the class of unsecured creditors were entitled, then any distribution to those creditors from the sale of those assets would be reduced if Euphoric lost its security and joined that unsecured class. The appellant would be the only person who would benefit. As such, the granting of leave did not advance the separate and independent welfare of Bycoon, so the requirements of section 237(2)(c) were not satisfied.Bell and Beazley JJA agreed with Tobias JA.etailed Contents**5.9 Approval of share transfers under section 468(1) of the Corporations Act**(By Audrius Skeivys, Blake Dawson) Carringbush Corporation Pty Ltd v ASIC [2008] FCA 474, Federal Court of Australia, Greenwood J, 10 April 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/april/2008fca474.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/april/2008fca474.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary** The plaintiffs, Carringbush Pty Ltd (CPL) and Carringbush Corporation Pty Ltd (CCPL), sought an order under section 468(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) that the court 'approve' the transfer of shares in Rothwells Limited (Rothwells) from CPL to CCPL after the commencement of winding up of Rothwells. Greenwood J ordered that the transfer was not rendered void by operation of section 468(1) of the Corporations Act, as the shares the subject of the transfer were fully paid and CPL had nothing further to contribute by way of unpaid calls on the shares in the liquidation of Rothwells.  There was therefore no prejudice to Rothwells or its creditors in approving the transfer of shares. **(b) Facts** In or around 1987 or 1988, Mr Denoon, a director of CPL, caused CPL as trustee of the Carringbush Unit Trust (Carringbush Trust) to invest approximately $2.5 million to acquire shares in Rothwells Limited (Rothwells). Rothwells was placed in provisional liquidation on 3 November 1988 and official liquidation on 22 September 1989.  On 26 May 1993, Mr Denoon executed an agreement between CPL and CCPL - a company of which Mr Denoon was also a director - to affect a sale by CPL as trustee of the Carringbush Trust to CCPL for all of the Rothwells shares for a total consideration of $1.00. No share transfer was lodged, however, and the share register of Rothwells continued to reflect CPL as the member following the sale. Mr Denoon intended the sale to effect the crystallisation of a capital loss on the Carringbush Trust's investment in the Rothwells shares, so that the loss could be offset against future capital gains. On 24 June 1993, Mr Denoon entered into arrangements with Mr Clark whereby Mr Clark ultimately acquired all of the units in the Carringbush Trust and Clark Enterprises Pty Ltd was appointed the new trustee of the Carringbush Trust. In entering into these arrangements, it was never contemplated that the Rothwells shares would be transferred from CPL to Clark Enterprises Pty Ltd as the new trustee of the Carringbush Trust, as Mr Denoon and Mr Clark assumed that the disposal by CPL to CCPL meant that CPL was no longer the owner of the Rothwells shares. On 16 August 1994, the liquidator of Rothwells issued a certificate stating that there were reasonable grounds that there was no likelihood that Rothwells shareholders would receive any distributions in the course of winding up Rothwells.Mr Clark and his wife, Mrs Clark, applied to the Federal Court of Australia to appeal a decision of the Federal Commissioner of Taxation made on 27 October 2006 to disallow objections to their amended assessments. The applications included a number of questions, including whether each taxpayer was entitled to take advantage of capital losses in the Carringbush Trust by reason of the disposal of the Rothwells shares, so as to offset capital gains derived from the Carringbush Trust from other projects. As one of the matters relied on by the Commissioner was that section 468(1) of the Corporations Act rendered void the transfer on 26 May 1993 of the Rothwells shares from CPL to CCPL, CPL and CCPL sought an order under that section that the court 'approve' the transfer. On 30 October 2007, the solicitors for CPL and CCPL wrote to ASIC advising of the proposed application.  On 20 November 2007, the application was served upon ASIC and Mr Ian Ferrier, the former liquidator of Rothwells. Notice of the application was given to the Australian Taxation Office (ATO) on 22 November 2007 and a copy of the application served on the Australian Government Solicitor on behalf of the ATO on 5 December 2007.  There was no appearance by ASIC, Mr Ian Ferrier or the Commissioner of Taxation in response to the proceeding. **(c) Decision** As it applied to the proceedings, section 468(1) of the Corporations Act provides that:468(1) [Dispositions, etc, void] Any disposition of property of the company, other than an exempt disposition, and 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.Greenwood J considered the common law principles that guide the exercise of the court's discretion under section 468(1). His Honour stated that '[t]he considerations that derive from an assessment of whether a 'disposition of property' of the company ought to be approved are quite different from those immediately relevant to a transfer of shares especially where the shares are fully paid and thus no calls can or will be made upon the shareholder.' When the question is one of transfer of shares after the commencement of the winding up, the question is 'would it be beneficial to the company' and would it 'benefit the creditors': In Re Onward v Building Society (1891) 2 QB 463. His Honour stated that the discretion is conferred in broad terms and is 'entirely at large', however ordinarily the discretion will not be exercised in favour of an order unless the court is satisfied that the order serves either the interests of the company or the interests of the creditors as a whole. Greenwood J referred to Jardio Holdings Pty Ltd v Dorcon Constructions Pty Ltd (1984) 3 FCR 311, in which case the court considered the overriding inquiry as 'essentially a commercial or economic one, calling for a balancing of the anticipated net gains or losses from the transaction for which approval was sought'. Moreover, the 'merits' of the transaction 'should be tested at the date of entry into the transaction sought to be validated'. In the present case, his Honour held that in assessing the net gains and losses from the perspective of the company and its creditors, there was no prejudice or loss to either, nor any benefit, by reason of the disposal of Rothwells shares on 26 May 1993. This was because all shares at the relevant date were fully paid, and although served with the application, neither ASIC nor the former liquidator of Rothwells nor the Commissioner of Taxation appeared before the court to contradict the orders sought by CPL and CCPL. Consequently, Greenwood J proposed to make an order that the transfer by CPL to CCPL of the Rothwells shares was not rendered void by operation of section 468(1) of the Corporations Act.etailed Contents**5.10 Scheme of arrangement: application for orders to convene meetings under section 411(1) of the Corporations Act 2001** (By Kathryn Finlayson, Minter Ellison) Macquarie Private Capital A Limited [2008] NSWSC 323, New South Wales Supreme Court, Barrett J, 9 April 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsc323.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsc323.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** None of the elements of the scheme arrangement, including that the consideration to be paid was variable, the inclusion of warranties that each holder's securities were free of encumbrances and the "no shop", "no talk" and "break fee" provisions, were sufficient to cause the court to withhold relief.  The question of avoidance of the operation of Chapter 6 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) proposed by section 411(17) should be addressed at the time of application for the court's approval under section 411(4)(b) and not at the convening stage. **(b) Facts** The three plaintiffs commenced proceedings seeking separate relief in relation to a composite proposal relating to stapled securities. Each stapled security consisted of:* one share in the capital of the first plaintiff, Macquarie Private Capital A Limited;
* one share in the capital of the second plaintiff, Macquarie Private Capital B Limited; and
* one unit of the managed investment scheme, Macquarie Private Capital Trust of which the third plaintiff, Macquarie Private Capital Management Limited  was the responsible entity.

The proposal was to transfer of all of the stapled securities to BSPEL Australia Limited in return for a cash price.   One unit holder, MISL, held approximately 48% of the stapled securities and the managed investment scheme. Both MISL and the third plaintiff were subsidiaries of Macquarie Group Limited. A third subsidiary of Macquarie Group Limited had also entered into an arrangement with BPSEL Australia Limited to continue to provide investment management services to the stapled security entities, assuming that the acquisition was completed.  MISL had stated that it intended to vote in favour of the acquisition proposal. Each of the first two plaintiffs applied for orders under section 411(1) of the Corporations Act for the convening of a meeting of their members to consider a scheme of arrangement between the company and its members. The third plaintiff applied for judicial advice under section 63 of the [Trustee Act 1925 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3784" \t "Default) that it was justified in placing a particular proposal before a meeting of holders of units in a registered managed investment scheme with a view to their considering a resolution to alter the constitution of the managed investment scheme to accommodate the proposal. **(c) Decision**   The court made orders under section 411(1) that the first and second plaintiffs convene meetings of their respective ordinary shareholders for the purpose of considering and if thought fit, agreeing (with or without modification) to a scheme of arrangement proposed to be made between the first and second plaintiffs and their respective ordinary shareholders.  The court also gave judicial advice in respect of the third plaintiff leading to a meeting of the members of the managed investment scheme for the purpose of its members considering and if thought fit, agreeing (with or without modification) to the resolution to alter the constitution of the managed investment scheme to accommodate the proposal.   Justice Barrett made a number of observations about the issues canvassed before him.  In particular, his Honour:* declined to consider whether, in the circumstances, the arrangements gave rise to any issue under section 253E of the Corporations Act. His Honour held that to do so at the convening stage was speculative and would require the court to give an advisory opinion divorced from any established factual situation;
* held that the fact that the consideration to be paid for the stapled securities was variable was not of concern as the formula by which the consideration would be calculated was fixed and the quantum of consideration would be notified to security holders in sufficient time to allow considered decision making;
* held that the inclusion in the schemes of arrangement of a warranty that each security holder will become bound that the holder's securities were not encumbered was not sufficient to cause the court to withhold relief as the purpose and effect of such a clause was to ensure that a scheme participant whose shares are subject to an encumbrance was not disadvantaged;
* held that, in the circumstances, there was no reason to think that MISL was a separate class for scheme purposes as its rights and interests were not relevantly different from those of other security holders. The possibility that a separate class might ultimately be found to exist ought not to deflect the court from letting the proposal go forward on the existing basis;
* held that the "no shop" and "no talk" provisions contained in the scheme arrangement operated only for the period necessary to bring the current proposal to its conclusion in the ordinary course.  In his Honour's view, neither those provisions nor the "break fee" provisions also contained in the scheme arrangement should cause the court to withhold the relief sought; and
* held that the question of avoidance of the operation of Chapter 6 proposed by section 411(17) should be addressed at the time of application for the court's approval under section 411(4)(b) and not at the convening stage.

etailed Contents**5.11 Whether irregularities in form will prevent a document from being classified as an affidavit under the Corporations Act**  (By Meng-xi Hu, Blake Dawson) Fastlink Calling Pty Ltd v Macquarie Telecom Pty Ltd [2008] NSWSC 299 New South Wales Supreme Court, Barrett J, 8 April 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsc299.html](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/april/2008nswsc299.html%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary** This case addresses whether a document's irregularity in form will prevent it being taken to be an affidavit under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act). Barrett J found that mere irregularities, such as a lack of date, witness signature or failure to use the words 'swear' or 'affirm',  will not prevent a document from being regarded as an affidavit so long as the factual requirements, that the document was in fact sworn at a certain date before the witness, are satisfied.  **(b) Facts**   On 22 January 2008, the applicant, Fastlink Calling Pty Ltd (Fastlink) filed an originating process to make an application under section 459G of the Corporations Act for an order setting aside a statutory demand served on it by the defendant, Macquarie Telecom Pty Ltd (Macquarie). Section 459G(3) requires that: "An application is made in accordance with this section only if, within those 21 days:(a) an affidavit supporting the application is filed with the Court; and(b) a copy of the application, and a copy of the supporting affidavit, are served on the person who served the demand on the company." A 9-page document signed by Ms Jerbil was filed with the court along with the originating process (Document). It began thus:"AFFIDAVITName            ANA JEBRILAddress         1212/87-98 Liverpool Street Sydney NSW 2000Occupation    DirectorDateI Ana Jebril do solemnly declare:"and after the numbered paragraphs contained the following:"SWORN at              GreenacreSignature of deponent (sgd) A JebrilSignature of witnessName of witness        Hilal ChoumanAddress of Witness    L1, 134A, Waterloo Road Greenacre NSW 2190Capacity of witness    Solicitor"Subsequently, Mr Chouman, the applicant's solicitor, and the witness named in the Document, filed an affidavit stating that: 'Ana Jebril swore the Affidavit (attached as Annexure A) and placed her signature on the Affidavit before me at Greenacre' and 'unintentionally and due to oversight at the time did not place my signature in the 'Signature of Witness' part of the Affidavit'. Annexure A contained a document comprising copies of 4 pages of the Document filed with the originating process. **(c) Decision**  Barrett J first noted that a finding adverse to the applicant on either requirement under section 459G would mean that the court had no power to set aside the statutory demand. By addressing each requirement in turn, he concluded that the Document did not constitute an affidavit for the purposes of the section, and even if it did, it was 'impossible to find' that a copy was served to the defendant within the 21 days or at all. Accordingly, he found that the requirements of section 459G were not satisfied and thus the court had no jurisdiction to make an order setting aside the statutory demand. **(i) Whether the Document constituted an 'affidavit'** Barrett J considered three aspects of the Document that might be taken to suggest that it did not constitute an affidavit within the requirements of section 459G. These were:* that it was undated
* the 'signature of the witness' was blank
* that it used the phrase ' solemnly declare' rather than the words 'say on oath' or 'affirm'

**(ii) Use of the words 'solemnly declare'** Barrett J recognised the application of state law to the Corporations Act through section 79 of the [Judiciary Act 1903 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "Default) and Gordon v Tolcher [2006] HCA 62, so long as there is nothing in the Corporations Act itself that indicates otherwise.  He referred to examples of acceptable forms of affidavit in the [Oaths Act 1900 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4112" \t "Default), Oaths Act 1888 (UK), [Supreme Court (Corporations) Rules 1999 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19658" \t "Default), [Uniform Civil Procedure Rules 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=86765" \t "Default) and Form 40 of the [Civil Procedure Act 2005](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=85461" \t "Default), but also noted that strict adherence to the prescribed form is not essential ([Interpretation Act 1987](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4023" \t "Default), section 80), so long as the statements within the document were made under oath.  Thus, Barrett J concluded that the use of the words 'solemnly declare' did not mean that the Document could not be an affidavit as it concluded by 'Sworn at Greenacre', showing the Ms Jebril made the statements under oath. **(iii) Lack of date**  In passing, Barrett J mentioned that the lack of date on the Document itself would not have stood in the way of finding the Document was an affidavit, given references to the date on the Document cover sheet and Mr Chouman's subsequent affidavit. **(iv) Lack of the witness' signature** Drawing on Australian and US case law, Barrett J stated that the lack of signature need not be fatal to the Document's being an affidavit as its quality depended not on its content but 'on the factual circumstances in which it was subscribed.' Thus, so long as it was 'sworn' by Ms Jebril before Mr Chouman, the witness, it would be a valid affidavit, as mere 'irregularity in form' will not invalidate an affidavit (Rule 35.1 of the Uniform Civil Procedure Rules). Extrinsic evidence is admissible to prove whether this occurred.  With reference to the later affidavit filed by Mr Chouman, Barrett J concluded that this did not prove that Ms Jebril swore the Document filed with the originating process. This was because Annexure A contained only four of the 9 sheets of the original Document, and could not show that the entire 9 page Document was signed by Ms Jebril before and attested by Mr Chouman. Accordingly, the Document did not constitute an affidavit.  **(v) Whether the affidavit was served on the defendant**  Given the finding against the applicant of the first requirement of section 459G, Barrett J did not consider whether the service requirement was fulfilled. However, he did observe that the document served on the defendant was only 4 pages, therefore the 9 page Document could not be said to have been served in accordance with section 459G. Barrett J concluded his judgment with the words: "This case illustrates the high price that may be paid for lack of attention to simple matters of detail'.etailed Contents**5.12 Manager's responsibilities under environment protection legislation** (By Jonathan Greenacre, Clayton Utz)Environment Protection Authority v Hogan [2008] NSWLEC 125, New South Wales Land and Environment Court, Jagot J, 31 March 2008  The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2008/125.html](http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2008/125.html%22%20%5Ct%20%22_new) **(a) Summary** The courts will take a punitive approach to a manager's responsibilities under the [Protection of the Environment Operations Act 1997 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4534" \t "Default) (the POEO Act), whether or not he or she was aware of them. As such, managers must actively learn about and act upon their environmental protection obligations. If a corporation breaches a provision of the POEO Act, section 169 of the Act provides that a person who is a director of the corporation, or who is concerned in the management of the corporation, is taken to have breached the same provision. Many managers are unlikely to be absolutely up to date with all of their company's environmental responsibilities. What approach will a court take when the company and its main manager clearly contravene the Act? Can the manager say "I didn't know"? The LEC's recent case of Environment Protection Authority v Hogan [2008] NSWLEC 125 provides some guidance on these questions.**(b) Facts**David Hogan was the general manager of Riverstone Earth Moving Pty Ltd. The Environment Protection Authority granted a licence to Riverstone to operate a solid waste landfill, but then suspended it. Waste, particularly virgin excavated natural material ("VENM"), continued to be delivered to Riverstone's landfill.This was a breach of section 144 of the POEO Act which states that a person (which includes a company) who is the owner or occupier of any land and who uses the land, or causes or permits the land to be used as a waste facility without lawful authority is guilty of an offence. This is a strict liability offence, meaning that the prosecution does not need to prove that the person had knowledge that it was committing an offence by performing certain acts. **(c) Decision**The Land and Environment Court of NSW found that Riverstone clearly breached the Act by permitting trucks to enter and deposit waste without a licence. The main issue in the case was Hogan's liability under section 169. The court found that Hogan was in breach of the Act regardless of his beliefs (albeit mistaken) of his responsibilities, however genuine those beliefs were. The court described Hogan's general argument that he did not knowingly commit a breach as a "serious misunderstanding" of the environmental compliance requirements of the Act. The court found that Riverstone's environment protection systems were "extraordinarily poor". Even though the company was on notice of the proposed suspension of its licence, no steps were taken to ensure that anyone read and understood the notice of suspension when it arrived. No-one asked the EPA to resolve any uncertainty about the date the suspension took effect or whether the suspension allowed VENM to be brought into the premises. The court attributed much of the responsibility for this inadequacy to Hogan. He knew that he was the nominated contact person for the EPA, had communicated with the EPA about the waste facility and was generally in a position to influence the conduct of the corporation.Despite this obvious responsibility, Hogan "did not use all due diligence to prevent the contravention." For example, although Hogan knew that the company's waste licence had been suspended, he did not take "adequate" steps to inform himself about its requirements. He also did not ensure that other, less senior managers were fully apprised of the situation. Hogan also negotiated waste prices with many of the trucks entering the premises to deposit waste after the licence was suspended.**(i) But I did nothing wrong** Hogan argued that, under his reading of the legislation, he was not liable because VENM does not constitute "waste", as defined under the Act. Unlike other waste, VENM can be reused. The court disagreed, pointing out that the Act defined waste as something which might be "processed, recycled, reused or recovered". **(ii) But I didn't know** Hogan argued that his liability should be limited to trucks that he knew were entering the waste facility with VENM. The court was particularly troubled by this lack of understanding of the nature of his obligations and was at pains to point out that his lack of knowledge was irrelevant to the charge, because the offence is "strict liability". **(iii) Penalty**Considering the court's uncompromising stance towards Hogan's mistaken beliefs about his environmental responsibilities, he may have expected to receive a heavy penalty. However, the Court reduced the penalty on the grounds that Hogan was of good character, was an undischarged bankrupt and had changed his plea from not guilty to guilty on the second day of the hearing on the basis that although he believed VENM was not waste, he accepted that he had not made sufficient inquiries of the supervisor of the waste facility to satisfy himself that certain loads of waste were VENM. He was still fined $18,000 and ordered to pay the EPA's costs, as agreed or assessed. These were estimated by the EPA to be approximately $30,000.**(iv) Significance**Hogan demonstrates the punitive approach that the court will take to a manager for a clear breach of the Act. The court clearly places the burden of understanding environment protection regulation on the company and the managers of such companies. The defences open to managers are limited. The court clearly restated that under section 169, a manager is liable for the company's environmental offence unless the person can establish that he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision or was in such a position but used all due diligence to prevent the contravention by the corporation. In light of this limited defence, managers should be proactive in learning about environmental protection obligations. The degree of understanding that a manager must have of the company's environmental obligations is unclear from the case, however it appears that he or she must know whether the company has a licence, the conditions of that licence, the type of materials which can be dealt with or activities authorised under the licence and, if relevant, when a termination or suspension of a licence takes effect. Further, as licence holders must lodge annual returns certifying compliance, the manager must know whether there have been any non-compliances or, at the very least, have in place a robust system for identifying and reporting non-compliances. Finally, it appears that a manager needs to take responsibility for ensuring the company complies with its own environmental policy. In this case, the court was highly critical of Riverside's poorly co-ordinated attempts at conforming with the relevant environmental policy and Hogan's efforts at ensuring his company's compliance with that policy. While the court did not state what Hogan should have done to ensure the company complied with its policy, other cases suggest that a manager needs to perform the following to be able to argue that he or she exercised all due diligence to prevent the company's contravention of its environmental obligations and thus, access the defence provided by section 169: * implement the policy in a way which creates a culture of environmental compliance;
* reinforce the policy through staff training programs to ensure staff are aware of the company's environmental program and understand the environmental risks associated with activities carried out on site; and regularly monitor the policy; and
* regularly review the policy to ensure that it is operating effectively and improving it where necessary to address increasing standards or to ensure that environmental issues are brought to the attention of the company or its officers.

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| **6. Contributions** |  |   |

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