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|  | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  | | --- | | **Bulletin No. 144**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), Director, Centre for Corporate Law and Securities Regulation  Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Securities Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com/" \t "_new).   1. 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We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** |  | | |  | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | **1.1 Inquiry on guidance for directors**   On 18 August 2009, the Australian Minister for Financial Services, Superannuation and Corporate Law, the Honourable Chris Bowen MP, asked the Corporations and Markets Advisory Committee to:   * examine the guidance or codes of conduct that are available overseas for corporate directors; * examine whether there is sufficient guidance provided to executive directors and non executive directors in Australia to ensure that they have a clear understanding of their roles and responsibilities; and * advise whether the performance of directors would be enhanced by the introduction of guidance for directors, for example through a code of conduct or best practice guidance, by a relevant regulator; and if so what form that guidance should take.   The Committee is to report by 31 April 2010.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.2 APRA releases further draft guidance for superannuation trustees**   On 14 August 2009, the Australian Prudential Regulation Authority (APRA) released draft guidance on a number of prudent practices for APRA-regulated superannuation trustees.       APRA has also released a discussion paper to assist in public consultation on the four new draft guides:   * draft Superannuation Prudential Practice Guide - SPG 110 - Capital; * draft Superannuation Prudential Practice Guide - SPG 200 - Risk Management; * draft Superannuation Prudential Practice Guide - SPG 230 - Adequacy of Resources; and * draft Superannuation Prudential Practice Guide - SPG 530 - Fitness and Propriety.   The release of the discussion paper and draft superannuation guides follows the release for consultation earlier this year of revised guidance on reserves and conflicts of interest.     The four prudential practice guides address measures that might be employed by a trustee and its directors to satisfy obligations imposed under legislated licence conditions, various operating standards and other provisions under the [Superannuation Industry (Supervision) Act 1993](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default) (SIS Act) and its regulations.  APRA is progressively issuing guides to replace Superannuation Guidance Notes and other information previously provided to trustees.     The need for updated APRA guidance has arisen from changes to the structure of the industry and the increase in size and sophistication of funds in the period following the licensing of trustees in 2006.  Where appropriate, APRA harmonises guidance provided to entities across all APRA-regulated industries.     The draft guides are available on the [APRA](http://www.apra.gov.au/Policy/Superannuation-Consultation-Packages.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.3 Diversity on boards of directors**  On 13 August 2009, the Corporations and Markets Advisory Committee (CAMAC) released its report 'Diversity on Boards of Directors'.  The report responds to a request in September 2008 from the then Minister for Superannuation and Corporate Law for advice on options for creating an environment that will encourage companies to foster a governance culture that embraces diversity in the composition of their boards, in particular in relation to women.  The advice was sought by way of background to consideration of board diversity at a meeting of the Ministerial Council for Corporations.  In considering diversity on corporate boards, the report looks at:   * the role and structure of boards, including the processes by which directors are appointed and the elements that make up an effective board; * the current state of diversity; * possible ways to promote an environment conducive to a more open approach to the composition of boards, including recruitment of directors from a more diverse pool of qualified candidates; and * possible ways to assist in the development of a broader pool of skilled and experienced board candidates.   The report encourages boards and shareholders in their own interests to give full consideration to issues of diversity and board composition. In that context, the Committee considers that the commentary in the ASX Corporate Governance Council Principles and Recommendations dealing with board composition might usefully be expanded to provide further information to shareholders to assist them in voting for board candidates.  The Committee does not support any move to impose a particular model of board diversity on private sector companies, such as through quotas. Such a move would cut across the responsibility of shareholders for the appointment of directors who are to be accountable to them.  CAMAC considers that effective change depends on convincing corporate leaders and shareholders of the benefits of a more open approach to the identification and selection of directors. The putting together of well qualified and effective boards, without overlooking candidates from a less traditional mould, should be promoted as an element of effective governance and corporate success.  The report also refers to possible steps that could be taken to assist a more diverse group, including women, to develop the skills that would enable them to take up board positions, including mentoring programs and adoption of more accommodating employment practices at executive management level.  The report is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2009/$file/Board_Diversity_B5.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.4 FSA introduces remuneration code of practice**  On 12 August 2009, the UK Financial Services Authority (FSA) introduced a new code that will require large banks, building societies and broker dealers in the UK to establish, implement and maintain remuneration policies consistent with effective risk management.    The new code is designed to achieve two objectives: first, that boards focus more closely on ensuring that the total amount distributed by a firm is consistent with good risk management and sustainability; and second that individual compensation practices provide the right incentives.    Eight principles have also been added to the FSA's handbook to ensure firms understand how the FSA will assess compliance.   The code makes clear that it is not expected that firms will enter into contracts with individuals which provide guaranteed bonuses for more than one year. It is also expected that for senior employees two-thirds of bonuses will be spread over three years.    Firms are expected to provide the FSA with a remuneration policy statement by the end of October. This will have to be signed off by remuneration committees and will enable the FSA to check compliance with the code. Non-compliant firms could face enforcement action or ultimately, be forced to hold additional capital should they pursue risky processes.    The rule and code are consistent with the recommendations of the Financial Stability Board and with the measures being considered by others such as the EU. International negotiations on common guidelines should be concluded in the first half of 2010.   The policy statement is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/Policy/2009/09_15.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.5 IFSA guidance on corporate governance**    On 5 August 2009, the Investment and Financial Services Association (IFSA) published a new edition of IFSA's Blue Book, the investment industry's guidance for corporate governance.  IFSA's Blue Book provides guidance to IFSA members in engaging with companies in all sectors on a range of issues that have the potential to impact on a company's perception and performance. It has now been updated to include guidance on various current policy issues and developments including:   * securities lending and vote renting; * director and executive trading; * managing risk management; * executive remuneration; and * environmental and social governance.   The Blue Book is available on the [IFSA](http://www.ifsa.com.au/public/content/ViewCategory.aspx?id=619" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.6 Reform of Australia's foreign investment framework**  On 4 August 2009, the Australian Treasurer, the Honourable Wayne Swan MP, announced reforms to Australia's foreign investment screening framework.  Currently, some screening requirements on foreign investors impose unnecessary compliance costs on businesses, and fixed foreign investment screening thresholds capture ever more low-value foreign investment proposals each year that do not raise any national interest issues.    The measures ensure that the Government does not become unnecessarily involved in uncontroversial business transactions. Based on 2008-09 figures, around 20 per cent of all business applications will no longer be screened by the Foreign Investment Review Board.   The Government aims to introduce amending regulations in September 2009.    The Government will:  1. Amend the [Foreign Acquisitions and Takeovers Regulations 1989](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8860" \t "Default) to replace the four lower business thresholds with one higher threshold of 15 per cent or more of a business valued at $219 million or more (see table below).  2. Index the new unified threshold on 1 January each year against the GDP price deflator.  3. Abolish the requirements that foreign private investors notify the Government when establishing a new business in Australia valued above $10 million. This currently applies to all non-United States investors.  The six monetary thresholds that currently apply to private foreign investment in Australian businesses will be reduced to two:   * $219 million (indexed) for private foreign investments in Australian businesses; and * $953 million (indexed) for United States investment in non-sensitive sectors.  |  |  |  | | --- | --- | --- | | **Current Thresholds** |  | **Proposed thresholds** | | Foreign Investor - Interest in an Australian business $100 million (not indexed) |  |  | | Foreign Investor - Offshore Takeover $200 million (not indexed) |  | $219 million (ALL indexed on 1 January each year to the GDP price deflator in the Australian National Accounts for the previous year) | | US investors only -  Sensitive sector acquisition $110 million (indexed) |  |  | | US Investors only - Offshore Takeover $219 million (indexed) |  |  | | US Investors only - Interest in an Australian business $953 million (indexed) |  | $953 million (indexed on 1 January each year to the GDP price deflator in the Australian National Accounts for the previous year) | | Foreign Investor - establishing a new business $10 million (not indexed) |  | Abolished |     Special screening arrangements for media and government sector investments will continue.  The special threshold for United States investors in non-sensitive sectors of $953 million (indexed) that currently applies will remain.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.7 IMF paper on enforcement in securities markets**  On 1 August 2009, the International Monetary Fund (IMF) published a paper titled "The challenge of enforcement in securities markets".  Weaknesses in the enforcement of regulation have been targeted by the G-20 as a priority concern for reform. But enforcement efforts in securities markets have proven difficult and uneven. The recent scandal in the United States, wherein a Ponzi scheme orchestrated by Bernard Madoff went undetected by the US authorities for more than two decades, has once again highlighted the importance of effective enforcement of securities regulation, as well as the challenges that securities regulators around the world face in implementing credible enforcement programs.  While in many instances it is individuals who bear the losses, the IMF paper shows that noncompliance with securities law can have serious system-wide impact and that the credibility of the system as a whole rests on the existence of effective discipline-the probability of real consequences for failure to obey the law. The paper explores the elements of enforcement, why it is so challenging, why it is important, and whether its effects can be measured. Through an analysis of the data gathered in the World Bank/IMF Financial Sector Assessment Program, the paper examines how enforcement is being carried out around the world and draws conclusions regarding how countries are meeting the challenge of effective enforcement.   The paper is available on the [IMF](http://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.8 IMF launches new online database of financial soundness indicators**   On 31 July 2009, the International Monetary Fund (IMF) launched a new website which allows public access to an expanding database of indicators of financial sector soundness for member countries. The database aims at supporting macroprudential analysis and thus financial sector surveillance. The initiative is one of the steps the IMF is taking to increase the transparency of financial systems, which helps in the strengthening of market discipline, with positive effects on financial stability.  The disseminated financial soundness indicators (FSIs), ranging from regulatory capital adequacy ratios to real estate prices, can assist in analyzing the soundness of financial institutions as a sector as well as in assessing the conditions of the counterpart corporate and household sectors of relevant markets. FSIs complement other assessments of soundness such as early warning indicators and macroeconomic vulnerability exercises.  The site is linked to a database holding FSI data from more than 25 countries, a number which is expected to increase as the database is expanded and more countries contribute data on a voluntary basis.    The new website is available on the [IMF](http://www.imf.org" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.9 Hong Kong SFC launches consultation on increasing short position transparency**    On 31 July 2009, the Hong Kong Securities and Futures Commission (SFC) issued a consultation paper to gather public input on increasing short position transparency.   The consultation paper sets out the objectives and seeks comments on further enhancing the transparency of short selling in Hong Kong, which is one of the four principles recommended in the report entitled "Regulation of Short Selling" published by the International Organization of Securities Commissions' (IOSCO) Technical Committee.   The report recommends four high-level principles for the effective regulation of short selling. The four principles are:  (a)   Short selling should be subject to appropriate controls to reduce or minimise the potential risks that could affect the orderly and efficient functioning and stability of financial markets. (b)   Short selling should be subject to a reporting regime that provides timely information to the market or to market authorities. (c)   Short selling should be subject to an effective compliance and enforcement system. (d)   Short selling regulation should allow appropriate exceptions for certain types of transactions for efficient market functioning and development.  The consultation paper is available on the [SFC](http://www.sfc.hk/sfcConsultation/EN/sfcConsultFileServlet?name=incshtpostrans&type=1&docno=1" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.10 Central clearing for European credit default swaps**    On 31 July 2009, credit default swaps (CDS) relating to European entities and indices based on these entities commenced clearing through central counterparties regulated in the EU. This will reinforce financial stability by ensuring better risk management for European CDS. CDS are financial products designed to insure the buyer against losses caused by a credit event (eg a default) affecting a given entity, and until now had been managed bilaterally between buyer and seller.   Clearing is the process by which obligations arising from a financial security are managed over the lifetime of the contract. Until now, credit default swap (CDS) trades in the EU - like most over-the-counter (OTC) financial derivatives - are predominantly cleared bilaterally between two contracting parties. A Central Counterparty (CCP) is a service providing clearing at central market level. The CCP steps into the middle of each trade, so as to become the buyer to every seller and the seller to every buyer. From its central position, the CCP's main business is therefore to manage the risk in that market.   Further information is available on the [European Commission](http://ec.europa.eu/internal_market/financial-markets/derivatives/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.11 Assessment of financial sector rescue programs**   On 31 July 2009, the Bank for International Settlements (BIS) analysed the wide array of rescue programs adopted in several countries, following Lehman Brothers' default in September 2008, in order to support banks and other financial institutions. BIS first provides an overview of the programs, comparing their characteristics, magnitudes and participation rates across countries. BIS then considers the effects of the programs on banks' risk and valuation, looking at the behaviour of CDS premia and stock prices. BIS then proceeds to analyse the issuance of government guaranteed bonds by banks, examining their impact on banks' funding and highlighting undesired effects and distortions. Finally, BIS briefly reviews the recent evolution of bank lending to the private sector. BIS draws policy implications, in particular as regards the way of mitigating the distortions implied by such programs and the need for an exit strategy.    The paper is available on the [BIS](http://www.bis.org/publ/bppdf/bispap48.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.12 Report on market integrity**  On 30 July 2009, the Australian Corporations and Markets Advisory Committee (CAMAC) released its report titled 'Aspects of Market Integrity'.  The report responds to a request for advice in relation to a number of practices that have the potential to damage the integrity of the market and investor confidence. These practices are:   * directors' interests in the securities of listed companies and margin lending; * 'blackout' trading by company directors; * spreading of false and misleading information; and * disclosure of information in the briefing of analysts.   The report notes that, while concerns about the practices may be heightened at a time when the market is under pressure and confidence has been shaken, they raise issues of continuing relevance.  **(a) Dealing by directors in shares of their company**  The report considers:   * the use by directors of margin lending arrangements in relation to shares in their company; and * trading by directors in their company's securities during sensitive (blackout) periods, such as between the close of books and the release of financial results in the broader context of the regulation of dealings by directors in the securities of their company.   It also proceeds on the basis that the most senior officers of a company (executive officers) should be subject to duties and constraints similar to those that apply to directors, given their privileged position as corporate insiders.  The report recommends that, as a matter of best practice, directors and executive officers should be required to obtain the board's clearance for dealings in the securities of their company. While they should not be prevented from entering margin lending or other loan arrangements as such, a clearance procedure should apply, having regard to possible conflicts of duty and other problems that can arise where securities of the company are used as collateral.  The report also recommends that, as a matter of best practice, directors and executive officers should not be permitted to deal in the securities of their company in sensitive blackout periods.  The report proposes the implementation of clearance processes and restrictions on dealings by corporate officers as governance requirements by the ASX Corporate Governance Council or in the ASX Listing Rules. In the absence of effective implementation, a legislative approach could be considered.  CAMAC also recommends legislative action to require:   * directors and executive officers to disclose to the market, within a short time, all their dealings in relation to securities of their company; and * a company to disclose in its annual report the number or percentage of its securities held by directors or executive officers that are subject to a pledge.   There is a further recommendation for tightening the insider trading provisions so that they apply to lenders and borrowers under margin lending and other financial arrangements in the same way as they apply to other market participants. On the other hand, CAMAC sees a need for an exception to the insider trading law to enable corporate insiders to use non-discretionary trading plans in order to meet regular or anticipated financial commitments or objectives.  **(b) Rumour-mongering**  The report considers the dissemination of false rumours against the background of the regime for disclosure of information to the market. The more timely and reliable the information available to the market, the less scope there is for the successful dissemination of false rumours.  The intentional spreading of false rumours is inimical to the maintenance of a fair, efficient and transparent market. While the market will never be free of rumour, egregious conduct should be pursued and eliminated where possible.  The law already contains a number of prohibitions relevant to the perpetration of false rumours and other forms of market misconduct. However, given the nature of this conduct, the uncovering of evidence and proof of elements of an offence present a challenge.  The report makes a number of recommendations in support of effective law enforcement:   * the introduction of civil penalties for market misconduct provisions where only criminal prosecution is now available; * empowering ASIC to require market licensees to have guidelines on rumour-mongering and to report any suspected misconduct; * empowering ASIC to make a banning order against a person who contravenes a licensee's guidance on rumour-mongering; * treatment of market manipulation as a serious offence for the purposes of telephonic interception legislation; and * making it an offence to provide false or misleading information to bodies that conduct clearing and settlement operations.   The report encourages ASIC, the ASX and industry bodies to develop further guidance to companies on how to respond to rumours about them. It also supports an ASIC initiative to develop best practice guidelines for market participants on responding to rumours of which they become aware.  **(c) Corporate briefing of analysts**  The practice by which listed companies provide briefings to analysts, institutional investors and others is considered in the context of the regime for market disclosure and the prohibition on insider trading.  Briefings provide a useful supplement to more formal disclosures to the market and can assist in the clarification or assessment of available information. At the same time, there are risks involved, including of selective disclosure of market sensitive information or harm to investor confidence through perceptions that some market participants are receiving favoured treatment.  While not seeing a need for legislative intervention, the report identifies areas where there is scope for further promotion of best practice. It is in the interests of a well-run company to control its communications with analysts and others to ensure consistency and accuracy, as well as compliance with legal requirements.  The report proposes action by the ASX Corporate Governance Council to build on existing guidance and encourage more open practices in relation to briefings, including:   * making briefings more accessible (including through use of the Internet); * keeping of records; * processes for checking information disclosed and rectifying any inadvertent disclosure by making the information generally available; and * restricting briefings during times of market sensitivity.   The report is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2009/$file/Market_Integrity_Report_Jun2009.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.13 Governance practices at financial regulatory and supervisory agencies**  On 30 July 2009, the International Monetary Fund (IMF) published a survey on 'Governance Practices at Financial Regulatory and Supervisory Agencies'.  The survey results are summarised below.  **(a) Specific findings for insurance supervisors**   * Most insurance supervisors did not consider monitoring systemic risks and maintaining financial stability as mandates. * Insurance supervisors appear to be less independent than other types of supervisors. 44% of insurance-only supervisors have industry representatives on their governing body (much higher than other agencies). * Less than half of insurance supervisors have the ability to set salary levels for their staff. They are more dependent on fees for funding than most other supervisory types.   **(b) General findings**  Legal protection for supervisors does not continue after they leave office. This can act as a deterrent to supervisors exercising supervisory powers.   The paper is available on the [IMF](http://www.iopsweb.org/dataoecd/41/17/43413373.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.14 New standards for risk management for the financial sector**    On 30 July 2009, the UK Financial Services Skills Council (FSSC) published National Occupational Standards (NOS) covering the processes to manage risk in the financial sector.    National Occupational Standards define the competences which apply to job roles or occupations in all sectors of industry. They can help organisations plan more effectively across a wide range of activities, from recruitment and selection to training and development, as well as making it easier for them to meet regulatory requirements for assessing competence. They may also comprise the building blocks for qualifications within the sector.    The types of risk covered by the Standards include credit, market, liquidity, insurance underwriting and operational.    These new Standards for the financial sector fit broadly into the four areas of risk management covering:   * Setting objectives and designing processes to manage risk in the financial sector; * Identifying and assessing risks and controls to organisations; * Implementing and executing the risk management process in the financial sector; and * Monitoring, evaluating and challenging risk management processes and systems.   The full set of National Occupational Standards for Risk Management for the Financial Sector is available on the [FSSC](http://www.fssc.org.uk/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.15 IOSCO publishes due diligence good practices for investment managers**   On 29 July 2009, the International Organization of Securities Commissions' (IOSCO) Technical Committee published a final report titled 'IOSCO Good Practices in Relation to Investment Managers' Due Diligence When Investing in Structured Finance Instruments' (Investment Manager Due Diligence Practices) - which contains guidelines aimed at assisting both investment management industry participants and regulatory bodies, in assessing the quality of their due diligence procedures regarding investments in structured finance instruments (SFI) by collective investment schemes (CIS) offered to retail investors.   These good practices are aimed at assisting industry and regulators in their understanding, assessment and monitoring of investments in SFIs on behalf of CIS'. The practices are broken down into the three stages which should be included in the due diligence process, and also address the question of the use of third parties in the due diligence process, including credit rating agencies. The three stages are:   * analysing the underlying assets of the SFI; * analysing the structure of the SFI; and * how does the SFI fit into the CIS mandate.   The report titled 'Good Practices in Relation to Investment Managers' Due Diligence When Investing in Structured Finance Instruments' is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD300.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.16 FRC issues update on the review of the combined code**    On 28 July 2009, the UK Financial Reporting Council (FRC) published a progress report on its review of the effectiveness of the Combined Code on Corporate Governance.   The report summarises the results of the consultations and research that the FRC has carried out to date and invites views on various aspects of the Combined Code and its application. These are:   * The responsibilities of the chairman and non-executive directors; * The composition of the board, including finding the right balance of independence and expertise; * The frequency of directors' re-election; * Board information, development and support; * Evaluation of the board's effectiveness; * The effectiveness of existing risk management systems; * Remuneration policy and process; * The usefulness of companies' reporting on corporate governance; and * Engagement between boards and shareholders.   The FRC is also considering the implications of the consultation paper on the governance of banks and other financial institutions issued by Sir David Walker on 16 July 2009. That report contains recommendations that could be taken forward through amendments to the Combined Code. It also recommends extending the responsibilities of the FRC and the FSA in relation to engagement between company boards and investors. The FRC is considering to what extent Sir David's recommendations are also applicable for some or all listed companies in other sectors and, with the FSA, how best to implement them.   The FRC will issue a final report before the end of the year. Any proposed changes to the Combined Code will be subject to a separate consultation.   The Combined Code on Corporate Governance sets out standards of good practice in relation to issues such as board composition and development, remuneration, accountability and audit and relations with shareholders. All companies incorporated in the UK with equity securities admitted to a primary listing on the Official List are required under the Listing Rules to report on how they have applied the Combined Code in their annual report and accounts, and either to confirm that they have complied with the Code's provisions or - where they have not - to provide an explanation (known as "comply or explain").    The progress report is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/Combined%20Code%20review%20progress%20report%20July%2020091.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.17 IAIS and OECD publish paper on corporate governance of insurers**   On 28 July 2009, the International Association of Insurance Supervisors (IAIS) and the Organisation for Economic Co-operation and Development (OECD) published an issues paper on the corporate governance of insurers. The paper, which builds on the OECD Guidelines and the IAIS Main Elements of Insurer Corporate Governance paper, describes the essential components of an insurer's corporate governance framework and explores the main issues relevant to the corporate governance of insurers. The topics examined in the paper include:   * governance structures; * the board of directors; * control functions; * the actuary; * the external auditor; * disclosure and transparency; and * relationship with stakeholders.   The paper is available on the [IAIS](http://www.iaisweb.org/__temp/Issues_Paper_on_Corporate_Governance__July_2009.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.18 Financial Crisis Advisory Group publishes review of standard-setting activities following the global financial crisis**   On 28 July 2009, the Financial Crisis Advisory Group (FCAG), a high level group with broad experience in international financial markets, published its recommendations related to accounting standard-setting activities, and other changes to the international regulatory environment following the global financial crisis.   The FCAG was formed at the request of the International Accounting Standards Board (IASB) and the US Financial Accounting Standards Board (FASB) to consider financial reporting issues arising from the crisis.   The report of the FCAG articulates four main principles and contains a series of recommendations to improve the functioning and effectiveness of global standard-setting. The chief areas addressed in the report are:   * Effective financial reporting; * Limitations of financial reporting; * Convergence of accounting standards; and * Standard-setters' independence and accountability.   The report is available on the [IASB](http://www.iasb.org/NR/rdonlyres/5EB35F78-33FC-4C34-9C97-53DB4543038D/0/FCAGReport29July_LD.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.19 Basel Committee issues papers on operational risk**  On 28 July 2009, the Basel Committee on Banking Supervision (BCBS) released two papers relating to operational risk titled 'Results from the 2008 Loss Data Collection Exercise for operational Risk' and 'Observed Range of Practice in Key Elements of Advanced Measurement Approaches (AMA)'.   The objectives of the work underlying these papers were to further the understanding of both supervisors and banking institutions regarding outstanding issues in the measurement and management of operational risk and to promote consistency in addressing these issues across jurisdictions. The work will facilitate comparative analysis of banking institutions across jurisdictions by benchmarking losses at the national/regional and international levels and by assessing capital levels relative to internal data and scenario analysis.    The papers are available on the [BIS](http://www.bis.org/press/p090728.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.20 SEC takes steps to curtail abusive short sales and increase market transparency**   On 27 July 2009, the US Securities and Exchange Commission (SEC) announced several actions that would protect against abusive short sales and make more short sale information available to the public.  First, the Commission made permanent an interim final temporary rule, Rule 204T, that seeks to reduce the potential for abusive "naked" short selling in the securities market. The new rule, Rule 204, requires broker-dealers to promptly purchase or borrow securities to deliver on a short sale. The temporary rule, approved by the SEC in the fall of 2008, was set to expire on 31 July.                      Second, the Commission and its staff are working together with several self-regulatory organizations (SRO) to make short sale volume and transaction data available through the SRO Web sites. This effort will result in a substantial increase over the amount of information presently required by another temporary rule, known as Temporary 10a-3T. That rule, which will expire on 1 August, applies only to certain institutional money managers and does not require public disclosure.   Further information is available on the [SEC](http://www.sec.gov/news/press/2009/2009-172.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.21 New EU rules on credit rating agencies, bank capital requirements, cross-border payments and e-money**   On 27 July 2009, the Council of the European Union adopted a regulation introducing a legal framework for credit rating agencies (3642/09) and a directive updating capital requirements for banks (3670/09), which constitute a significant part of the work program it launched last year in response to the financial crisis.  It also adopted a regulation on cross-border payments (3665/09) and a directive on electronic money (3666/09), in the light of assessments of the application of existing rules.   **(a) Credit rating agencies**   Credit rating agencies play an important role in securities and banking markets, as their ratings are used by investors, borrowers, issuers and governments in taking decisions on investment and financing. They are however considered to have failed to reflect early enough in their ratings the worsening of market conditions in the run-up to the financial crisis.  The regulation is aimed at ensuring that credit ratings used in the EU for regulatory purposes are of the highest quality, and issued by agencies that are subject to stringent requirements.   Currently, credit rating agencies are only to a limited extent subject to EU legislation and most member states do not regulate their activities, although their ratings are used by financial institutions which themselves are subject to EU rules. The agencies, most of which have their headquarters outside the EU, may however apply a voluntary code of conduct issued by the International Organisation of Securities Commissions.   The regulation comes in response to calls from both the European Council and the G-20. It establishes a common framework for measures adopted at national level, in order to ensure the smooth functioning of the EU's internal market with comparable levels of investor and consumer protection from one member state to another.   It provides for a legally-binding registration and surveillance system for credit rating agencies issuing ratings that are intended for use for regulatory purposes.   It is also aimed at:   * ensuring that credit rating agencies avoid conflicts of interest in the rating process, or at least manage them adequately; * improving the quality of methodologies used by credit rating agencies and the quality of their ratings; and * increasing transparency by setting disclosure obligations for credit rating agencies.   **(b) Capital requirements for banks**   The directive is aimed at tightening the rules on capital requirements for banks, in response to specific weaknesses identified in the light of the financial crisis.   It amends directives 2006/48/EC and 2006/49/EC1 in five main areas:   * Strengthening the supervision of cross-border banking groups:   (a) close coordination is required between the supervisor of the member state where the parent undertaking is located and the supervisors of its subsidiaries with regard to decisions relating to risk assessment and additional capital requirements; (b) reporting requirements will be fully harmonised at European level in 2012; (c) colleges of supervisors, chaired by the supervisor of the parent undertaking, will be established for all cross-border groups; (d) the role of the Committee of European Banking Supervisors (CEBS) is strengthened; and (e) the mandates of national supervisory authorities are given a European dimension.   * Improving the framework for securitisation practices.   In order to remedy the faults of the "originate to distribute" model, due diligence and transparency obligations imposed on the originators of securitization operations and on investors are strengthened. Investors should be able to assess the risks involved in structured products otherwise than solely by the means of the ratings given by agencies. In order to encourage better risk assessment, the text introduces the obligation for originators to retain on their balance sheets 5% of risks transferred or sold to investors.   * Harmonising the classification of banks' "tier 1" capital funds and hybrid instruments, with a central role given to CEBS in ensuring greater  uniformity of supervisors' practices. * Introducing rules on liquidity risk management, in particular as regards the setting up of liquid asset reserves, conducting liquidity stress tests and establishing contingency plans. * Tightening the supervision of exposure to a single counterparty ("large exposures").   The text establishes arrangements that place a greater restriction on the extent of exposure to a single counterparty, whatever its nature, including when it is a bank (in all cases, the limit is 25 % of banks' own funds). Within the current framework, concentration limits for bank counterparties are less restrictive than for "undertaking" counterparties, yet the financial crisis has shown that bank counterparties also present a risk of default.  **(c) Cross-border payments**  The regulation is aimed at achieving a single market for payment services in euros without distinction between cross-border payments and payments made on a national basis, thereby providing significant savings and benefits to the broader European economy.  It updates and replaces regulation 2560/2001 on cross-border payments, which applies to credit transfers, cash withdrawals and electronic payments, including card payments, made in euros up to EUR 50,000. Regulation 2560/2001 has succeeded in bringing down the charges for cross-border payments to the level of national charges, and has encouraged the payments industry to build an EU-wide payments infrastructure for the "single euro payments area".  The new regulation extends the principle of the equality of charges to direct debits and addresses a number of enforcement problems that were identified in a report from the Commission on application of regulation 2560/2001. It also aligns the definitions and wording of the text with those of directive 2007/64/EC on payment services.   **(d) Electronic money**   The directive is aimed at promoting the design of electronic money services that are both innovative and secure, whilst fostering competition between market participants and providing market access to new players.  Its adoption follows an assessment by the Commission of application of directive 2000/46/EC on electronic money institutions, which shows that electronic money is still far from delivering the benefits that were expected when that directive was adopted eight years ago. The number of newcomers to the market has been relatively low, and in most member states e-money is not yet considered a credible alternative to cash.  The new directive updates the provisions of directive 2000/46/EC, with particular regard to the level of initial capital and the prudential supervision of electronic money institutions. It is also aimed at ensuring consistency with directive 2007/64/EC on payment services.  Further information on the legal framework for credit rating agencies is available on the [Consilium](http://register.consilium.europa.eu/pdf/en/09/st03/st03642.en09.pdf" \t "_new) website.   Further information on the directive updating capital requirements for banks is available on the [Consilium](http://register.consilium.europa.eu/pdf/en/09/st03/st03670.en09.pdf" \t "_new) website.   Further information on the regulation on cross-border payments is available on the [Consilium](http://register.consilium.europa.eu/pdf/en/09/st03/st03665.en09.pdf" \t "_new) website.   Further information on the directive on electronic money is available on the [Consilium](http://register.consilium.europa.eu/pdf/en/09/st03/st03666.en09.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1)  **1.22 Research report - personal insolvency and the middle class**   The latest research report of the University of Melbourne's Centre for Corporate Law and Securities Regulation is titled "Personal Insolvency in Australia: An Increasingly Middle Class Phenomenon". The report is co-authored by Professor Ian Ramsay and Cameron Sim.   Under the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default), there are three regulated forms of personal insolvency: bankruptcy, debt agreements, and personal insolvency agreements. Between 1990 and 2008 there was a 261% increase in the number of personal insolvencies in Australia. The authors suggest one important aspect of this increase is that Australian personal insolvency has become an increasingly middle class phenomenon. Whilst the concept of middle class is not readily quantifiable, the authors suggest that several factors reveal that personal insolvency is affecting those who might generally be considered middle class. The findings have implications for Australia's personal insolvency laws. The findings also raise for consideration the connections between personal insolvency laws and broader social issues such as rising debt levels, spending habits and social welfare benefits.   The report is available on the [Social Science Research Network](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444150" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1) |  | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 Changes to form-lodging arrangements for financial reporting class order relief**  On 7 August 2009, the Australian Securities and Investments Commission (ASIC) announced changes to form-lodging arrangements for companies wishing to take advantage of relief under Class Order [CO 98/98] 'Small proprietary companies which are controlled by a foreign company but which are not part of a large group' and Class Order [CO 98/1418] 'Wholly-owned entities'.  These changes respond directly to concerns raised by stakeholders and support ASIC's ongoing efforts to reduce regulatory red-tape and enhance regulatory compliance. They follow various changes last year which were aimed at enabling more companies to rely on the relief and reduce the administrative work for group companies.   The changes introduced by ASIC mean that companies relying on relief in [CO 98/98] will be able to lodge opt-in and opt-out forms at any time during a 19-month period commencing three months before the start of the relevant financial year and ending four months after the end of the financial year.  The changes are not expected to affect the quality of information currently contained in ASIC's public records.  **(a) Changes to [CO 98/98] arrangements**  Previously, companies were required to lodge a Form 384 opt-in notice with ASIC within the three-month period immediately before the start of the first financial year of any period they intended to take advantage of relief under [CO 98/98]. A Form 394 opt-out notice was required to be lodged, when necessary, within a period of four months after the end of the first financial year companies ceased to rely on relief in the order.  In many cases, companies did not lodge the forms in time and were unable to rely on the relief and therefore obliged to lodge the relevant financial reports.  As a result of the changes, companies will now be able to lodge both Forms 384 and 394 at any time during a 19-month period commencing three months before the start of the financial year in question and ending four months after the end of the financial year.  As the last date for lodging Form 384 under the new arrangements coincides with the deadline for lodging a financial report for the first financial year a company intended to rely on [CO 98/98] relief, there is no scope for a further extension to the period to lodge the notice. Accordingly, ASIC's discretion to extend the period for lodging Form 384 has been removed from the class order.  Companies which fail to lodge a Form 384 on time, and therefore cannot rely on [CO 98/98], will have a continuing obligation to prepare and lodge a financial report for the first financial year they intended to rely on the relief. Although ASIC may not take action to require such companies to lodge the outstanding financial report, ASIC will be very unlikely to grant individual relief to remove the continuing obligation to lodge the report. ASIC will also be unlikely to grant a formal no-action letter where the report has not been lodged.  Where a company lodges a financial report after the due date, normal late lodgement fees will apply. However, late lodgement of the financial report will not prevent a company taking advantage of relief in [CO 98/98] for the next financial year, provided the conditions of the class order are met.  For detailed information about the form-lodging arrangements, please refer to paragraphs 16 to 27 of ASIC Regulatory Guide 58 Reporting requirements - registered foreign companies and Australian companies with foreign shareholders (RG 58).  **(b) Changes to [CO 98/1418] arrangements**  As the last date for lodging a Form 389 opt-in notice coincides with the deadline for lodging a financial report for the first year an entity intended to rely on [CO 98/1418] relief, there is no scope for a further extension to the period to lodge the notice. Accordingly, ASIC's discretion to extend the period for lodging Form 389 has been removed from the class order.  Entities which fail to lodge a Form 389 on time, and therefore cannot rely on [CO 98/1418] relief, will have a continuing obligation to prepare and lodge a financial report for the first financial year they intended to rely on the relief. Although ASIC may not take action to require such companies to lodge the outstanding financial report, ASIC will be very unlikely to grant individual relief to remove the continuing obligation to lodge the report. ASIC will also be unlikely to grant a formal no-action letter where the report has not been lodged.  Where a company lodges a financial report after the due date, normal late lodgment fees will apply. However, late lodgment of the financial report will not prevent a company taking advantage of relief in [CO 98/1418] for the next financial year, provided the conditions of the class order are met.  Lodgment arrangements for opt-out notice Form 399 have not changed.  For detailed information about the form-lodging arrangements, please refer to paragraphs 36 to 38G of the Editorial Note to [CO 98/1418].  **(c) No changes to [CO 98/1417] requirements**  The current arrangements for taking advantage of relief under Class Order 98/1417 'Audit Relief for Proprietary Companies' [CO 98/1417] which require annual lodgment of Form 382, have not changed.  ASIC intends to review the current form-lodging arrangements for [CO 98/1417] in the light of operational experience with the new arrangements for CO 98/98 and 98/1418 and announce any further changes separately.  For detailed information about the form-lodging arrangements for [CO 98/1417], please refer to paragraphs 38 to 39G of Regulatory Guide 115 'Audit Relief for Proprietary Companies'.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h2)  **2.2 Improved disclosure for retail derivative investors**  On 7 August 2009, the Australian Securities and Investments Commission (ASIC) announced it is looking to strengthen protections for retail investors trading derivative products such as contracts-for-difference (CFDs).  ASIC is raising awareness, among both retail investors and the issuers of over-the-counter derivative products, about the proper use of money paid by investors for trading on their behalf.  ASIC has released a consultation paper, 'Client Money Relating to Dealing in OTC Derivatives' (CP 114), which contains proposals to improve disclosure by a financial services licensee dealing in OTC derivatives. The paper also clarifies how ASIC expects licensees to comply with the client money provisions in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).   Client money is paid to a financial service licensee for either a financial service or a financial product held by a client and can comprise margin deposits and other money that a client has paid to or left with a licensee, such as an OTC derivatives provider. However, the client agreements of many financial services licensees dealing in derivatives can contain a broad authorisation for the licensee to use client money for any purpose.  ASIC is seeking stakeholder views on the best ways for licensees to advise their clients how their money is held, the counterparty risks and the licensee's policies for the use of client money.   While client money must be held separate from the licensee's own money, licensees are being asked to consider the adequacy of disclosures to investors, particularly where client money is:   * held in the same account with client money of other clients; * used to meet a licensee's trading obligations for other clients; and * if authorised by the client, used by the licensee for its own purpose.   Investors need to be aware that these activities could result in them not receiving all of their money back even if they are not in default. A shortfall could arise if the issuer used the money for trading for another client but could not obtain that money from the other client or cover it from its own funds. A shortfall could also arise if the issuer uses money for its own purposes and then became insolvent.  ASIC ultimately is seeking a regulatory position where licensees are better informed about the handling of client money and that licensees improve their disclosures to clients about the counterparty risk to which clients are exposed.  In the meantime, ASIC recommends retail investors trading in CFDs or other derivatives find out from their issuer how they look after client money, including seeking the issuer's position on:   * whether client money is held separate from the issuer's funds as required by law; * if their money can be used to meet trading obligations of other clients; * whether the issuer can use client money for their own purposes; and * where and how the issuer has disclosed its client money policies to the investor.   The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp114.pdf/$file/cp114.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h2)  **2.3 Guidance on unsolicited credit and debit cards**  On 6 August 2009, the Australian Securities and Investments Commission (ASIC) released Regulatory Guide 201 titled 'Unsolicited Credit Cards and Debit Cards' (RG 201).   RG 201 clarifies ASIC's interpretation of the scope of section 12DL of the [Australian Securities and Investments Commission Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default), which prohibits a person from sending unsolicited credit cards and debits cards to consumers.  The aim of this guidance is to provide card providers with a clear statement of ASIC's view of the types of card distributions that are allowed under section 12DL. Unsolicited distributions of credit and debit cards can be confusing for consumers and can result in consumers using a card with features that they have not asked for or agreed to.   The guide sets out ASIC's view that the exceptions to this prohibition only allow the sending out of a credit card or debit card that is effectively the same as, or equivalent to, the existing card and would not place the consumer in a different position with respect to use of the card. An example is where a card provider sends new cards with the same features to cardholders whose existing cards are close to expiry, or where the new card has new security features.   The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg201.pdf/$file/rg201.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h2)  **2.4 Report on relief applications decided between December 2008 to March 2009**  On 3 August 2009, the Australian Securities and Investments Commission (ASIC) released a report outlining recent decisions on applications for relief from the corporate finance, financial services and managed investment provisions of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act) between 1 December 2008 and 31 March 2009.  The report titled 'Overview of Decisions on Relief Applications' (December 2008 to March 2009)' (REP 162) provides an overview of the applications where ASIC has exercised, or refused to exercise, its exemption and modification powers from the financial reporting, managed investment, takeovers, fundraising and financial services provisions of the Corporations Act.  REP 162 also highlights instances where ASIC decided to adopt a no-action position regarding specified non-compliance with the provisions, and features an appendix detailing the relief instruments it executed.  ASIC can exempt or modify the Corporations Act under the provisions of Chapters 2D (officers and employees), 2J (share buy-backs), 2L (debentures), 2M (financial reporting and audit), 5C (managed investment schemes), 6 (takeovers), 6A (compulsory acquisitions and buy-outs), 6C (information about ownership of entities), 6D (fundraising) and 7 (financial services) of the Corporations Act.  ASIC uses its discretion to vary or set aside certain requirements of the law, where the burden of complying with the law significantly detracts from its overall benefit or where business can be facilitated without harming other stakeholders.  The report is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep162.pdf/$file/rep162.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h2)  **2.5 ASIC consults on dispute resolution requirements for consumer credit and margin lending**  On 27 July 2009, the Australian Securities and Investments Commission (ASIC) released a consultation paper seeking public comment on proposals designed to ensure that consumers have timely access to dispute resolution if they have a problem with consumer credit or margin lending.  ASIC's Consultation paper 112 'Dispute Resolution Requirements for Consumer Credit and Margin Lending' (CP 112) explains how ASIC proposes to apply the dispute resolution requirements for credit providers, brokers and other credit licensees and their representatives, as well as for margin lenders and those who provide advice on margin loans, once the [National Consumer Credit Protection Bill](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=107620" \t "Default) (the Bill), and reforms around margin lending, come into effect.  The dispute resolution requirements are similar to those that currently apply to holders of an Australian financial services licence and their representatives.   For consumer credit, the Bill provides for a two-stage transition to full licensing. Initially those engaged in regulated 'credit activities' must apply to be registered with ASIC, or be a representative of an entity that is registered. Applications for registration must be made between 1 November 2009 and 31 December 2009. Registered persons must have membership of an ASIC-approved external dispute resolution (EDR) scheme.  Credit licensing commences on 1 January 2010 and applications must be made by 30 June 2010. Credit licensees will be required to have dispute resolution arrangements that include:   * an internal dispute resolution (IDR) process that meets ASIC's approved standards and requirements; and * membership with an ASIC-approved EDR scheme.   Those licensed to provide margin loans or advise on margin lending will be required to meet the same two requirements from the time the margin lending reforms come into effect.  Some of the key proposals on which ASIC is consulting are that:   * during the credit registration phase, prior to the requirement for credit licensing, EDR schemes should be able to hear complaints about a member without the complaint first going through IDR if the member doesn't yet have an IDR process. This will assist EDR to work more smoothly as IDR is usually a necessary first step before going to EDR; and * urgent matters involving hardship variations and postponement of enforcement proceedings should be able to by-pass IDR and go straight to EDR.   ASIC also seeking feedback on whether matters involving default notices should be able to by-pass IDR and go straight to EDR, or whether they should be subject to a IDR process shorter than 45 days before going to EDR.  In addition, the consultation paper sets out options for avoiding confusion about which EDR scheme consumers should apply to where a licensee and its representative belong to different schemes, or where a complaint involves two licensees (eg. a credit provider and a broker) which each belong to a different scheme.  There has been some ambiguity about the ability of dispute resolution schemes to deal with some of the complaints referred to as 'small claims procedures' in the legislation. The paper makes clear ASIC's expectation that EDR schemes will be able to handle these issues. The types of issues in question include hardship applications, and claims about unjust transactions, unconscionable interest and other charges, postponement of enforcement proceedings and compensation for loss.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp112.pdf/$file/cp112.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 First review of corporate governance reporting under Revised Principles and Recommendations**   On 4 August 2009, ASX Markets Supervision (ASXMS) conducted the first review of corporate governance reporting under the Revised Principles and Recommendations for listed entities with a 31 December balance date.   The Revised Principles and Recommendations were released in August 2007. The effective date for the Revised Recommendations to apply to an entity's reporting is the first financial year starting on or after 1 January 2008.  For entities having a 31 December financial year end the effective date for reporting in accordance with the Revised Recommendations is the reporting period ending 31 December 2008.  There were 168 listed entities (9% of total listed entities) subject to the 31 December 2008 corporate governance review.   The results of the review are available at on the [ASX](http://www.asx.com.au/about/pdf/mr_040809_corp_gov_report_review.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h3)  **3.2 Austraclear amendment: Procedure 2.6 - solicitor's representation letter**   On 4 August 2009, Procedure 2.6 of the Austraclear Regulations, relating to Public Trust Participant Status, was amended.   A solicitor's representation letter is required as part of the application process for a Public Trust Participant in the Austraclear System.  The letter requires the applicant's solicitor to give opinions on various aspects of the proposed trust.   The requirements were developed at a time when unit trusts were less frequently used than they are today and before the creation of the Managed Investment Scheme provisions in the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).  Solicitors involved in modern commercial trust arrangements sometimes have difficulty giving opinions which fully satisfy the requirements.   The solicitor's representation letter has been updated to a shorter, simplified form.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h3)  **3.3 New S&P/ASX Emerging Companies Index**   On 3 August 2009, Standard & Poor's (S&P) and the Australian Securities Exchange (ASX) launched the S&P/ASX Emerging Companies Index; an Australian microcap equity benchmark.  The creation of this Index follows lengthy consultation with stakeholders in this market segment and is designed to provide an investable industry benchmark for Australian microcap funds.   The Index significantly broadens the universe of securities covered by the S&P/ASX index family, providing investors with a new index portfolio that will enable them to make more informed investment decisions.  The S&P/ASX Emerging Companies Index has a maximum of 200 constituents with stocks ranked between 350 and 600 by total market capitalisation eligible for inclusion.   This portfolio is representative of a segment in the market that is relatively under-researched compared to stocks in the S&P/ASX 300.  With its tailored methodology, the performance characteristics of the S&P/ASX Emerging Companies Index are unique to the microcap sector, complementing existing Australian equity benchmarks such as the S&P/ASX 200, therefore allowing a meaningful comparative analysis to take place.  The Index will initially be available as an end-of-day index from S&P.  ASX is anticipating making the Index available in real-time later in the year.    The press release is available on the [ASX](http://www.asx.com.au/about/pdf/mr300709_asx_sp_co_index_final.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h3)  **3.4 Proposed amendments to ASTC Settlement Rules re Chess Release 7.0 and Securities Lending Activity Reporting**   On 31 July 2009, ASTC released a Participant Bulletin announcing proposed amendments to the ASTC Settlement Rules relating to CHESS Release 7.0 and Securities Lending Activity Reporting.   The amendments include changes to meet the new requirements of the RBA's Financial Stability Standard for Securities Settlement Facilities in relation to improving the transparency of equities securities-lending activity.  They also involve expanding the current transmission of Holder Registration details to include e-mail in order to improve the efficiency and effectiveness of Issuer and ASTC management of shareholder communication by enabling Holders to nominate to receive shareholder communications via e-mail.   These amendments were provided for the information of Participants but they are still subject to regulatory approval.  ASTC will provide further notification once the regulatory approval process is complete.   The bulletin is available on [ASX](https://www.asxonline.com/intradoc-cgi/groups/clearing_and_settlement/documents/communications/asx_024098.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Corporate Law Decisions** |  |  | | |  | | |  | | --- | | **4.1 Anti-suit injunctions: Interpreting exclusive jurisdiction and choice of law clauses**  (By Steven Grant, Minter Ellison)   Ace Insurance Ltd v Moose Enterprise Pty Ltd [2009] NSWSC 724, Supreme Court of New South Wales, Brereton J, 31 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc724.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc724.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The case considers the relevant principles governing anti-suit injunctions and in particular, whether the institution of proceedings in California constituted a breach of an exclusive jurisdiction clause, a breach of an implied negative stipulation arising from an express choice of law clause, a breach of a contractual term implied by law, an abuse of process or was otherwise unconscionable, vexatious or oppressive.   **(b) Facts**   The plaintiff, ACE Insurance Limited (ACE) sought an anti-suit injunction restraining the defendant, Moose Enterprise Pty Ltd (Moose) from continuing proceedings that it had commenced against ACE in the Superior Court of California.  In the Supreme Court of California, Moose sought a declaration that, as a result of a contract of insurance made between ACE as insurer and Moose as insured, and the operation of relevant Californian law, ACE was obliged to defend certain actions brought against Moose in a number of jurisdictions in the United States of America (Californian Proceedings).  ACE is a NSW corporation, with a registered office and principal place of business in Sydney, which carries on business as an insurer.  ACE issued a policy of insurance in Australia which included the following terms:   * Clause 4.11 of the contract provided that 'Should any dispute arise concerning this policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory of Australia.' * An 'Expona endorsement' with a proviso to the effect that any dispute be determined in accordance with Australian law and practice.   Moose is a Victorian corporation, with a registered office and principal place of business in Victoria, which develops toys for sale to retailers in Australia and overseas distributors.  Moose's products included a toy called 'Aquadots', which was withdrawn from the market, both in Australia and in the United States, by reason of an allegation that it contained a toxic substance that was hazardous if ingested.  A number of class actions in respect of 'Aquadots' were commenced against Moose in various United States jurisdictions, including California.  Having engaged a Californian law firm to act on behalf of Moose, ACE later gave notice that it would no longer fund Moose's defence and Moose commenced the Californian Proceedings.  Obtaining an ex parte interlocutory anti-suit injunction, ACE sought an anti-suit injunction on the basis that the institution of the Californian Proceedings:   * constituted a breach of an exclusive jurisdiction clause whereby Moose promised to litigate only in Australia; * was an attempt to invoke Californian municipal law in breach of an implied negative stipulation arising from the express choice of law clauses, that the parties would not invoke any system of law other than Australian law to resolve any disputes concerning the contract; * was an attempt to invoke Californian municipal law in breach of the contractual term implied by law, that a party will not do anything to deprive the other party of the benefit or efficiency of the contractual bargain, in respect of the choice of law clause; * was an attempt to invoke Californian municipal law constituting an abuse of process; and * was an attempt to invoke Californian municipal law, which was otherwise unconscionable, vexatious or oppressive.   Accordingly, it was necessary for the Supreme Court of New South Wales, constituted by Brereton J, to consider:   * whether an Australian court was a clearly inappropriate forum; * if not, whether ACE should be required to apply in California for a stay or dismissal of the Californian Proceedings; and * if not, whether an anti-suit injunction should be granted on any of the grounds advanced by ACE.   **(c) Decision**   **(i) Clearly inappropriate forum**   Brereton J concluded that an Australian jurisdiction was not a clearly inappropriate forum, given that:   * ACE and Moose are both Australian corporations, with registered offices and principal places of business in Australia; and * the contract of insurance was made in Australia, and contained Australian jurisdiction and choice of law clauses.   **(ii) Stay or dismissal in California?**   Observing that there is no rule requiring a plaintiff to seek a stay or dismissal in the foreign proceedings, before an anti-suit injunction can be granted in a local court, and that such a course of action is neither appropriate nor desirable if the application can be determined without such a step [*CSR Limited v Cigna Insurance Australia Limited* [1997] HCA 33; (1997) 189 CLR 345 (Cigna), at 395-397], Brereton J concluded that there was no apparent reason why ACE should be required to seek a stay or dismissal in California before seeking an anti-suit injunction in the Supreme Court of New South Wales.   **(iii) Breach of exclusive jurisdiction clause?**   After an analysis of the relevant case law concerning jurisdiction clauses, Brereton J observed that:   * Whilst the absence of the word 'exclusive' is not determinative, the distinction between an exclusive and non-exclusive jurisdiction clause is sufficiently well-known and the drafting of an exclusive jurisdiction clause was so straightforward, that its absence was not merely neutral but tends against the clause being an exclusive jurisdiction clause. * Where the courts of the selected forum would have jurisdiction in any event, that tells in favour of a clause being an exclusive jurisdiction clause; a fortiori where they would be the 'natural forum'. * A suggested exception in respect of insurance policies is not well supported by the authorities, with the exception that in the case of ambiguity the court will more readily incline to a construction that favours the insured. * The use of words such as 'all' or 'any' disputes, and mandatory words such as 'shall', tell in favour of a clause being an exclusive jurisdiction clause.   Concluding that the Expona endorsement was simply a choice of law clause, Brereton J made the following observations in respect of clause 4.11 of the contract:   * The word 'exclusive' was not used. * The reference to 'any such dispute' was equivalent to using the phrase 'all such disputes'. * The provision could be read 'transitively', as an agreement to submit 'any such dispute' to the jurisdiction of a competent Australian court. * Given that ACE and Moose are Australian corporations, the contract was made in Australia and provided for Australian law to govern it, Australian courts had jurisdiction in any event and moreover, Australia was the natural forum.  Accordingly, the clause was superfluous unless it conferred exclusive jurisdiction. * The clause was included primarily for the benefit of ACE - the insurer, and thus the likely defendant in any dispute under the policy. The commercially sensible interpretation was that the parties intended to litigate in and only in Australia.   Accordingly, Brereton J concluded that clause 4.11 was an exclusive jurisdiction clause whereby the parties agreed to submit any dispute concerning the contract to the jurisdiction of a competent court in Australia and implicitly agreed not to invoke the jurisdiction of courts elsewhere.  **(iv) Contravention of negative stipulation arising from choice of law clause?**   Brereton J considered the second, third and fourth bases upon which ACE advanced its claim together, as they substantially involved the same proposition, namely that by instituting the Californian Proceedings, Moose contravened an implied contractual obligation arising from the express selection of Australian law as the governing law.   Brereton J observed that in our system of private international law, the choice of law is a mechanism for ascertaining the intention of the parties as to the legal system that is to govern their contract, not for providing covenants or promises that a particular legal system will apply.  Where a choice of law is 'inferred' rather than 'express', it is not conceivable that there would be an implied negative stipulation not to invoke the jurisdiction of a court, which would apply a law other than the chosen one.     Consequently, where there is an express choice of law, there is similarly no implied obligation not to invoke the jurisdiction of a court, which will not apply the chosen law.  The parties may elect to frame a provision which is promissory in effect, but given the conventional function of a choice of law clause it would require very clear language to make a choice of law clause promissory rather than declaratory.  Accordingly, the second, third and fourth bases of ACE's claim were unsubstantiated.   In obiter, Brereton J was also of the view that these grounds would fail on the basis that the Californian court would not apply Californian law, but would apply Australian law, thereby giving effect to the parties' choice of law.   **(v) Vexatious and oppressive?**   In obiter, Brereton J considered whether the institution of the Californian Proceedings was 'vexatious or oppressive'.   On the basis of observations in Cigna, Moose contended that foreign proceedings would not be vexatious, oppressive or unconscionable if the foreign proceedings afforded a relief or a benefit not available in local proceedings.    In this respect, Moose argued that by application of Civil Code 2778, it would enjoy an advantage in the Californian Proceedings, namely that ACE would be obliged to defend the claims against Moose, regardless of the limits of cover, whereas in Australia, given that ACE had purported to decline indemnity, it would not have to do so.  Brereton J considered that this argument failed on the following bases:   * The conclusion that the Californian court would apply Australian law meant that there would be no such advantage for Moose in suing in California. * Even if Californian law were applied, Code 2778 would not apply if 'a contrary intention appears' from the contract.  In Brereton J's view (applying Californian law), a contrary intention appeared from the contract, so that even were Californian law applied, there would be no duty to defend.   Accordingly Brereton J concluded that given the choice of law, the jurisdiction clause, the location of the parties, where they made their contract, and the very faint connection with California, the invocation of Californian jurisdiction for the purpose of securing a supposed legal advantage which did not exist, was unconscionable, vexatious and oppressive.  California was a clearly inappropriate forum for the resolution of the dispute.   **(vi) Orders**   Brereton J ordered that Moose be permanently restrained from taking any further step directly or indirectly in the Californian Proceedings as against the plaintiff, save for discontinuing those proceedings, and that Moose pay ACE's costs.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.2 Service on a non resident of an examination summons issued under section 596B Corporations Act**    (By David Fixler, Virginia Burns and Laura Keily, Corrs Chambers Westgarth)   Waller v Freehills [2009] FCAFC 89, Federal Court of Australia, Full Court, Finn, Dowsett and Siopis JJ, 31 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fcafc89%20.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fcafc89%20.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This case involved an appeal by Mr Andrew Waller (Waller) from a decision of the primary judge of the Federal Court to give Freehills leave to serve an examination summons on Mr Waller outside Australia by substituted service.  This appeal was heard and determined unanimously by Finn, Dowsett and Siopis JJ (the court).   Mr Waller made the following submissions:   * Primary judge erred in holding that a summons for examination issued pursuant to section 596B [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) was an 'originating process' within the definition of O 8 r 1 Federal Court Rules. * Alternatively, the exercise of discretion by the primary judge miscarried in circumstances where the effect of the order for leave constituted a direct interference with the sovereignty of another country and the threat to a resident of the other state with criminal sanctions not enforceable in that state.   In dismissing the appeal the court held that while a summons for examination is not an 'originating process' within the definition of O 8 r 1, section 596B of the Act operates extraterritorially to allow service on a person not resident in Australia.  Furthermore, the court found that the primary judge had properly exercised his discretion in the context of the Act and had properly considered the concerns involved in interference with the sovereignty of a foreign state.   **(b) Facts**   The dispute relates to a transaction that occurred in 2001, whereby New Tel Ltd (New Tel) sought to acquire control of Cable & Telecoms Limited (CAT). Freehills acted for New Tel in the acquisition by providing legal advice. Mr Waller, the applicant, was a director of CAT. During the acquisition, New Tel obtained the transfer of shares in CAT held by Wainter Pty Ltd (Wainter).   In December 2002 New Tel went into administration. Freehills was a creditor of New Tel in relation to unpaid legal fees. Wainter brought an action in the Federal Court alleging that a director of New Tel and a partner at Freehills were liable for $60 million as losses suffered as a result of their alleged misleading and deceptive conduct in relation to the takeover.  In particular, the claim relates to whether the true worth of CAT and its assets were disclosed.   This proceeding concerned an application by Freehills for an examination summons directed to Mr Waller for the purpose of determining the merits of Wainter's claim. Mr Waller was an Australian citizen residing overseas and Freehills was, therefore, seeking to serve the examination summons out of the jurisdiction.    This was an appeal to the Full Court of the Federal Court of Australia from a decision by the primary judge to grant leave to serve the examination summons out of the jurisdiction and that service could be effected by substituted service.    **(c) Decision**   **(i) Whether the Corporations Act and Corporations Rules authorised the making of the orders**   Mr Waller contended that sections 596A and 596B the Act were not intended to have extraterritorial jurisdiction and that Rule 11.4 of the Corporations Rules did not allow personal service on persons outside Australia.  Section 596A provides that the court must issue a summons for examination about a corporation's examinable affairs if the person is an officer or provisional liquidator of the corporation.  Section 596B provides the court with discretion as to whether to issue a summons for examination in certain circumstances.  Rule 11.4 of the Corporations Rules provides that an examination summons issued by the court must be personally served or served in any other manner as the court may direct.   The court found that when sections 596A and 596B are construed in light of section 5 of the Act it is clear that Parliament intended the court to have power and jurisdiction to issue a summons for persons to attend court and be examined whether or not they are resident in or citizens of Australia.  Rule 11.4 must be interpreted by reference to the Corporations Act.  Accordingly, Rule 11.4 permits substituted service and applies to service in respect of residents and non residents.   The court agreed with Peter Gibson J in *In Re Seagull Manufacturing Co Ltd (In Liquidation)* [1993] Ch 345 (Seagull) that there is a well-established presumption that legislation is intended to operate territorially but this presumption will give way where there is clear parliamentary intention that a statute is to apply extraterritorially.  The court found that sections 596A and 596B apply extraterritorially for the following reasons:   * The language of sections 596A and 596B is wide enough to apply to persons within their ambit, regardless of where those persons are resident. * Section 5 of the Act provides that the Act applies to natural persons and incorporated and unincorporated bodies whether or not they are resident in the jurisdiction. * In circumstances of liquidation, those concerned with the corporation's state of affairs should be liable to be subjected to a process of public investigation regardless of their physical location.  Deliberate evasion by removing oneself from the jurisdiction would otherwise be possible. * The Corporations Act contains provisions expressly modifying the territorial reach of certain provisions of the Corporations Act, otherwise capable of applying extraterritorially.   **(ii) Is an examination summons an "originating process" for the purposes of the Federal Court Rules?**   While the court was of the opinion that service could be affected under the Corporations Act and Rules, it nevertheless turned to consider whether service out of the jurisdiction could be affected under O 8 of the Federal Court Rules.    In particular, the question of whether service of an examination summons could be effected under the Federal Court Rules turned on whether it could be characterised as an "originating process".   The court accepted Mr Waller's contention that an examination summons is not to be regarded as an "originating process" and therefore service out of the jurisdiction could not be effected under the Federal Court Rules. This construction was adopted by the court for the following two reasons:   * The Federal Court Rules must be read together with the Corporations Rules. Of particular relevance, the Corporations Rules do not characterise an examination summons as an "originating process", rather they describe it as an order issued by the court following a hearing commenced by an "originating" or interlocutory process. * The Federal Court Rules (O 8 r 3(2)(c) ) require that the court must be satisfied that the applicant has a "prima facie case for relief". The examination summons simply requires the recipient to attend court for examination and the applicant seeks no relief (the court dismissed arguments that sought to identify the attendance for examination itself, as a form of relief, as involving "an element of artificiality").   **(iii) Whether an examination summons is a 'document' which may be served out of the jurisdiction under O 8 r 4 of the Federal Court Rules**   Freehills contended that if the examination summons was not an "originating process" to which O 8 r 2 and r 3 applied, it would be a document to which O 8 r 4 applied.     Mr Waller contended that O 8 r 4 had no application to the examination summons since it involves the assertion of extraterritorial sovereignty over a person by issuing coercive orders on that person rather than the service of a 'document'.  Mr Waller further contended that O 8 r 4 is procedural, not jurisdictional and should not operate to confer jurisdiction on the court.    In response to this, the court held that even if O 8 r 4 is limited in scope, section 596B of the Act provides the external statutory jurisdictional source for the court to summons a person not resident in Australia to appear before the court.    Accordingly, the court rejected Mr Waller's contention that O 8 r 4 was incapable of applying to the examination summons.  If sections 596A and 596B of the Act and Rule 11.4 Corporations Rules do not apply extraterritorially, the source of the power to serve the summons lies in O 8 r 4 by reason of Rule 1.3 Corporations Rules.   **(iv) Discretion in not refusing to grant leave**   Mr Waller contended that the primary judge had erred in granting leave to Freehills to serve the examination summons outside of the jurisdiction because when considering whether to exercise the discretion the primary judge failed to consider the intrusion upon the sovereignty of a foreign state and the fact that there is a criminal sanction for non-compliance with the summons.    The court dismissed this argument, holding that the primary judge was aware of the impact of the examination summons on the sovereignty of a foreign state, and found that concern for comity between the states was exceeded by the strong nexus between Mr Waller and Australia.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.3 Misleading and deceptive conduct and oppression in share sale agreements**  (By Libby Penman, Freehills)   Campbell v Backoffice Investments Pty Ltd [2009] HCA 25, High Court of Australia, French CJ, Gummow, Hayne, Heydon and Kiefel JJ, 29 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2009/july/2009hca25.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2009/july/2009hca25.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The High Court has recently allowed an appeal against an award of damages for misleading and deceptive conduct where a vendor provided documents prior to the making of a share sale agreement (SSA) that did not accurately state the company's financial performance. The court held that the evidence did not support the finding by the NSW Court of Appeal that the vendor had contravened the [Fair Trading Act 1987 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3955" \t "Default), nor was the evidence of reliance upon the misrepresentations in buying the share sufficient. Unresolved aspects of the claims for misleading and deceptive conduct and for breach of warranties in the SSA were remitted to the Court of Appeal for determination. The High Court upheld the Court of Appeal's decision that the primary judge had erred in making an order that the vendor buy-back the share in the company from the purchaser.   **(b) Facts**   Mr Campbell established a business to sell and maintain water filtration systems, Healthy Water (NSW) Pty Ltd (the Company). The business was incorporated and in January 2005, Mr Campbell decided to restructure the capital of the Company and so entered a SSA with Mr Weeks and his company, Backoffice Investments Pty Ltd (Backoffice). The SSA provided that Backoffice would receive one of the two issued shares in the Company for a purchase price of $850,000, and the pair would jointly manage the business.     Mr Weeks purchased the share but within days, the relationship with Mr Campbell broke down, leading to the appointment of a provisional liquidator (by consent) and the sale of all the assets of the Company for only $196,815. The Company became an empty shell because all proceeds were used to pay the creditors.   Shortly thereafter, Mr Weeks began proceedings in the Supreme Court of NSW alleging oppression under section 232 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Mr Weeks argued, in line with section 232, that Mr Campbell had conducted the affairs of the Company "in a manner contrary to the interests of the members as a whole and in an oppressive and unfairly prejudicial and discriminatory manner, by excluding Backoffice and Mr Weeks from the management of [the Company] and by making payments from [the Company's] funds to meet Mr Campbell's private expenses, not related to [the Company's] business". As such, Mr Weeks sought an order under section 233 of the Corporations Act that Mr Campbell buy-back his share in the Company. The claim was allowed by the primary judge, who ordered Mr Campbell to buy-back the share for $853,000.   Mr Weeks also sought damages for breach of warranties in the SSA, breach of the implied duty to cooperate, breach of the services agreements and damages for contravention of section 42 of the Fair Trading Act for misleading and deceptive conduct. Whilst the primary judge held that some of these claims were established, no further relief was deemed necessary. In relation to the misleading and deceptive conduct claim, the primary judge found that there was insufficient reliance on the alleged misrepresentations to establish the claim.     Mr Campbell appealed to the NSW Court of Appeal against the buy-back order. By majority, the appeal was allowed and the buy-back order was set aside. By a different majority, the Court of Appeal ordered Mr Campbell to pay damages of $850,000 to Mr Weeks and Backoffice for misleading and deceptive conduct instead. Only one of the three judges considered the issue of breach of contractual warranties and agreed with the primary judge's conclusions, but considered that the damages flowing from the breaches were only nominal in any event.     The High Court granted special leave to appeal against the decision of the Court of Appeal.   **(c) Decision**   The High Court held that:   * the order made by the Court of Appeal setting aside the primary judge's buy-back order should stand; * the orders awarding damages of $850,000 for misleading and deceptive conduct should be set aside; and * issues concerning breach of contractual warranties, and the quantum of any damages should be remitted to the Court of Appeal for due consideration.   **(i) Oppression**   Mr Weeks sought leave to cross-appeal to restore the success had at trial in obtaining relief under the oppression provisions of the Corporations Act. Leave was refused because the Court considered the appeal would not be successful, given that there was no continuing oppression, that the Company's shares were worthless, it had no assets and was all but an empty shell. The High Court held that no order for the compulsory purchase of Backoffice's share should have been made.   **(ii) Misleading and deceptive conduct claims**   These claims arose due to reliance that was placed by Mr Weeks on two documents provided by Mr Campbell prior to the execution of the SSA, which over-stated the Company's estimated financial performance. The claim was divided into two issues: (1) the add back of 'non-recurring expenses' to the EBIT of the Company and (2) the over-stated sales revenue which lead to a misleading EBIT.    Neither claim was established, but for different reasons. The add-backs and EBIT claim failed because the alleged contravention of the Fair Trading Act was not established. Mr Campbell provided figures to Mr Weeks which were his estimates and which he believed to be true, but which he expressly indicated to Mr Weeks, could not be otherwise substantiated. The Court looked at the relevant conduct as a whole, and held that it was not misleading and deceptive (relying on McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625).   As for the claims concerning the estimate of sales revenue, Backoffice and Mr Weeks established misleading or deceptive conduct. However, they could not prove that, had they known the truth, they would not have proceeded with the share purchase. This was because the sales revenue was only $7,147 less than estimated. Therefore, the claims by Backoffice and Mr Weeks that they would not have paid $850,000 for a share which turned out to be worthless, did not arise.    Certain deficiencies in a schedule to the SSA that gave rise to claims under the Fair Trading Act, were remitted for further consideration by the Court of Appeal.   **(iii) Breach of contractual warranties**   Mr Weeks and Backoffice further claimed that Mr Campbell had breached contractual warranties in the SSA which stated, to the best of Mr Campbell's knowledge, all information provided material to the sale was "substantially accurate and complete and not misleading". Only one member of the Court of Appeal decided on the issue of breach of express warranties. Young CJ in Eq accepted that there were identified breaches, but concluded that the damages were only nominal. This was because, in his Honour's opinion, "none of the breaches materially affected EBIT and, if the warranties had not been breached, Backoffice would still have bought the share at the price it paid" [155]. There was not enough evidence advanced that the provision of the warranty was of itself misleading and deceptive.    Because the issues about breach of warranties and the damages to be allowed were not decided by the majority in the Court of Appeal, these issues were remitted for consideration by that Court. The High Court made only one comment on the question of damages: that the damages be assessed for breach of contractual warranties not by reference to the fact that the share acquired was now worthless.    **(iv) Implied duty to cooperate**   Mr Weeks and Backoffice sought leave to cross-appeal on the basis that Mr Campbell had breached his implied obligations under the shareholders agreement and the SSA by not doing all things necessary on his part to enable Backoffice to have the benefit of those contracts. The claim went beyond the claim considered by the primary judge, and was advanced as a reflex of the arguments advanced for oppression. Special leave was refused. The Court held that "although described as an implied term that each would co-operate with the other, the content of the duty said to be imposed was, in substance and effect, to bind each of the two shareholders, in contract, not to give the other grounds for relief under Pt 2F.1 of the Corporations Act. A term of this kind goes well beyond the particular obligations undertaken ." [170].  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.4 Director owed fiduciary duty to shareholder**  (By Stephen Magee)   Jones v Jones [2009] VSC 292, Supreme Court of Victoria, Judd J, 23 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/july/2009vsc292.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/july/2009vsc292.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   Where a director/shareholder was negotiating to buy out the other shareholder of a company, he owed a fiduciary duty to the other shareholder to disclose the existence of concurrent negotiations to sell the company's business.   **(b) Facts**   David Jones and Jeffrey Jones owned all the shares and units in the ITR Group. Their relationship was governed by an agreement under which each was entitled to appoint a director. Following David's resignation from the board, Jeffrey was the sole director.    In early 2006, David and Jeffrey began to negotiate a possible sale of David's shares to Jeffrey. Concurrently with those negotiations, Jeffrey was negotiating the sale of the company's business to a third party. Jeffrey did not tell David about these negotiations. David several times asked Jeffrey whether a sale of the business was "in the wings". Jeffrey replied in the negative.   On 7 September, David contracted to sell his ITR shares to Jeffrey.   On 11 September, it was announced that ITR had sold its business.    David then began proceedings against David, claiming damages for breach of a fiduciary duty and/or misleading or deceptive statements under the [Fair Trading Act 1999 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=12938" \t "Default).   Jeffrey responded that:   * he did not owe a fiduciary duty to David; * if he did owe a fiduciary duty, that duty had not been breached; and * if there had been a breach, he had not gained any advantage and David had not suffered any consequential loss.   **(c) Decision**   **(i) Fiduciary duty**   The court held that Jeffrey had owed a fiduciary duty to David and had breached that duty.     The court applied *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, saying that there was a "striking similarity" between the director's conduct in that case and Jeffrey's conduct in this. It dismissed Jeffrey's arguments that Brunninghausen could be distinguished and said that there was in fact a stronger case for finding a fiduciary duty in Jeffrey's case:   * in early 2006, Jeffrey had assured David that he would continue to fulfil all his fiduciary duties and act at all times in the best interests of all shareholders; and * Jeffrey's repeated denials, during his negotiations with David, that there was a deal to sell the business in the wings.   **(ii) Other issues**   Jeffrey's repeated denials were also misleading and deceptive within the meaning of the Fair Trading Act, and deceit.   The court dismissed Jeffrey's argument that the contract for the sale of David's interest was void for illegality. This argument was based on the allegation that the contract was for the purpose of avoiding tax and so would be caught by Part IVA of the [Income Tax Assessment Act 1936](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6606" \t "Default). Jeffrey argued that, if it could be shown that the Commissioner of Taxation would be likely to apply Part IVA, thus tainting the contract with impropriety, the court should refuse to enforce it. The court dismissed this argument:   "A decision by the Commissioner of Taxation to apply Part IVA does not have the effect of transforming an otherwise valid and enforceable contract into an illegal contract.  The administrative act of a third party cannot determine whether a contract is illegal and unenforceable.  Even if the application of Part IVA is confirmed by a court that does not impugn the validity or enforceability of the agreements."   Jeffrey was ordered to pay compensation to David.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.5 Deed of company arrangement administrator holds property of company as company's agent**   (By Ben Hopper, Blake Dawson)   Johnson v Hancock; re Meditech Nursing Service & Skillforce Agency Pty Ltd [2009] NSWSC 685, New South Wales Supreme Court, Barrett J, 23 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc685.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc685.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   How is a fund created under a Deed of Company Arrangement to be treated if a creditors' voluntary winding up is subsequently initiated?  Is that fund the property of the company for the purposes of the winding up or is it vested in the Deed Administrator or subject to a trust in favour of the Deed Administrator?   In Johnson v Hancock [2009] NSWSC 685, Barrett J found that a Deed Administrator is an officer or agent of the company.  As such, receipts of and dealings with property by the Deed Administrator are receipts and dealings by the company as the Deed Administrator's principal.  This has two consequences.  First, a fund created pursuant to a Deed of Company Arrangement ('DOCA'), to be distributed by the Deed Administrator according to the DOCA statutory regime, is the property of the company and not vested in the Deed Administrator or subject to a trust in his or her favour.  Second, upon the initiation of the winding up, the fund, as property of the company, is to be distributed, not in accordance with the DOCA statutory regime, but in accordance with section 501 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Corporations Act').  Under that section the fund is applicable in satisfaction of the company's liabilities equally, subject to the provisions of the Corporations Act.  The Deed Administrator is susceptible to the control of the court with respect to the fund.   **(b) Facts**   Meditech Nursing Service & Skill Force Agency Pty Ltd ('Meditech') became subject to voluntary administration under Part 5.3A of the Corporations Act on 4 April 2006.  A DOCA was executed and Deed Administrator appointed on 28 July 2006.  On 9 April 2009, a special resolution was passed to voluntarily wind up Meditech, with two liquidators appointed (neither of whom was the Deed Administrator).  This was a creditors' voluntary winding up: see sections 491, 493, 494, 497 and definition of 'creditors' voluntary winding up' in section 9.  On 9 April 2009, funds of slightly more than $111,000 were held subject to the DOCA.   Under the DOCA, the Deed Administrator's costs and liabilities were to be paid from out of the fund in priority to all other claims.  The creditors were to accept rights and entitlements specified in the DOCA.  However, if section 501 of the Corporations Act applied, the fund had to be distributed in satisfaction of the company's liabilities equally. That section provides:   * Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally and, subject to that application, must, unless the company's constitution otherwise provides, be distributed among the members according to their rights and interests in the company.   The question before Barrett J, then, was whether the fund was property of the company such that it had to be distributed in accordance with section 501 or whether, by virtue of the DOCA, the fund was no longer the property of the company because it either (i) had already vested in the Deed Administrator (to be dealt with in accordance with the DOCA) or (ii) was held by the company on trust for the Deed Administrator.   The Deed Administrator commenced proceedings upon an application for directions as to the correct treatment of the fund under section 447D of the Corporations Act.   **(c) Decision**   Barrett J held that because the Deed Administrator was an 'officer' of the company, as defined by section 9, and particularly where, as in this case, the DOCA designated the Deed Administrator an agent of the company, receipts of and dealings with property by the Deed Administrator were receipts and dealings by the company as the Deed Administrator's principal: [21].  As his Honour emphasised, '[t]he important point is that, unless the deed itself brings about some specific vesting of property and the creation of equitable interests in that property, the deed administrator is simply a company functionary who, like a liquidator, administers company property according to a particular statutory regime': [21].   In dismissing the argument that the fund was subject to a trust in favour of the Deed Administrator, Barrett J drew an analogy with the legal relationship between liquidator and company property.  Just as the specific form of administration of company property that arises upon winding up does not cause the company's property to become trust property, so too does the property subject to the specific form of administration created by a DOCA of the kind in this case not thereby become trust property.   Accordingly, Barrett J concluded that the sum of about $110,000 held by the Deed Administrator was, in the creditors' voluntary winding up of Meditech, part of the 'property' of Meditech and was, therefore, to be distributed in satisfaction of the company's liabilities equally, subject to the provisions of the Corporations Act.  Section 501 thus operated to remove the fund from the Deed Administrator's control.  Despite the absence of any specific provision saying so, in a creditors' voluntary winding up the liquidator 'must necessarily have power to take possession of the company's property':  *Commissioner of Taxation v Bruton Holdings Pty Ltd* (2008) 173 FCR 472.   Barrett J reasoned the court had jurisdiction, by virtue of section 500(3), to require the Deed Administrator to deliver the fund to the liquidator: [29].  Section 500(3) of the Corporations Act permits a court to require any agent or officer of the company to transfer any property in his or her hands, and to which the company is prima facie entitled, to the liquidator.  His Honour underscored these findings by opining that once the winding up provisions are catalysed, placing all the company's property in the hands of a liquidator, those provisions leave no room for the continued operation of previously activated statutory provisions by which an inconsistent mode of dealing with company property is prescribed: [30].  His Honour made obiter dicta that the Deed Administrator in this case may be entitled to a lien over the fund.  However, as the issue was not agitated by counsel, his Honour declined to make a ruling on it.  Barrett J concluded the matter would be listed for mention for consideration of the appropriate form of direction.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.6 Unjust contract claim defeats a loan agreement where the borrower did not receive independent legal advice**   (By Chloe Johns, Mallesons Stephen Jaques)   Spina v Permanent Custodians Limited [2009] NSWCA 206, New South Wales Court of Appeal, Tobias JA, Campbell JA and Young JA, 22 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswca206.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswca206.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This was an appeal from a decision of Hammerschlag J, who dismissed the claim of Angelina Spina (the appellant) to have a loan agreement and supporting mortgage given to Permanent Custodians Limited (the respondent) with respect to her property at Cherrybrook set aside.  The grounds of the application were that the transaction was brought about as a result of the unconscionable conduct of the respondent, or that the transaction ought to be set aside as being "unjust" under the [Contracts Review Act 1980 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=10771" \t "Default).   The appeal was unanimously allowed.  It was held that in circumstances where the mortgagee was "asset lending" over the home of an elderly person who apparently received no independent legal advice, for the sole benefit of a relative, the transaction should be varied to relieve the appellant of liability to repay monies she did not receive.   This decision serves as a warning to credit providers that they must take precautions to protect transactions entered into with weaker parties from attacks of unconscionable conduct or an unjust contract claim.  This is best done by ensuring that the weaker party receives independent legal advice.   **(b) Facts**   On 24 October 2003, the appellant (who is now deceased) and her son, Michael Spina (who is also, now, deceased), entered into a loan agreement with the respondent.  Under this agreement, the respondent obtained a mortgage over the appellant's Cherrybrook property, her only asset, as security for the $400,000 loan to the appellant and Michael.  The finance from this loan went towards Michael's business.  The appellant was an Italian-born woman who was 86 years old at the time of contracting and lived in a nursing home, had no income and the Cherrybrook property was virtually her sole asset.  On the facts, there was no evidence that the appellant was incapacitated at the time of entering into the loan agreement.     At the time of contracting, Michael held a power of attorney in relation to the appellant's affairs.  The mortgagee obtained an acknowledgment that Michael had received independent legal advice, however it did not also obtain one to the effect that the appellant had received such advice.  In fact, she had not received such advice.  In addition, the mortgagee's lending guidelines were not observed when making the loan agreement.    **(c) Decision**   Justice Young (with Tobias and Campbell JJA agreeing) allowed the appeal, setting aside the orders made by Hammerschlag J and declared the loan agreement void as against the appellant.   **(i) Necessity of independent legal advice**   Justice Young noted that in the circumstances, the clear procedure of the respondent was to counsel the appellant to obtain independent legal advice.  Judicial decisions have shown that transactions where a third party puts up his or her house as guarantor for a child or niece or nephew's business purposes are ones in which the guarantor needs to understand the ramifications of the transaction or else it may be set aside.   His Honour held that on the facts, there was no evidence indicating that the appellant was connected with the business or with the investments that were proposed to be made, and her son held a power of attorney and was signing documents.  His Honour stated that this situation "cried out for someone to actually talk to Angelina face to face" (at [54]).  There was no material corroborating that the legal and practical effects were adequately explained by any person to the appellant, or whether she understood it.  The respondent's solicitors did not know whether or not she had received independent advice, and indeed had not even turned their minds to it.   His Honour outlined the crucial matter as being whether the person seeking to set aside the transaction was denied the opportunity to have the assistance of a disinterested legal advisor.  In the present case, the lender's solicitor sought a "proper" declaration, received a declaration that went half way, but did not follow up its requisition.  It was never told that the appellant had personally received independent legal advice.  His Honour noted that this is hardly a matter that can be ignored by a lender wishing to protect itself from an unjust contract claim.   **(ii) The contract was unjust in the circumstances relating to when it was made**   His Honour stated that a reasonable person would be concerned when considering this scenario, where an application for finance was being made:   * by an 86 year old retired lady; * by her son as her attorney; * in circumstances where the son took a benefit; * over the 86 year old's major asset; * where there was no material to show the lady personally had been given legal advice; and * where, if the son died or was unable to repay the loan out of his income, the lady's home was at risk.   Overall, Young JA decided that the factors favouring declaring this contract unjust outweighed those that do not.  This conclusion in relation to the application of the Contracts Review Act made it unnecessary to deal with the question of unconscionability.  The appellant was in a situation of special disadvantage, and as such the loan agreement was declared void against her.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.7 The procedure for replacing the responsible entity of a managed investment scheme under section 601FM(1) and whether procedural irregularities can be cured under section 1322**   (By John Farnik, Blake Dawson)   City Pacific Limited, in the matter of City Pacific Limited v Bacon (No 2) [2009] FCA 772, Federal Court of Australia, Dowsett J, 20 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fca772.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fca772.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This case concerned a resolution passed by a meeting of members of an unlisted managed investment scheme, the City Pacific First Mortgage Fund (the "Fund"), which purported to remove the Fund's existing responsible entity, City Pacific Limited ("City Pacific"), and to appoint a new company, Trilogy Funds Management Limited ("Trilogy") to that position. City Pacific sought a declaration from the court that the resolution was 'ineffective' because of non-compliance with section 601FM(1).    Justice Dowsett, after considering a number of sections of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act"), found that the resolution was valid and reached the following conclusions:   * The removal and replacement of a registered scheme's responsible entity under section 601FM(1) of the Act does not require two separate votes. * A procedural irregularity will not render a change of a scheme's responsible entity ineffective pursuant to section 601FJ(2), provided that:   + the procedure adopted complies substantially with the requirements of Division 2 of Pt 5C.2 of the Act; and   + it was not Parliament's intention that such an irregularity would render the change ineffective. * The adoption of a resolution at a meeting of a scheme's members is a 'proceeding' for the purposes of section 1322(1) and (2) of the Act and therefore such a resolution will not be invalidated by reason of a procedural irregularity unless it causes substantial injustice. * An invalid resolution of a scheme's members may be validated by an order of the court made under section 1322(4), provided that the court is satisfied that such an order would not cause substantial injustice.   **(b) Facts**   A meeting of the Fund's members took place on 25 June 2009. At the meeting an extraordinary resolution was proposed. The proposed resolution was that City Pacific be removed as responsible entity of the Fund, in accordance with section 601FM(1) of the Act, and that Trilogy be appointed as responsible entity of the Fund.    The members purportedly passed this proposed resolution in a single vote (both sides accepted that votes representing more than 50% of the units held by persons entitled to vote were cast in favour of the proposal).   **(c) Decision**   City Pacific contested the validity of the resolution. It submitted that section 601FM(1) of the Act required two separate votes and that because the resolution failed to satisfy this requirement it was void.    **(i) The proper construction of section 601FM(1) of the Act**   Dowsett J considered the wording of s 601FM(1) and other associated sections of the Act and consequently construed it as requiring two separate resolutions; one resolution to remove the existing responsible entity of the scheme and one to appoint a replacement. However, City Pacific's submission that these two resolutions must be put to the members in two separate votes was rejected. Dowsett J reasoned that if Parliament had intended that two separate votes were required, it would have adopted the more explicit mandatory language of section 201E(1) of the Act. Consequently, the purported resolution of the Fund's members complied with section 601FM(1).   Although this conclusion would have effectively disposed of the controversy between the parties, Dowsett J went on to consider the application of other sections of the Act assuming his construction of section 601FM(1) was incorrect.   **(ii) Consequence of non-compliance with Division 2 of Pt 5C.2**   If the resolution did not comply with section 601FM(1) because two votes were required, such non-compliance could have caused the resolution to be invalid because of section 601FJ(2) which renders a purported change of responsible entity 'ineffective' if it is not 'in accordance' with Division 2 of Pt 5C.2. Dowsett J concluded that since the adopted procedure 'complied substantially' with the requirements of Division 2, and in the absence of any reason to suspect that Parliament would have intended that a resolution supported by over 50% of the total number of possible votes should fail merely because there was one vote rather than two, section 601FJ(2) would not have the effect of rendering the resolution ineffective or invalid.    **(iii) The operation of section 1322(2) and (4) of the Act**   The final issue considered was whether, assuming the resolution was invalid, such invalidity could be 'cured' pursuant to section 1322(2) or (4) of the Act. Dowsett J ruled that the adoption of a resolution at a meeting is a proceeding for the purposes of section 1322(1) and (2) and that as a consequence, a 'procedural' irregularity, unless it gave rise to substantial injustice, would not invalidate a resolution.   Dowsett J then addressed City Pacific's submission that taking only one vote where two was required amounted to more than a 'procedural irregularity' arguing that it effectively deprived the company of its right to vote at the meeting. This submission was rejected because it was not the form of the proposal, but rather the operation of section 253E of the Act which had the effect of preventing City Pacific from voting. Consequently, Dowsett J concluded that the alleged non-compliance would have been a procedural irregularity, and since City Pacific did not establish that it would cause substantial injustice, the irregularity could be cured pursuant to section 1322(2).    Finally Dowsett J addressed the submission of the defendants that it would have been just and equitable for the Court, assuming the resolution was invalid, to make an order under section 1322(4) to validate resolution. This submission was accepted since the fact that the resolution was approved by holders of more than 50% of the total units in the Fund provided strong support for the view that it was both just and equitable for effect to be given to the resolution, and that making a validating order under section 1322(4) would not cause substantial injustice.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.8 Voidable transactions - application of section 588FF**  (By Bradley Urban, DLA Phillips Fox)   New Cap Reinsurance Corporation Ltd v AE Grant, Lloyd's Syndicate No 991 [2009] NSWSC 662, Supreme Court of New South Wales, Barrett J, 14 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc662.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/july/2009nswsc662.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   New Cap Reinsurance Corporation Limited (NCRA) was a reinsurer that went into liquidation.  The liquidator and NCRA (together the Plaintiffs) were seeking to recover unfair preference payments allegedly made by NCRA to AE Grant and persons associated together as the members of Lloyds Syndicate No 991 (together the Defendants) when NCRA was insolvent.  In particular, the Plaintiffs claimed that two payments made by NCRA to the Defendants constituted "voidable transactions" within the meaning of section 588FE of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).   The court found that the substantive elements of the Plaintiffs' claim were satisfied.  Accordingly, the court exercised its power under section 588FF(1)(a) of the Act and ordered that the Defendants repay NCRA an amount equal to the aggregate paid to them under the transactions in question, plus interest.    The court also ordered that a letter be sent to the English court (where the Defendants were resident) requesting their assistance in securing enforcement of the section 588FF orders.   Whilst this case does not reflect a change to the law, it provides a good example of how the relevant legal principles relating to voidable transactions and unfair preferences are applied.   **(b) Facts**   NCRA was in the international reinsurance business.  In January 1997, NCRA incurred contractual liabilities to the Defendants under a whole account reinsurance contract.  NCRA was the reinsurer and the Defendants were the insured.     In December 1998, the parties to the reinsurance contract entered into a commutation agreement.  Under the terms of the commutation agreement, NCRA owed the Defendants two sums of US$2,697,380 and US$3,283,380.  These sums were due and payable on 31 December 1998.  NCRA made two payments to the Defendants - a payment of US$2,000,000 on 8 January 1999 and a payment of US$3,980,600 on 14 January 1999 causing the Defendants, as creditors to receive in respect of those unsecured debts the sum of US$5,980,600.     The Plaintiffs claimed that the payments were made at a time when NCRA was insolvent, and so constituted "voidable transactions" within the meaning of section 588FE of the Corporations Act.    The Defendants were residents outside Australia.  They filed no appearance and made it clear, in correspondence with the liquidator's solicitors that they did not submit to the jurisdiction of the New South Wales Supreme Court.   **(c) Decision**   **(i) Payments were "voidable transactions"**   Justice Barrett rejected the Defendant's claim as to the court's lack of jurisdiction and found that there was no obstacle for the New South Wales Supreme Court to hear the Plaintiff's' claim.     His Honour went on to find that each of the two payments made to the Defendants was made within the 6 month period ending on the relation back day, that NCRA was insolvent at all relevant times and that the payments resulted in the Defendants receiving more from NCRA than they would have received if the transactions were set aside and the Defendants were to prove for the debts in a winding up of NCRA.  Accordingly, Justice Barrett concluded that the payments were:   * unfair preferences under section 588FA of the Act; * insolvent transactions under s588FC of the Act; and * therefore voidable transactions under section 588FE of the Act.   This meant that each of the transactions could be set aside under section 588FF of the Act.  Consequently, Justice Barrett made an order pursuant to section 588FF(1)(a) of the Act that the Defendants pay to NCRA an amount equal to the aggregate paid to them under the transactions in question (a sum of US$5,980,600) plus interest.  In ordering interest to be paid, Justice Barrett noted that the court had power to award interest under section 588FF(1)(c) of the Act.    **(ii) Enforcement of the section 588FF(1) orders**   Justice Barrett then went on to discuss the Plaintiffs' request that the court transmit a letter of request to the High Court of Justice in England and Wales to assist in securing the enforcement of the orders (given that the Defendants were in the United Kingdom and amenable, in a direct and practical sense to the jurisdiction of the English court).     His Honour noted that the Plaintiffs did not seem to have any prospects of enforcing the court's section 588FF(1) orders in the United Kingdom either by separate action on the obligation that the order created, or by resort to statutory processes for the enforcement of foreign judgments.     His Honour concluded that in such circumstances there is a good substantive reason to comply with the Plaintiffs' request.     Accordingly, Justice Barrett ordered that the Registrar transmit to the English court a letter requesting assistance in securing the enforcement of the orders.  In making this order, His Honour noted that the court had power to make the relevant request under section 581(4) of the Act and that the English court had the power to act upon the request under section 426(4) of the Insolvency Act 1986 (UK).  He also noted that there was utility in the request in the sense that the English court was likely to exercise its power to act upon the request if it was made.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.9 The Federal Court's powers under section 511 of the Corporation Act**   (By Robert Kelly, Mallesons Stephen Jaques)   Australian Capital Territory Commissioner for Revenue v Michael Slaven as Liquidator of PAAN Investments Pty Ltd (in liquidation) [2009] FCA 744, Federal Court of Australia, Rares J, 10 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fca744.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/july/2009fca744.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**  A company in liquidation owed a significant amount under an assessment for payroll tax. The Australia Capital Territory Commissioner for Revenue ("the Commissioner") wanted to recover the unpaid tax from the former directors of the company and the company's accountant.  The Commissioner applied to the Federal Court for leave to commence proceedings against those parties in the company's name as part of proceedings he wished to bring in his own name.   The court held that under section 511 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) the Federal Court has jurisdiction to order that a person other than a liquidator be authorised to bring proceedings in the name of a company being voluntarily wound up by creditors.  In obiter, it was held that section 477(6) would give the Federal Court the same jurisdiction in relation to a company being wound up by the Court.  In granting leave for such an application, the Court must decide whether in the circumstances such leave is appropriate and whether the action proposed to be taken in the company's name has some arguable foundation.  The proceedings proposed by the Commissioner passed these tests.  In upholding section 511 as the source of the power to grant such leave, Rares J held that statutory grants of jurisdiction or power to a Court should not be narrowly construed.   **(b) Facts**   PAAN Investments Pty Ltd ("PAAN") was placed into a creditor's voluntary winding up on 22 December 2004.  PAAN owed a significant amount under an assessment of payroll tax.  Mr Slaven was appointed liquidator.   Mr Georgiou had been a director of PAAN from 1995, and Mrs Georgiou had been a director between 1996 and 2000.  Each held 10 of 20 issued ordinary shares in PAAN.  In the late 1990s, PAAN had established a trading trust of which it was a trustee with Mr and Mrs Georgiou the beneficiaries. The Georgious were advised to establish the trust by their accountant, Mr Beames.  In the proceeding years, the following events took place:   * In 2001, a proposed sale of the company's security business to MIL Security fell through. In 2002, the $50,000 forfeited deposit from that transaction with interest was paid to Mrs Georgiou, apparently by way of distribution to beneficiaries. * In September 2003, the business was sold to Sydney Night Patrol and Inquiry Co Pty Ltd for $1,327,847.85 which was paid to PAAN. * In October 2003, Mr Georgiou and Mr Beames met with the Commissioner and discussed the amount the Commissioner was then claiming for payroll tax due by PAAN. * The money from the sale of the business was used to pay business creditors and the surplus $750,000 distributed to Mrs Georgiou as an eligible termination payment (even though she had not been an employee of PAAN for at least two years) and Mr and Mrs Georgiou for repayment of loans owing to them.  A tax refund to PAAN was also paid to Mr and Mrs Georgiou. No payment was made to the Commissioner for pay roll tax. * Mr Georgiou claimed that Mr Beames had advised him to makes these payments. * In November 2004, the Commissioner issued an assessment claiming a total amount of $578,291.34 in respect of unpaid payroll tax together with penalty tax, payable within 30 days.  PAAN did not pay the amount of the assessment and the resolution for the creditor's voluntary winding up followed shortly afterwards.   On the basis of these facts, the Commissioner applied to the Federal Court seeking to excuse the liquidator from the proceedings and to bring various claims on behalf of himself and PAAN against Mr and Mrs Georgiou and Mr Beames.  The draft statement of claim included a claim by PAAN to an equitable lien over money distributed by the trust to Mrs Georgiou from 2001 to 2004, a liability on the part of Mr Georgiou to the Commissioner for insolvent trading, and claims by PAAN against Mr Beames for negligent advice.  The liquidator had given his consent under section 588R of the Corporations Act for the Commissioner to bring proceedings, as a creditor of PAAN, in relation to PAAN's having incurred debts for payroll tax owed to the Commissioner.  The court had to decide whether the Commissioner was also able to bring claims on behalf of PAAN.  Mr Beames opposed the application.   **(c) Decision**   **(i) Jurisdiction**   The key question was whether the Federal Court had jurisdiction to allow a person other than a liquidator to be authorised to bring proceedings in the name of a company in liquidation, and if so whether this jurisdiction arose under section 511 of the Corporations Act or under the court's inherent or implied power to make orders ancillary to the conduct of a winding up.  Rares J held that the court did have such a power and that it existed under section 511.  His reasoning was as follows:   * Section 511 allows any liquidator, contributory or creditor to apply to the court to exercise all or any of the powers that the court might exercise if the company were being wound up by the court.  If satisfied that the determination of the question or exercise of power will be just and beneficial, the court may accede wholly or partially to any such application, making such orders as it sees fit. * Cases that have considered the historical analogues of section 511 have provided that an action by a creditor of a company in liquidation could be taken, provided it was not "vexatious or merely oppressive". * In *Aliprandi v Griffith Vitners Pty Ltd (in liq)* (1991) 6 ASCR 250 and *Wenhem v General Credits Ltd* (unreported 16 December 1998 NSWSC), McClellan J had set out two methods by which a company being wound up may be joined as a plaintiff or co-plaintiff.  The first was by the court directing the liquidator to join the company as a co-plaintiff.  The second was to allow a creditor or contributory to use the company's name as a co-plaintiff to its proceedings. This second procedure was ". of respectable antiquity and is sanctioned by high authority". * Although both the Commissioner and Mr Beames had argued that the power to make orders allowing a creditor to bring an action on behalf of a company was part of the inherent power of the court in a winding up, Rares J held that there was no reason to read down the statutory power in section 511, or to search elsewhere for some other explanation of a source of power, when the clear words of the statute were apt to ensure that the court may do justice in the case.  It is inappropriate to construe provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words of the statute. * Section 477(6) will allow a similar order to be made in the case of a winding up by the court.   **(ii) Granting leave**   Rares J held that in an ordinary case where a company in liquidation was to be joined to proceedings, this would be achieved by directing the liquidator to join the company as a plaintiff or co-plaintiff.  However, given that PAAN would not be the only plaintiff and that the Commissioner would bear the costs (and risk) of the court proceedings (and indemnify the liquidator accordingly), as well as the fact that the liquidator was of the view that the Commissioner was best placed to take the action, Rares J held that it was appropriate to allow the Commissioner to bring an action on PAAN's behalf provided that the claim was not vexatious or oppressive.  Mr Beames argued that the claims made by the Commissioner were vexatious or oppressive, at least in so far as they applied to him.  Rares J applied the test in *Magarditch v Australian New Zealand Bank Group Limited* (1999) 32 ACSR 367 and inquired as to whether the claims made by the Commissioner had a sufficiently arguable foundation.  The Court granted leave on the basis that Mr Georgiou's testimony at the public examination, in which he had sworn on oath that he acted in reliance on Mr Beames' advice, raised a sufficiently arguable case against the Georgious and Mr Beames.   **(iii) Width of authority to bring proceedings**   The Commissioner sought an order in wide terms allowing him to amend the proposed pleadings in the proceedings once commenced, including the freedom to add or remove parties and causes of action.  Rares J held that a party granted leave to bring proceedings under section 511 is not authorised to make a substantive expansion of the proceedings by adding new parties or significant new material facts.  The grant of leave to bring proceedings is not a delegation of the important role the Court plays in determining how a winding up is to be conducted.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.10 Investigating possible oppression proceedings not a proper purpose for application to inspect books under section 247A of Corporations Act**   (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)   McLean v D.I.D Piling Pty Ltd [2009] SASC 205, Supreme Court of South Australia, Lunn J, 10 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/july/2009sasc205.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/july/2009sasc205.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The plaintiff, a minority shareholder in the defendant company, made an application under section 247A of [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) to inspect the books of the defendant.  The court held that the plaintiff had not shown his dominant purpose was for valuing his shares for their sale by the Board of the defendant under a process laid down by the defendant's Articles, but was also partly to assist him in deciding whether to institute an oppression action under section 233 of the Act.  As the latter purpose was not shown to be a proper purpose, the court dismissed the application.   **(b) Facts**   Prior to May 2003 the defendant had 1,000 issued shares of which 510 were held by entities controlled by Ian Tarbotton, 245 by entities controlled by Dominic Vieceli and 245 by the plaintiff.  On 29 April 2009 the defendant gave notice to the plaintiff of an offer for the plaintiff to take up a further 61,250 x $1 ordinary shares in the defendant with similar offers being made to the entities controlled by Mr Tarbotton and Mr Vieceli in proportion to the number of shares held by them.  On 22 May 2009 the entities associated with Mr Tarbotton and Mr Vieceli took up the offers of shares made to them, but the plaintiff did not take up the offer made to him.  The plaintiff disputed the validity of this share issue on grounds of oppression but he did not institute any proceedings to challenge it or restrain it.  The effect of the further shares being issued to the entities associated with Mr Tarbotton and Mr Vieceli was that the plaintiff's proportionate shareholding in the defendant was reduced from 24.5% of the total to slightly less than 1%.   The defendant's Articles set out the procedure required to transfer shares in the defendant.  The procedure involves the member giving written notice to the Board that the member wishes to effect a transfer.  The notice constitutes the Board the member's agent for the sale of such shares at a price to be agreed upon between the member giving notice and the Board or, in the case of difference, at a price determined by an independent chartered accountant appointed by the Board.   Accordingly, the two possible ways in which the plaintiff could effect a sale of his shares is first, pursuant to the Articles, and second, by bringing an oppression action under sections 232 and 233 of the Act and obtaining an order of the court under section 233(1)(e) for the purchase of his shares.  If the plaintiff qualifies for such an order, the court has a discretion about how the purchase price is to be fixed which will represent a fair value for the shares in all the circumstances.  Therefore, if the plaintiff were to pursue the second option of an oppression action, he may recover more for his shares than if he proceeded under the defendant's Articles.     **(c) Decision**   The court held that the plaintiff did not discharge the onus upon him to show that he brought the application under section 247A in good faith and for a proper purpose.   The court accepted the defendant's submission that overall on the balance of probabilities the plaintiff's evidence was not consistent with the plaintiff primarily wanting the further documents for a valuation of his shares for their sale under the Articles.  If the plaintiff had locked himself into the process prescribed in the Articles by giving notice of his wish to transfer his shares, the court considered it likely that his purpose would be found to have been to provide a proper foundation for negotiations for an agreed price for the shares.  By not doing so, the Court considered that the plaintiff was leaving his options open whether to proceed under the Articles or by an oppression action, and was not entirely candid about that in a number of the pieces of evidence, which the court considered to reflect adversely on his bona fides.   The court held that the plaintiff's real purpose was to obtain information so that he could decide on the relative advantages and disadvantages of pursuing an oppression action compared with the process under the Articles.     Although there is authority in support of allowing a section 247A application in respect of a prospective oppression action in some circumstances, the court held that it is a matter of whether it is an appropriate exercise of the court's discretion in this case.  The court considered that it was clear from the plaintiff's evidence that because of his previous employment with the defendant he has considerable knowledge of the affairs of the defendant to which the documents in question relate, and apparently enough to mount an oppression action if he chose to do so.  The court considered that there is no reason to think that the ordinary processes of disclosure of documents in such an action would not be sufficient for him to pursue properly that action without recourse to a prior section 247A action.   Accordingly, the court held that the plaintiff did not establish that his primary or dominant purpose for his section 247A application was to assist in the process under the Articles.  Although it may be an equal purpose to preparing for an oppression action, it was not shown to be the primary or dominant purpose.  The court dismissed the application.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.11 Pre-registration contracts are formed at the date of ratification not at the date of signing the agreement**  (By Simon Truskett and Liz Pennell, Clayton Utz)   Keswick Developments Pty Ltd v Kevroy Pty Ltd; Keswick Developments Pty Ltd  v Keswick Island Pty Ltd [2009] QSC 176, Supreme Court of Queensland, McMurdo J, 6 July 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/june/2009qsc176.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/june/2009qsc176.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   In a contract entered into for or on behalf of a company prior to the registration of the company, the date of formation of the contract is the date of ratification of the agreement by the company, not the date of signing.  Accordingly, warranties given in the agreement are given as at the date of ratification of the agreement unless the contract expressly provides otherwise.   A clause in an agreement that permits a party to set-off amounts owed to it for breach of warranty against other amounts owed by the party under the agreement, entitles the party to retain only such amount as has been formally adjudicated or agreed as being the loss or damage suffered (and not the maximum potential liability).   **(b) Facts**   An agreement for the sale of a head-lease (Sale Agreement) between the Vendor and a yet to be incorporated Purchaser contained a warranty that "no dealings other than the dealings revealed by the searches in Schedule 3 have taken place in respect of the land". The warranty was not qualified by the knowledge of the Purchaser.   Between the date of signing the Sale Agreement and the date of ratification of the Sale Agreement by the newly incorporated Purchaser, the Vendor agreed to sub-let part of the land to a third party. The agreement to sub-let was not revealed in Schedule 3 to the Sale Agreement; however, the Purchaser was aware of it at the time of ratification of the Sale Agreement.     As the entry into the sublease was dealing in respect of the land and was not identified in Schedule 3 to the Sale Agreement, the Purchaser sought to recover from the Vendor for breach of the warranty in the Sale Agreement and other related breaches.  In response, the Vendor argued that the Purchaser's ratification of the Sale Agreement with knowledge of the sublease indicated consent by the Purchaser to an alteration to the Sale Agreement to include the agreement to sublease, although no such alteration was made to the terms of the document.    In addition, a series of option agreements between the Vendor and the Purchaser provided that, if the Purchaser suffered a loss as a consequence of the Vendor's breach of the Sale Agreement, the Purchaser could "retain the value of such loss and damage from monies due to be paid by the Purchaser [under the option agreements]".  The Purchaser sought to withhold amounts for the alleged breach of warranty from payments due to the Vendor under the option agreement. In response, the Vendor sought a declaration that the Purchaser was only entitled to withhold such amounts as had been formally awarded to the Purchaser as an assessment of damages, or otherwise agreed between the parties.   An earlier decision in relation to the same Sale Agreement (*Kevroy Pty Ltd v Keswick Developments Pty Ltd* [2009] QSC 49) held that:   * the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) provisions in relation to pre-registration contracts (sections 131-133) applied to the Sale Agreement; * the correct interpretation of sections 131-133 of the Corporations Act is that pre-registration contracts take effect from the date of ratification of the agreement by the newly formed company, and not before; and * the interest in land created by the agreement to sublease (which pre-dated the ratification of the Sale Agreement) took priority over the interest created by ratification of the Sale Agreement, even though the sublease was not actually granted until after the ratification of the Sale Agreement.   The parties to the present matters accepted the correctness of these findings (at [14]). The interpretation of sections 131-133 of the Corporations Act is considered in more detail below.   **(c) Decision**   To determine whether the warranties under the Sale Agreement were given by the Vendor at the date of signing the agreement or at the date of ratification by the Purchaser, McMurdo J reviewed the provisions of the Corporations Act relating to entry into contracts by or on behalf of companies before registration of the company (Part 2B.3 of the Corporations Act). McMurdo J's analysis of those provisions is as follows (at [16]):   * the signing of a written agreement between the Vendor and the unincorporated Purchaser did not give rise to a contract between the Vendor and the Purchaser at the time of signing; * the immediate legal consequences of the signing of the written agreement are that the person signing for or on behalf of the unincorporated Purchaser is liable to pay damages if the Purchaser is not subsequently registered (section 131(2)) or, having been registered, does not ratify the contract (section 131(2)) or, having been registered and ratified the contract, the Purchaser subsequently fails to perform its obligations under the contract (section 131(4)); * although it is not expressly included in the terms of Part 2B.3 of the Corporations Act, the signing of the written agreement means that the Vendor is not able to unilaterally withdraw from the agreement - as to permit the Vendor to do so would defeat the purpose of the provisions; and * the warranties included in the written agreement in this case could only be enforced by the Purchaser if and when it became registered and ratified the contract.   In light of the above analysis of the law, McMurdo J found that the Vendor's intention must have been that it would give the warranties under the agreement as at the time when ratification occurred, that being the time when the contract was formed between the Vendor and the Purchaser. In reaching this conclusion McMurdo J relied on provisions in the agreement where the words "the date of this Contract" could "have no sensible operation if that [date] was understood to be the date of signing rather than the date of ratification" (at [17]).  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.12 Consideration of what constitutes oppression of minority in context of small proprietary company**   (By Chris Hurley, DLA Phillips Fox)   Dick v Alan Powell Holdings [2009] QSC 184, Supreme Court of Queensland, Philippides J, 22 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/june/2009qsc184.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/june/2009qsc184.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**  The applicant, Wayne Dick, a director of and shareholder in Alan Powell Holdings Pty Ltd ("APH") alleged various conduct on the part of two directors of APH was contrary to the interests of the members as a whole, or oppressive to, unfairly prejudicial to, or unfairly discriminatory against the applicant.    While the majority of the allegations were dismissed, the court held that two aspects of conduct were oppressive, namely:   * the authorising of an unsecured, interest-free loan from APH to a director who controlled a majority of APH's shares, without observing proper process and seeking formal board approval; and * two directors using their position to cause APH to fund the defence in their own interests in the oppression action, as opposed to the discrete interests of APH.   The relief granted by the court was a winding up order.   This decision contains some useful judicial discussion applying the principles relevant to section 232 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) to proprietary (Pty Ltd) companies.  It also analyses the rights of employees who are minority shareholders in proprietary companies.   **(b) Facts**   Wayne Dick, a minority shareholder in APH, brought proceedings against APH and the two other shareholders alleging oppressive conduct of the affairs of APH and seeking an order from the court requiring APH to purchase his shares at a price determined by the court.    Mr Dick was a senior employee of APH. APH carried on a business of car dealerships.  The business had been founded by Alan Powell who remained a director and the majority shareholder, controlling 75% of the shares of APH.   The two remaining shareholders and directors of APH were Mr Dick who owned 15% of the shares and a company controlled by fellow employee, Tom Smith, which held 10%.  Both had been offered the opportunity to purchase shares on the basis that they were senior employees of APH.    The dispute arose in part from the terms of Mr Dick's exit as a shareholder from APH.  In October 2005 Mr Dick was made redundant as an employee of APH following the sale of the Ford dealership business.  There was an informal understanding that Mr Powell was prepared to purchase the relevant shares at a price equivalent to 15% of the net assets of APH.   The relationship between Mr Dick and Mr Powell deteriorated when Mr Dick sought to challenge the value ascribed to a real property asset of APH.  The offer to purchase the shares was then withdrawn.   In the proceedings, allegations of oppressive conduct were made, with the applicant being successful in relation to two claims.   **(c) Decision**   **(i) Restatement of applicable principles**   Philippides J reasserted a number of general principles regarding oppressive conduct pursuant to section 232 of the Corporations Act, noting among other things that:   * courts are reluctant to intervene where matters are business judgments unless it can be shown that there is a lack of good faith or that no reasonable board could have come to that decision; * the conduct of an applicant may be relevant to the assessment of fairness; and * the focus of the oppressive provision is on objective unfairness and there must be more than a mere dissatisfaction with the conduct of the company's affairs.   **(ii) Application in present case**   The court addressed each of the allegations of oppression, determining two allegations to be oppressive conduct requiring relief:   * The decision by Mr Powell to authorise an unsecured and interest-free loan from APH to himself for the sum of $195,000 in circumstances where the loan was for a separate business venture with no connection to the affairs of APH.  Mr Powell did not call a board meeting or consult Mr Dick, a fellow director.  The loan was later repaid to APH.  Although Mr Powell could have prevailed at a meeting of directors by virtue of his majority shareholding, Philippides J noted that Mr Powell did not observe proper process and characterised the loan as devoid of commercial benefit to APH. * The use of APH funds for the payment of legal expenses relating to defence of the respondent directors. Philippides J characterised the dispute as one between shareholders and held that Mr Powell and Mr Smith had used their position as directors to cause APH to assist in funding their defence in the current court action, and not simply to defend APH's discrete interest.  Their offer to reimburse APH for legal expenses did not negate the oppressive conduct.   Philippides J also considered that it may be oppressive for APH to fund a defence to claims if its defence goes beyond merely protecting the discrete interests of the company and amounts to support of the majority, citing Brereton J in *Mopeke v Airport Fine Foods Pty Ltd* (2007) 61 ACSR 395.   Amongst other things, the court held the following allegations did not constitute statutory oppression:   * the exclusion of Mr Dick from various meetings attended by Mr Powell and Mr Smith, as these could not be characterised as board meetings and had occurred without prior complaint from Mr Dick; * payment of dividends contrary to APH's Articles of Association in circumstances where the mistake was shared equally by all shareholders and payments were ratified by all directors and shareholders; * refusing Mr Dick permission to inspect company books and records where the documents did not relate to the removal of Mr Dick as a director; and * the removal of Mr Dick as a director where other directors had genuine concerns about him remaining on the board and where due process was observed regarding the meeting called to terminate Mr Dick as a director.   **(iii) Relief**   Philippides J made an order pursuant to section 233 of the Corporations Act.  He ordered APH be wound up and APH's assets be distributed to shareholders in proportion to their percentage entitlements. He noted that APH was no longer a going concern, having since sold its car dealership businesses and therefore in the circumstances, winding up APH could not be considered prejudicial to shareholders.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4)  **4.13 Statutory demands and the presumption of insolvency - don't presume**   (By Chris Keefe, Clayton Utz)   Leveraged Capital Pty Ltd v Modena Imports Pty Ltd [2009] NSWSC 509, Supreme Court of New South Wales, Brereton J, 7 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc509.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc509.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   Parties seeking to rely on the unsatisfied statutory demand presumption of insolvency in an application to wind up a company must be cautious in some circumstances where a previous application to have the statutory demand set aside was unsuccessful. If a set-aside application was successfully defended on the basis that no valid application had been made, the presumption of insolvency in a consequent winding up proceeding will be available only if the proceedings are commenced within 3 months of the expiry of the original 21 day period for compliance with the statutory demand.   **(b) Facts**   Leveraged Capital Pty Ltd (receivers and managers appointed) (Leveraged) had a debt of $495,000 assigned to it by a creditor of Modena Imports Pty Ltd (Modena) on 15 October 2008. On 7 November 2008, Leveraged served a statutory demand on Modena for payment of the $495,000 debt.   Modena subsequently issued proceedings (within the 21 day time limit) to have the statutory demand set aside on the basis that there was a genuine dispute about the debt and that Modena had an offsetting claim pursuant to section 459H of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). On 2 February 2009, Barrett J dismissed Modena's application to have the demand set aside in *Modena Imports Pty Ltd v Leveraged Capital Pty Ltd (in Liq)* [2009] NSWSC 20 on the basis that the affidavit filed in support of the application was deficient and did not constitute an affidavit 'supporting the application' under section 459G of the Act.   Leveraged then issued the proceedings to have Modena wound up in insolvency pursuant to section 459P of the Act on 24 March 2009. Modena was now apparently in voluntary administration.   The main issue to be determined was whether, under section 459C of the Act, Leveraged was entitled to rely on the presumption of insolvency arising from the statutory demand served by it on Modena on 7 November 2008.   **(c) Decision**   **(i) Time limit on deemed insolvency**   Brereton J found that, in light of section 459C of the Act, where Leveraged sought to rely on the presumption of insolvency arising out of a failure to comply with a statutory demand, proceedings for the winding up of Modena should have been commenced within 3 months of the expiry of the period in which Modena had to comply with the statutory demand.   Whilst the period for compliance would ordinarily be 21 days, where an application is made to have the statutory demand set aside in accordance with section 459G of the Act, section 459F(2)(a)(i) of the Act provides that, on hearing the application, the court may order that the period for compliance be extended. If no order is made, section 459(2)(a)(ii) of the Act automatically extends the period until 7 days after the final determination of the application.   Brereton J, however, found that an extension under section 459F(2)(a) of the Act was available only where a company applied to have the statutory demand set aside in accordance with section 459G of the Act. In the present circumstances (where the affidavit in support of the section 459G application was found not to be 'in support'), Brereton J found that an application had not been made in accordance with that section.   As a result, the 3 month time limit for commencing a winding up application that sought to rely on the presumption of insolvency (arising out of a failure to comply with a statutory demand) ran from 21 days after the statutory demand was originally served by Leveraged on Modena.   This effectively created a situation where Leveraged would have been required to issue winding up proceedings before the final determination of the setting aside application.    Brereton J commented that 'a creditor who wishes to take the point that there has been no valid application needs to be vigilant to guard its position and file a winding up application if it wishes to take advantage of the presumption of insolvency.'   **(ii) Alternative basis for winding up**   In light of this 'stale demand', Leveraged sought and was granted leave to amend its application, firstly, to allege insolvency in fact, and secondly, to claim standing as a contingent creditor pursuant to a costs order made in favour of Leveraged in the earlier proceeding where Modena failed to have the statutory demand set aside.   In alleging insolvency in fact, Leveraged sought to rely on Modena's failure to comply with the statutory demand to found an inference that Modena was insolvent under section 459B of the Act. Modena sought to dispute that it was indebted to Leveraged in respect of the debt (the subject of the statutory demand). Leveraged argued that section 459S of the Act precluded Modena from disputing the debt, in any event, without leave, and that leave could not be granted because Modena was plainly insolvent (regardless of the existence of the debt owed to Leveraged).   Section 459S of the Act provides that, where a winding up application relies on a failure by the company to comply with a statutory demand, the company may not, without leave, oppose an application on a ground that was relied on by the company for the purpose of an application to have the demand set aside. Section 459(2) of the Act further provides that a court is not to grant leave if it is satisfied that the ground is material to proving that the company is solvent.   Brereton J found that section 459S of the Act was plainly concerned with an application for a company to be wound up in insolvency that relied on the statutory presumption of insolvency (which was not available to Leveraged), and accordingly, that Leveraged was not entitled to rely on Modena's failure to comply with the statutory demand as a basis for a finding of insolvency in fact. Modena was therefore not precluded from disputing its indebtedness to Leveraged or Leveraged's standing as a creditor.  Leveraged accepted that there was a dispute with Modena as to the amount of the debt and that as such, it was yet to establish standing as a creditor to bring a application for winding up in insolvency.   Leveraged sought to bring its application on the basis that it was a contingent creditor pursuant to the earlier award of costs (which was yet to be quantified) in Leveraged's favour arising from the earlier proceeding by Modena to have the demand set aside. Brereton J found that a person with a costs order (which has not yet been taxed and assessed) was clearly a contingent creditor. However, under section 459P(2)(a) of the Act, leave of the court was required to bring an application for winding up in insolvency. Section 459P(3) of the Act provides that the court may give leave if it is satisfied that there is a prima facie case that the company is insolvent.   The report of Modena's administrator was produced to show debts of $2.45 million and assets of $575,000 (in an optimistic view). The court found this evidence plainly sufficient to establish a prima facie case of insolvency and granted leave to Leveraged.  Finally, Modena sought to have the proceedings dismissed in order to allow the administration of Modena to proceed. Modena had a proposed deed of company arrangement that would provide funding for Modena to dispute its indebtedness to a third party. In relying on the decision of Palmer J in *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 548, Brereton J found that the authorities demonstrated that a clear case must be made out that it is in the best interest of creditors for the administration to proceed. The court found that, at best, Modena was only able to point to the administrators' view that the deed of company arrangement might be in the best interests of creditors. This fell far short of a clear case that it was in the best interests of creditors to allow the administration to proceed.   Leveraged was successful in obtaining orders to have Modena wound up in insolvency on the basis of its standing as a contingent creditor.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Contributions** |  |  | | |  | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/144%20August%202009.htm%23h1) | | |  |

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