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| **Bulletin No. 138**Editor: Professor Ian Ramsay, 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/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20138.htm-February%202009.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  |  |

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| **1.1 National consumer law**On 17 February 2009, the Australian Consumer Affairs Minister, Chris Bowen MP, announced a new national consumer law and the publication of a consultation paper relating to the proposed new law. Parliament will consider legislation during the year to protect consumers from unfair contract terms and provide new enforcement powers for the Australian Competition and Consumer Commission. In 2007‑2008, the Productivity Commission (PC) reviewed Australia's consumer policy framework. The PC concluded that "while Australia's consumer policy framework has considerable strengths, parts of it require an overhaul". On October 2008, all Australian state and territory governments agreed to a new consumer policy framework, comprising a single national consumer law and streamlined enforcement arrangements.  The new national consumer policy framework will involve the following key elements:* a new national consumer law, which will be called the Australian Consumer Law, and which is implemented as part of an application law scheme with the Australian Government as the lead legislator and other jurisdictions to apply the national consumer law as part of their own laws; and
* the national consumer law will be based on the existing consumer protection provisions of the [Trade Practice Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default) (TPA).

As recommended by the PC, the national consumer law will also include:* a provision which regulates unfair terms in consumer contracts;
* new enforcement powers which will enable more proportionate responses to consumer law breaches and new redress options for consumers; and
* a new national legislative and regulatory regime for product safety.

There will be an Inter‑Governmental Agreement between the Australian Government and the governments of the states and territories concerning the process for amending the national consumer law and the administrative architecture underpinning it.Consumer regulators will develop improved enforcement cooperation and information sharing arrangements.The purpose of the consultation paper is to:* explain how the national consumer law will be developed;
* explain the nature and scope of the agreed reforms to create the national consumer law and, in some limited circumstances, seek views on specific aspects of those reforms; and
* seek views and explore options for augmentations and modifications to existing generic consumer protections which are based on best practice in existing state and territory laws.

The paper is divided into four parts, covering:1. the context of the reforms (Part I);2. the agreed consumer law reforms, including the establishment of a national consumer law (based on the TPA), unfair contract terms regulation, a national product safety regulatory regime and new enforcement powers and redress (Part II);3. suggested reforms based on best practice in existing state and territory laws (Part III); and4. implementation and review (Part IV).The consultation paper is available on the [Australian Treasury](http://assistant.treasurer.gov.au/ministers/ceb/content/pressreleases/2009/attachments/An_Australian_Consumer_Law_brochure.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.2 IPO activity falls to 17 year low** At 31 December 2008, nearly all of the year's floats (96%) were trading at a significant discount to their issue price, according to PricewaterhouseCoopers' 17th Annual Survey of Sharemarket Floats.Published on 17 February 2009, the Survey charts the performance of Australian IPOs in the calendar year to 31 December 2008, and excludes compliance listings, 'backdoor' listings, demutualisations and resource sector floats, which trade on different fundamentals.In addition to poor returns, the low number of floats in 2008 (only 24) marks a 17 year low and has fallen 74% from the 91 listings in the prior year. The total funds raised in 2008 were also down significantly to just $1.6 billion, a decline of 82% from the $8.9 billion in 2007. Float activity was impacted significantly in the second half of the year. Twenty-two of the 24 floats were listed in the six months to July, with only one subsequent listing in each of the final two quarters of the year. From October onwards, there were no new listings and the late flurry of IPO activity typical for December each year, was totally absent in 2008.etailed Contents**1.3 EU Markets in Financial Instruments Directive - review of supervisory powers and sanctions**On 16 February 2009, the Committee of European Securities Regulators (CESR) published a review (Ref. CESR/08-220) of supervisory powers and practices, as well as administrative and criminal sanctioning regimes across Europe in relation to the Markets in Financial Instruments Directive (MiFID). The report gives a factual overview of the implementation of MiFID by mapping the supervisory powers, practices and sanctioning regimes of CESR Members. In 2007, CESR undertook a similar exercise to evaluate the equivalence of supervisory powers in the EU under the Market Abuse and Prospectuses Directive (Ref. CESR/07-334b). This work was followed by a formal request by the ECOFIN Council in December 2007 to extend this work, and display the differences in the implementation of MiFID as well. The review covers powers, practices and sanctioning regimes but not the actual use of sanctioning powers and the enforcement of measures and sanctions. A similar exercise is now being undertaken regarding the sanctioning powers under the Transparency Directive. Further information is available on the [CESR](http://www.cesr.eu" \t "_new) website.etailed Contents**1.4 Banned foreign directors to be banned in Australia**On 13 February 2009, Senator Nick Sherry, Australian Minister for Superannuation and Corporate Law, welcomed the passage through Parliament of the [Corporations Amendment (No. 1) Bill 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=104970" \t "Default), which will ensure that individuals who are disqualified from managing companies in foreign countries will also be disqualified in Australia.The legislation will, in the first instance, operate only in relation to banned company directors from New Zealand, although other jurisdictions may be added in the future.The Bill will ensure that persons disqualified by a court in their home jurisdiction from managing companies will be automatically disqualified in Australia.In addition, where disqualification of a director has occurred by automatic operation of the law in a persons' home jurisdiction, as opposed to by a court, there will now be legal grounds for the Australian Securities and Investments Commission (ASIC) to apply to an Australian court for an order that that person also be disqualified in Australia. ASIC will also be required to record the name of any person that has had a court order made against them under the proposed section on its disqualified persons register and ensure a copy of that court order is retained on the register.Additionally, the Bill also establishes that a corporation cannot indemnify a director for the legal costs of an unsuccessfully defended action brought by ASIC under the new law. etailed Contents**1.5 The future of Europe's financial services**  On 12 February 2009, the Association of British Insurers (ABI) launched a three-stage plan to help restore confidence and trust in European financial services. A report outlining the ABI's priorities for Europe also highlights key principles for a global recovery. The UK insurance industry is the largest in Europe, and in total European insurers generate premium income of ?1,110 billion, employ over one million people and invest more than ?7,200 billion in the European economy.   The report, "The Insurance Industry: Rebuilding Confidence in Europe", proposes three steps to help build trust in European capital markets:1. Short term: Better use of the information exchange offered by Colleges of supervisors.2. Medium term: More resources for Level Three committees, which bring together European regulators in specific financial sectors.3. Long term: A debate over the feasibility of a single prudential supervisor, to overcome the current lack of trust between European regulators.The report also includes principles to underpin any new legislation or proposed solutions to reform financial supervision. These include:* The need for better, targeted regulation rather than simply adding to existing rules.
* The importance of consumer needs, which should be fundamental to any proposed changes.
* Risk and principles-based regulation (as opposed to "light touch" regulation) is key.
* The need for a global response and the dangers of protectionism.

The report is available on the [ABI](http://www.abi.org.uk/Members/circulars/viewAttachment.asp?EID=21948&DID=17297" \t "_new) website.etailed Contents**1.6 Issues paper on the regulatory consequences of the financial crisis**On 12 February 2009, the Pan European Insurance Forum (PEIF) published a paper titled "Regulatory consequences of the financial crisis - An Insurance view". Key messages include:* policy makers reacting to the financial crisis need to take into account the fact that the business model of the insurance industry differs substantially from that of other financial services sectors;
* government interventions in support of insurance companies have to be carefully evaluated and justified against insurance specific criteria; and
* as the regulatory environment in financial services is being redefined, new legislation should be targeted and balanced.

The paper is available on the [PEIF](http://www.cea.eu/uploads/DocumentsLibrary/documents/1234432162_final-booklet-peif.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.7 OECD report on private pensions**On 12 February 2009, the Organisation for Economic Co-Operation and Development (OECD) published its "Private Pensions Outlook" in which the OECD estimates that the loss in private pension assets in the year to December 2008 has increased to US$ 5.4 trillion, up from US$ 5 trillion until October. The average pension fund had a negative rate of return of 23% over the year.The OECD recommends policy actions in line with the long-term horizon of private pensions. In particular, it calls for using public safety nets to address the impact of the crisis. The OECD also calls for structural changes in the way private pensions are managed, regulated, and promoted.The report finds pension funds are very costly to manage in some countries, either because they are too small or because they are sold on a commercial basis to often ill-informed consumers. For instance, if pension funds' members in Hungary paid fees as low as in Sweden, their pension benefits would be about 30% higher.Policymakers also need to step up action to improve the way both defined benefit and defined contribution systems are regulated. For defined benefit plans, regulations should encourage the build-up of funding buffers in good market conditions and provide more flexibility during a period of market turmoil. Investment rules for defined contribution plans should promote a reduction in exposure to risky assets substantially as the worker ages, especially in countries where such plans are a major component of retirement income.The OECD argues for pursuing the expansion of private pension systems, especially in countries where future reductions in public pension benefits are already legislated or expected in order to make them sustainable. The report finds that in 10 OECD countries, the average worker is unlikely to have a combined public and private pension greater than 60% of his/her final salary. The greatest policy concern is in countries where low income households receive low public pension benefits and are not covered by private pension plans. Further efforts are also needed to support public pension systems with public pension reserve funds. Only countries like Ireland, Japan, Mexico and Sweden have accumulated reserves sufficient to cover more than twice the annual expenditure on public pensions.The executive summary of the publication and key facts and figures are available on the [OECD](http://www.oecd.org/daf/pensions/outlook%22%20%5Ct%20%22_new) website. etailed Contents**1.8 AICD issues new guidelines for boards on executive remuneration** On 12 February 2009, the Australian Institute of Company Directors (AICD) issued a new set of guidelines to assist boards of publicly listed companies when designing, negotiating and monitoring remuneration arrangements for CEOs and overseeing the basis on which other senior executives are appointed. The Guidelines recognise that there are many possible arrangements, reflecting different economic conditions and corporate circumstances. It is the board, not shareholders or government, where the responsibility for remuneration setting and monitoring should continue to reside. The Guidelines provide a series of "Do's and Don'ts", as well as a range of issues which boards might consider when determining executive pay. They outline good practice in putting in place appropriate frameworks and processes, setting remuneration policies and terms and reviewing arrangements. These include: * "stress testing" of proposed incentive arrangements prior to accepting them or agreeing to variations to understand the impact of changes in economic or market circumstances;
* adopting an appropriate mix of base pay, short-term incentives and long-term incentives and considering other possibilities, such as base pay and long-term incentive plan only, combined with superannuation;
* linking incentive elements to an appropriate set of performance measures, ensuring that they promote long-term performance of the company and wealth creation for its owners; and
* ensuring the issue of termination payments, particularly for non-performance, is addressed when drafting the executive's contract.

The Guidelines also advise against poor practices, such as:* having executives involved in setting their own remuneration;
* putting in place arrangements which promote excessive risk-taking or "short-termism";
* providing for additional termination payments beyond the date of termination and statutory entitlements where an executive's employment is terminated for misconduct; and
* changing performance hurdles in executive pay contracts in mid-stream without exceptionally good reason.

The Guidelines urge boards to think about a range of issues including:* engaging with shareholders and other relevant stakeholders on their company's approach to remuneration and where a material change in remuneration arrangements has been made;
* whether to have a discretionary bonus rather than a bonus which the board is contractually obliged to approve regardless of changed circumstances;
* whether they should place an upper bound on short and long-term incentive rewards;
* putting in place arrangements where a percentage of a CEO's long-term equity incentive benefit is withheld for a period beyond the term of the employment contract; and
* examining the range of performance measures available other than just comparative market data.

The Guidelines are available to purchase from the [AICD](http://www.companydirectors.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**1.9 Issues paper on regulation of aspects of market integrity**On 10 February 2009, the Australian Corporations and Markets Advisory Committee (CAMAC) released an issues paper titled, "Aspects of Market Integrity".The paper responds to a request from the Minister for Superannuation and Corporate Law, the Hon Senator Nick Sherry, for CAMAC to provide advice by 30 June 2009 in relation to the effect of various market practices on the integrity of the Australian financial market:* directors entering into margin loans over shares in their company;
* trading by company directors in 'blackout' periods;
* spreading false or misleading information; and
* corporate briefing of analysts.

To facilitate responses from interested persons, the paper provides background material on each of these four matters, analyses the current legal position in Australia, compares approaches in some overseas jurisdictions, and identifies issues for consideration. While the Committee is not putting forward any proposals at this stage, the paper identifies a number of options for consideration if further action is considered necessary. Given the time constraints, the issues paper is published in electronic form only, and submissions are requested by 10 March 2009.CAMAC will prepare its report following consideration of submissions received. The Issues Paper is available on the [CAMAC](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFDiscussion%2BPapers/%24file/Market_integrity_Issues_Paper_Feb09.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.10 Private Equity Council members adopt guidelines for responsible investment**On 10 February 2009, the Private Equity Council (PEC) announced that its members have adopted a set of investment guidelines that they will apply prior to investing in companies and during their period of ownership. The guidelines cover environmental, health, safety, labour, governance and social issues. The guidelines grew out of a dialogue between PEC members and a group of the world's major institutional investors, which took place under the umbrella of the United Nations-backed Principles for Responsible Investment (PRI).  The guidelines call for PEC member firms to:1. Consider environmental, public health, safety, and social issues associated with target companies when evaluating whether to invest in a particular company or entity, as well as during the period of ownership.2. Seek to be accessible to, and engage with, relevant stakeholders either directly or through representatives of portfolio companies, as appropriate.3. Seek to grow and improve the companies in which they invest for long-term sustainability and to benefit multiple stakeholders, including on environmental, social and governance issues. To that end, Private Equity Council members will work through appropriate governance structures (e.g. board of directors) with portfolio companies with respect to environmental, public health, safety, and social issues, with the goal of improving performance and minimizing adverse impacts in these areas.4. Seek to use governance structures that provide appropriate levels of oversight in the areas of audit, risk management and potential conflicts of interest and to implement compensation and other policies that align the interests of owners and management.5. Remain committed to compliance with applicable national, state, and local labour laws in the countries in which they invest; support the payment of competitive wages and benefits to employees; provide a safe and healthy workplace in conformance with national and local law; and, consistent with applicable law, will respect the rights of employees to decide whether or not to join a union and engage in collective bargaining. 6. Maintain strict policies that prohibit bribery and other improper payments to public officials consistent with the US Foreign Corrupt Practices Act, similar laws in other countries, and the OECD Anti-Bribery Convention. 7. Respect the human rights of those affected by their investment activities and seek to confirm that their investments do not flow to companies that utilize child or forced labour or maintain discriminatory policies. 8. Provide timely information to their limited partners on the matters addressed herein, and work to foster transparency about their activities. 9. Encourage their portfolio companies to advance these same principles in a way which is consistent with their fiduciary dutiesThe guidelines are available on the [PEC](http://www.privateequitycouncil.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.11 US financial stability plan** On 10 February 2009, US Treasury Secretary Timothy Geithner announced a Financial Stability Plan intended to "restart the flow of credit, clean up and strengthen our banks, and provide critical aid for homeowners and for small businesses". The plan builds upon existing programs and earmarks the second US$350 billion of funds authorised under the Emergency Economic Stability Act of 2008.  The Treasury Department has announced the following major elements of the plan:* a Capital Assistance Program that will invest in convertible preferred stock of large institutions that undergo comprehensive "stress tests" and smaller institutions that undergo supervisory reviews as a bridge to private capital and a buffer to help them withstand a worsening economy;
* a Consumer and Business Lending Initiative that will leverage US$100 billion of Treasury funding to up to US$1 trillion in Federal Reserve lending to fund new consumer loan, small business loan and commercial mortgage asset-backed securities issuances;
* a new Public-Private Investment Fund that will leverage public and private capital with public financing to buy up to US$500 billion to US$1 trillion of legacy "toxic assets" from financial institutions; and
* assistance for homeowners by providing up to US$50 billion to help reduce mortgage payments and interest rates and establishing loan modification guidelines for government and private programs.

Firms receiving assistance under the Financial Stability Plan going forward will be subject to higher transparency and accountability standards, including restrictions on dividends, acquisitions and executive remuneration and additional disclosure requirements. The Financial Stability Plan follows several lending facilities created by the Federal Reserve since March 2008 to stabilise financial markets and the Treasury's direct capital injections in US financial institutions starting in October 2008 under the Troubled Asset Relief Program Capital Purchase Program.Further details are available on the [US Treasury](http://www.ustreas.gov/news/index2.html%22%20%5Ct%20%22_new) website.etailed Contents**1.12 FSA publishes financial risk outlook**On 9 February 2009, the UK Financial Services Authority (FSA) published its Financial Risk Outlook (FRO) outlining the main risks facing firms, consumers and the regulatory system in the economic downturn, in particular the challenges created by banking sector and real economy deleveraging. These challenges include banks adjusting their business models to operate successfully in difficult conditions in financial markets and in the real economy. This year's FRO is divided into three sections:1. Financial and economic crisis sets out an integrated view of the macroeconomic, financial and regulatory developments which lie behind the crisis. It outlines issues relating to the regulation of banks and bank-like institutions which will be covered by the Turner Review and an FSA discussion paper due to be published in March; 2. Economic outlook describes a central economic scenario drawn from various forecasts focusing in particular on how deleveraging is likely to affect firms, markets, consumers and the FSA. Three alternative scenarios explore the ways in which the economy and financial sector could plausibly evolve over the medium and long term to highlight the substantial uncertainties that face both firms and consumers; and3. Outlook for financial sectors and consumers identifies the risks and implications of the financial and economic environment for firms, market participants and consumers. The FRO is available on the [FSA](http://www.fsa.gov.uk/pubs/plan/financial_risk_outlook_2009.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.13 Review of corporate governance of UK banking industry** On 9 February 2009, the UK Chancellor of the Exchequer, the Secretary of State for Business, Enterprise and Regulatory Reform and the Financial Services Secretary to the Treasury,s announced a review to recommend measures to improve the corporate governance of UK banks, particularly with regard to risk management. The review is being chaired by the former financial services regulator, Sir David Walker.It will examine board management of risk (including the effectiveness of risk and audit committees), incentives to manage risk in bank remuneration policies, the competences needed on bank boards, board practices and structures, and the role played by institutional shareholders. The terms of reference for the review are to examine corporate governance in the UK banking industry and make recommendations, including in the following areas:  * the effectiveness of risk management at board level, including the incentives in remuneration policy to manage risk effectively;
* the balance of skills, experience and independence required on the boards of UK banking institutions;
* the effectiveness of board practices and the performance of audit, risk, remuneration and nomination committees;
* the role of institutional shareholders in engaging effectively with companies and monitoring of boards; and
* whether the UK approach is consistent with international practice and how national and international best practice can be promulgated.

The review will report jointly to the Chancellor of the Exchequer, the Secretary of State for Business, Enterprise and Regulatory Reform and the Financial Services Secretary to the Treasury, with preliminary conclusions by the autumn and final recommendations by the end of the year. etailed Contents**1.14 World Federation of Exchanges Board of Directors issues statement on short selling ban** On 9 February 2009, the Board of Directors of the World Federation of Exchanges (WFE) issued a statement on the short selling bans implemented on many markets as emergency measures in September 2008. According to the WEF, various analyses have concluded that the bans did not solve the problem of slowing the fall in securities and contract prices, as was intended. Furthermore, the uncertainty created by the implementation of these bans may have had a negative impact on liquidity and the normal functioning of markets. In particular, it appears that spreads in banned stocks widened, depth of market deteriorated, and trading volumes in banned stocks declined more than in other securities not affected by the bans.The WFE Board of Directors considers short selling to be a well established market mechanism, which contributes to market liquidity and efficiency. It should be conducted subject to regulations which enhance the public's confidence in exchanges.Rules governing short-selling should include borrowing and delivery requirements, and should be strictly enforced. All short-selling transactions should comply with rules prohibiting market manipulation.Further information is available on the [WFE](http://www.world-exchanges.org/%22%20%5Ct%20%22_new) website.etailed Contents**1.15 FSA proposes enhanced transparency requirements on short selling for all stocks**In a discussion paper (DP) issued on 6 February 2009, the UK Financial Services Authority (FSA) has proposed a general short selling disclosure requirement for all UK listed stocks. The proposals follow a review of short selling undertaken since the FSA introduced its temporary ban in September 2008.The DP looks at the arguments for and against short selling, examines possible regulatory constraints on short selling and then examines options for enhanced transparency. The paper poses a number of questions on each of these areas and asks for responses to assist the FSA in formulating a regulatory response. The FSA believes that the benefits of short selling such as price efficiency and liquidity normally outweigh the disadvantages and proposes that there should be no direct restrictions on short selling. However, the FSA sees advantages in having enhanced transparency of short selling and so proposes that disclosure requirements for significant short positions should be introduced for all UK listed stocks.Regulators around the globe have put in place a variety of different measures on short selling. The International Organization of Securities Commissions (IOSCO) and the Committee of European Securities Regulators (CESR) both have working groups on short selling. The FSA believes that international consensus on the key issues is extremely important and is actively contributing to the work of both groups supported by its findings from this review. The FSA is therefore not setting out a detailed blueprint for a disclosure regime at present but will use the feedback from this DP to inform the international debate.The consultation period will close on 8 May 2009, following which the FSA will issue a feedback statement. This will set out its conclusions on a longer term policy for short selling.  The discussion paper is available on the [FSA](http://www.fsa.gov.uk/Pages/Library/Policy/DP/2009/09_01.shtml%22%20%5Ct%20%22_new) website. etailed Contents**1.16 Analysis of the supervisory implications of national market stabilisation plans** On 5 February 2009, the Committee of European Banking Supervisors (CEBS) published its analysis of the supervisory implications of the national plans for the stabilisation of markets that have been announced by the European Members States until the end of December 2008. The report focuses on three main areas: 1. an overview of the national plans, including the tools, conditions and supervisory involvement;2. an assessment of general measures for the stabilisation of the markets; and 3. potential areas for further work by CEBS.CEBS work in 2009 will focus on enhancing supervisory practices for the cross border banks. In combination with the ongoing regulatory review, this will improve the framework for financial supervision. CEBS Members will coordinate in key areas such as the quality of capital and the definition of adequate capital buffers to withstand shocks. As to the quality of capital and in the context of the revision of the Capital Requirement Directive, CEBS will issue further guidance on the definition of hybrid instruments and intends to issue guidance on the definition of core tier 1, so that it incorporates only instruments that have the highest quality in terms of loss absorbency and flexibility of payments.As to the quantity of capital, internationally agreed minimum capital requirements should remain the main reference point for supervisors. However, CEBS intends to provide input to the current discussion on pro-cyclicality by developing views on how banks can use capital buffers during periods of stress. Further information is available on the [CEBS](http://www.c-ebs.org/%22%20%5Ct%20%22_new) website. etailed Contents**1.17 Enhanced disclosure guidelines** On 29 January 2009, the Enhanced Disclosure Working Group, a group of leading investors and accounting experts, published enhanced disclosure guidelines to assist directors, audit committees, shareowners and investors in fulfilling their responsibilities. The Guidelines address a range of topics which are critical to the exercise of effective oversight of audit, risk and control matters by boards around the world.The topics include: * information flows to the audit committee;
* risk and internal controls;
* valuation of assets and liabilities;
* write downs and impairment provisions;
* securitisation, off balance sheet and contingent liabilities;
* internal and external auditors;
* executive compensation and risk;
* substance not form;
* audit committee charter; and
* audit committee membership.

The guidelines are available on the [Standard Life Investments](http://pdf.standardlifeinvestments.com/exported/pdf/CG_Guidelines_For_Enhanced_Disclosure/CG_Guidelines_For_Enhanced_Disclosure_09.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.18 Report on capital flows and emerging market economies** On 3 February 2009, the Committee on the Global Financial System (CGFS) released "Capital flows and emerging market economies". In principle, the flow of capital between nations brings benefits to both capital-importing and capital-exporting countries. However, very large flows can also create new exposures and risks. Total capital inflows reached US$1,900 billion in 2007, four times as large as in the period before the Asian crisis. A very large reversal of foreign investment in emerging market assets occurred in 2008. The failure to analyse and understand the risks, excessive haste in liberalising the capital account and inadequate prudential buffers to cope with the excessive volatility in more market-based forms of capital allocation have the potential to compromise financial or monetary stability in many emerging market economies. On the other hand, rigidities in capital account management can also lead to difficulties in macroeconomic and monetary management.  Against this background, the report takes stock of the policy debate on this complex subject over the past 20 years. While many questions remain unsettled, the current global financial crisis provides and identifies vulnerabilities - especially those related to foreign currency exposures. Key points in the report include: * There is a "financial stability hierarchy" of capital flows. Many crises have clearly demonstrated that reliance on short-term, foreign currency denominated inflows can increase a country's vulnerability. Countries have often been led to rely on short-term foreign currency debt because their long-term intermediation capacities in the local currency were limited. During periods of low rates and easy credit availability, with inadequate appreciation of currency and liquidity risks, foreign lenders have also been keen to extend short-term foreign currency lending to emerging market economies.
* Large foreign currency inflows have had major consequences for the liquidity of domestic financial systems. The report discusses the advantages and drawbacks of central banks' market and non-market instruments. It notes the complex interrelations between monetary policy, exchange rate objectives, forex intervention and domestic financial balance sheets.
* There is a strong two-way link between capital flows and the resilience of the financial system. Capital flows do most good and least harm when domestic financial markets are developed and local financial firms are strong. At the same time, the greater presence of foreign investors should improve the operation of local financial markets.
* The impact of the greater role of foreign banks. The shift from cross-border, short-term foreign currency lending to more sustained local currency lending through local financial subsidiaries has improved financial stability. However, if the source of funding for local subsidiaries continues to be borrowing in foreign currency from the international markets/the parent bank, rather than domestic currency deposits, risks to financial stability remain. Local supervisors need to be particularly vigilant with new and rapidly developing market instruments - especially where they allow opaque leveraged positions to be built up.

The main chapters of the report discuss: * macroeconomic context of capital flows;
* composition of capital flows and financial stability;
* intervention, sterilisation and domestic financial intermediation;
* capital flows and domestic financial markets;
* banks and capital flows;
* intermediation of private outflows of portfolio capital; and
* preliminary assessment of the global financial crisis and capital flows in 2008.

The conclusion provides a summary of the report arguing that a combination of policies - sound macroeconomic policies, prudent debt management, exchange rate flexibility, the effective management of the capital account, the accumulation of appropriate levels of reserves as self-insurance and the development of resilient domestic financial markets - provides the optimal response to the large and volatile capital flows to the EMEs. How these elements are best combined will depend on the country and on the period: there is no "one size fits all". The report is available on the [CGFS](http://www.bis.org/publ/cgfs33.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.19 Guidance note on accessing register of members**  On 21 January 2009, the UK Institute of Chartered Secretaries and Administrators (ICSA) published an updated version of its guidance note on what is a proper purpose for accessing the register of members of a company.  Sections 116-119 of the UK Companies Act 2006 makes access to a company's register of members subject to a proper purpose test but has not defined what is, or is not, a proper purpose. Whether a purpose is proper or not, is, ultimately, a matter for the courts. The original guidance note, published in June 2007, provided an industry view on what might constitute a proper purpose and provided examples of both proper and improper purposes. The revised guidance note provides new examples of proper and improper purposes.  On the proper purpose side, the note is revised to take account of the legitimate needs of credit reference agencies including the need to undertake credit or identity checks for the purposes of money laundering regulations. This is in line with a statement from BERR that they are confident that a court would consider a request to be for a proper purpose if it is in order to comply with anti-money laundering and "know your customer" requirements in which case, the court will not relieve the company of the obligation to meet the request. There are also two more examples of proper purposes covering court judgments and bankruptcies. One new improper purpose relates to the recovery of unclaimed assets where the program is not felt to be in the best interests of shareholders.  A new recommended best practice point suggests that access to the register be limited to the specific records in question. The note also includes extra information on the interaction with the Data Protection Act and examples of other registers which have a proper purpose test.  The guidance note is available on the [ICSA](http://www.icsa.org.uk/assets/files/pdfs/Press/PP3.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.20 Auditor liability limitation agreements**On 21 January 2009, the GC100 (the association of general counsel and company secretaries of FTSE 100 companies) published an issues note on auditor liability limitation agreements under sections 534-538 of the UK Companies Act 2006 (2006 Act). Since 6 April 2008, companies have been able to enter into liability limitation agreements with their auditors to limit an auditor's liability to the company for negligence, default or breach of duty or trust in relation to the audit of the accounts, provided they seek prior shareholder approval.It is thought that very few public companies have yet sought shareholder approval to enter into such an agreement.The GC100 note sets out issues for directors to consider before entering into a liability limitation agreement in the context of guidance already issued by the FRC. The note emphasises in particular:* that the provisions relating to auditors' liability in the 2006 Act are enabling provisions and there is no compulsion on any company to enter into this type of agreement;
* companies should see a liability limitation agreement in the context of their existing contractual relationship with their auditor which will normally be set out in an engagement letter and letter of representation; and
* in the case of complex groups consisting of large numbers of companies spread over many jurisdictions, it would be reasonable to expect that the audit firm should bear the costs of the necessary research to establish how liability limitation provisions might work.

The note emphasises that a company that has entered into a liability limitation agreement is likely to be in a weaker position when negotiating any claim against its auditor.The issues note is available on the [Practical Law Company](http://www.practicallaw.com/7-384-6267%22%20%5Ct%20%22_new) website.etailed Contents |

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

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| **2.1 Prosecution of company officers arising from public complaints**On 13 February 2009, ASIC announced the successful prosecution of 206 company officers in the first half of the 2008-2009 financial year.These prosecutions were the result of 463 contraventions of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and lead to fines and costs totalling $411,430. The prosecutions followed complaints received by the general public and the business community.ASIC took action over the failure of company officers to assist liquidators and administrators in the administration of their failed companies and also took action in relation to directors who failed to update ASIC registers with the addresses of their companies and company officers, often in an attempt avoid creditors. A full list of the prosecuted people is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/09-14AD.pdf/%24file/09-14AD.pdf%22%20%5Ct%20%22_new) website.etailed Contents |

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| **3.1 ASX to expand its energy and environmental product offering** On 11 February 2009, ASX announced that subject to regulatory clearance, it intends to list Thermal Coal (Newcastle) futures and options as well as New Zealand Electricity and Victorian Wholesale Gas futures contracts on 21 April, 28 April and 5 May 2009 respectively. These products are the first tranche in a suite of new Energy and Environmental products that ASX is proposing to launch. Others include Renewable Energy Certificate futures and options; Australian Emissions Unit futures and options (pending the passage of the Carbon Pollution Reduction Scheme legislation); and Certificate Emission Reduction futures and options (AUD denominated and Australian delivered). Thermal Coal futures and options summary sheets are available on the [ASX](http://www.asx.com.au/products/futures/coal/index.htm%22%20%5Ct%20%22_new) website. New Zealand Electricity futures and options summary sheets are available on the [ASX](http://www.asx.com.au/products/futures/electricity/new_zealand.htm%22%20%5Ct%20%22_new) website. Victorian Wholesale Gas futures and options futures and options summary sheets are available on the [ASX](http://www.asx.com.au/products/futures/gas/index.htm%22%20%5Ct%20%22_new) website. Further information on ASX Energy and Environmental products is available on the [ASX](http://www.asx.com.au/products/energy_environment/index.htm%22%20%5Ct%20%22_new) website.etailed Contents**3.2 New commodity products for ASX AQUA Market** On 2 February 2009, ASX announced the start of trading of four new structured products in the newly created AQUA market. The four new products have been developed by ETF Securities Ltd, a UK-based business with Australian origins and the global leader in exchange traded commodity products (ETCs). ETF Securities Ltd previously launched an exchange traded gold product on ASX in 2003 (ASX Code: GOLD). These new structured products are the first products to come to the ASX AQUA market. The AQUA market is a platform tailored for managed funds, exchange traded funds and structured products.  These four new structured products have the features of an ETC as they will provide investors with an opportunity to invest in Platinum, Palladium, Silver, a basket of all three, plus the existing gold product, via an on-market transaction on ASX. The codes for the new AQUA-quoted ETCs are: Platinum - ETPMPT; Palladium - ETPMPD; Silver - ETPMAG; and Basket - ETPMPM.  The last two letters of the Platinum, Palladium and Silver products are their respective symbols in the periodic table.  The code for the existing Gold product remains the original four letter ASX code - GOLD.etailed Contents**3.3 Reinstatement of ASX Market Rules 3.6.3 and 3.6.6** On 23 January 2009, Rules 3.6.3 and 3.6.6 were reinstated in the published version of ASX Market Rules, having earlier inadvertently fallen out of the published version. This did not constitute the reinstatement of previously deleted rules but the re-publication of currently existing rules. Rule 3.6.3 deals with obligations on Participants to have appropriate supervisory policies and to meet any standards prescribed in the Market Rule Procedures to ensure compliance with the Market Rules and [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). Rule 3.6.6 deals with the recognition under the Market Rules of a Responsible Executive appointed by a Market Participant as a suitably qualified affiliate (and thus as a recognised affiliate in relation to the financial market operated by ASX) for the purposes of s761A of the Corporations Act.etailed Contents**3.4 Enhancements to Listed Investment Companies Index** The ASX Listed Investment Companies (LIC) Index provides investors with an easy, low-cost way to gain access to a range of ASX-listed entities through one transaction. The ASX LIC Index, which commenced on 2 January 2009, comprises of 43 ASX LICs and adds value to advisers and investors seeking to use LICs as a part of their portfolios. On 21 January 2009, ASX announced the creation of two new sub-indices of the ASX LIC Index to allow for better tracking against either the domestic or internationally focussed LICs. The code for the domestic LIC Index is XID. The code for the LIC International Index is XII.  The code for the composite LIC index remains as XIC. Data analysis of the ASX LIC indices is undertaken by S&P.   Both end-of-day values and historical data are available daily on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.5 Rule amendment - ASTC Settlement Rules: Close out requirement** As part of a number of initiatives designed to enhance settlement risk management, ASX has announced its intention to amend its settlement rules to require Settlement Participants who enter the Batch Settlement process with a net short position to close out settlement shortfalls, if the settlement shortfall remains after the completion of Batch Settlement two business days later (generally on T+5), by purchasing or borrowing the shares required to complete the settlement. The close-out requirement will complement the increased economic disincentives imposed through the recently introduced new delay fail regime, by providing a means to guarantee that settlement delays have an end date. Subject to regulatory approval, the automatic close-out requirement will be effective Tuesday 31 March 2009.etailed Contents**3.6 Enhancing Australia's equity settlement system; CCP harmonisation and linking** On 9 December 2008, ASX circulated Consultation Papers requesting comment on enhancing Australia's equity settlement system and on delivering efficiencies to the marketplace through the harmonisation and linking of CCP activities.  The consultation paper 'Enhancing Australia's Equity Settlement System' is available on the [ASX](http://www.asx.com.au" \t "_new) website. The consultation paper 'CCP Harmonisation and Linking' is available on the [ASX](http://www.asx.com.au/about/pdf/consultation_paper_harmonisation_linking_ccp_activities.doc%22%20%5Ct%20%22_new) website.etailed Contents**3.7 Reporting against revised corporate governance principles and recommendations for year ending 31 December 2008**The first companies to report against the revised Corporate Governance Principles and Recommendations, released by the ASX Corporate Governance Council in August 2007, were those whose financial year ended on 31 December 2008. Each year ASX conducts a review of companies' corporate governance statements in their annual reports to monitor compliance with Listing Rule 4.10.3.ASX is planning to begin its review in March 2009.etailed Contents |

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| **4.1 International All Sports Limited - Panel decision**On 13 February 2009, the Takeovers Panel (Panel) announced that it has declined to make a declaration of unacceptable circumstances in response to an application dated 2 February 2009 from Centrebet International Limited. In April 2008, Centrebet gave confidentiality and standstill undertakings in favour of International All Sports Ltd (IAS) before it was provided with information about IAS for the purposes of a possible acquisition of IAS assets. Centrebet withdrew from the asset sale process, and IAS subsequently announced the termination of the asset sale process in November 2008. On 2 February 2009, Centrebet announced a cash takeover offer for all the shares in IAS, conditional on being released from the standstill either by IAS or the Panel. The Panel considered that standstill agreements are a useful means to enable price-sensitive information to be provided to a potential acquirer of a company's shares. However, the period of a standstill should be negotiated with regard to the nature of the information made available under it. In this case the standstill applied for a period ending 12 months after the date Centrebet withdrew from the asset sale process. This period appeared to be commercially justifiable having regard to the nature of the information provided. In the Panel's view, it was likely that at least some of the information provided to Centrebet was price-sensitive at the time it was given and the Panel was not satisfied that all of that information was no longer price-sensitive. The Panel declined to make a declaration and orders which would have the effect of releasing Centrebet from its standstill undertakings.etailed Contents |

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

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| **5.1 Allegation of oppressive conduct** (By Andrew Coffey, Mallesons Stephen Jaques) Szencorp Pty Ltd v Clean Energy Council Limited [2009] FCA 40, Federal Court of Australia, Goldberg J, 2 February 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/feburary/2009fca40.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/feburary/2009fca40.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** This case considers facts which may substantiate a claim under s. 233(1) of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_new) (the Act). The case also considers the kinds of remedies which may be appropriate in circumstances of "oppression" and whether a remedy is appropriate if, at the time of the trial, the oppressive conduct has concluded.  It is the first case to consider whether the court's ability to make an order "requiring a person to do a specified act" under s. 233(1)(j), empowers the court to order a financial accounting firm to provide a financial report to relieve the claimed oppressive conduct. The court dismissed the application and held there was no oppression. **(b) Facts**  The Clean Energy Council Limited (the Council) was incorporated on 24 August 2007 to effect a merger between two existing sustainable energy associations: the Australian Wind Energy Association (AusWind); and the Australian Business Council for Sustainable Energy Inc (BCSE) (the Merger). The Merger was implemented as a result of the parties entering into a Memorandum of Understanding dated 31 August 2007 (the MOU). The MOU provided that the BSCE and AusWind were peak industry associations "representing a range of energy supply and demand side technologies" and that the objective of the Merger was to ensure that the "sustainable" energy sector was represented by a single entity that clearly and articulately presented a uniform message to external stakeholders.  The MOU set out the obligations, activities and conduct to be undertaken by the Council if the Merger proceeded, including: * commencing operations using the principles and basis outlined in the Information Memorandum;
* establishing a limited and manageable number of technology directorates covering priority issues and in the different industry segments as outlined in the Information Memorandum;
* developing and documenting policies that cover all sectors of the sustainable energy industry; and
* ensuring that the current level of activities is maintained and advocating policy positions that are in the best interests of all the membership.

The deputy chair of Council, Mr Szental, brought proceedings under ss. 232 and 233 of the Act, claiming that Council had not carried out its obligations under the MOU or the Information Memorandum and had failed to achieve its objective of unifying the members of BCSE and Auswind. In particular, Szental argued that Council failed to:* represent its members in the sustainable energy sector;
* implement the vision and promises set out in the Information Memorandum and also its obligations under the MOU; and
* implement governance, transparency and financial controls and reporting mechanisms.

The ultimate impetus to commence these proceedings was brought forth by a board meeting on 23 May 2008 in which Council was asked to pass a declaration of solvency. Although Szental dissented, the resolution was passed. Mr Szental dissented on the basis that he and the board had not been given an adequate report into the financial position of Council upon which to make the relevant declaration of solvency.  By way of relief, Szental asked the court to order that an independent accountant make a financial report to members of Council.  Council submitted that:* the proceeding was an abuse of process;
* the relief sought by Szental could not be ordered by the court; and
* the matters raised by Szental do not constitute oppression or conduct contrary to the interests of Council as a whole.

**(c) Decision**  Although Justice Goldberg did not ultimately grant Szental the requested relief, his Honour did not consider the proceeding to be an abuse of process.In relation to the claim of oppression, his Honour, referring to cases, noted that an essential feature of the relevant section is whether there has been "commercial unfairness", judged with reference to whether "reasonable directors" would not consider it fair. His Honour cited authority which suggested that the question of oppression is one of fact and degree and is objective [at 60]. His Honour found that "Council had engaged in conduct which was contrary to the interests of its members." However, his Honour held that this conduct did not amount to a contravention of the Act. His Honour also noted that the conduct had finished before the commencement of the trial. "In short, the conduct of Council's affairs has not been oppressive to, unfairly prejudicial to or unfairly discriminatory against any members of Council. The matters of which the plaintiff complains, taken either singularly or cumulatively, are not such as to constitute oppression or commercial unfairness as that expression has been construed and analysed in the authorities." In obiter, his Honour queried whether:".it is open to a court to grant relief under section 233(1) when the conduct complained of, although in existence at the time the proceeding was filed, is no longer continuing as at the date of the trial or thereafter." [at 69] In deliberating over this question, his Honour noted that the power to grant relief under section 233 of the Act is "very wide and the specific types of orders set out in section 233(1) are inclusive rather than exclusive" [at 70]. However, his Honour cited authority which articulated that the "relief to be granted should be such as to terminate or remove the oppressive conduct" and that "the general trend of authority is that it is open to a court to grant relief notwithstanding the fact that at the time of the trial . the conduct . complained of is not continuing". [at 70, 73] Importantly, his Honour queried whether the form of relief sought by Mr Szental - namely a court order to force Council to procure financial reports - was an appropriate form of relief for the purposes of removing oppressive conduct. His Honour held in respect of the section and its ability to grant the relief sought: "Such relief leads nowhere. It does not resolve or remove the conduct complained of by the plaintiff . the relief sought . is not, in my opinion, aptly described as requiring a person to do a "specified act". In [past] cases [which considered the same section] the circumstance were quite different from the circumstances presently before me . [and] the orders made were specific and did not involve a wide-ranging enquiry or investigation of the type sought by the plaintiff" [at 79, 80 and 83].etailed Contents**5.2 Breach of confidentiality under a contract of employment**(By Aaron Canty, Clayton Utz)Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd [2009] FCAFC 2, Federal Court of Australia, Full Court, Tamberlin, Finn and Sundberg JJ, 23 January 2009The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/janurary/2009fcafc2.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/janurary/2009fcafc2.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary**Mr Atta was the National Sales Manager employed by Futuretronics.com.au Pty Ltd (Future). He ended his employment with Future; however, prior to doing so, he provided information to Graphix Labels Pty Ltd (Graphix) by email. Future claimed that the information provided in the emails was confidential and therefore, Mr Atta had breached fiduciary duties that he owed as an employee. Future also alleged that Mr Atta breached the terms of a confidentiality agreement he had made with Future.  On appeal the Full Federal Court upheld the primary judge's decision. The court was of the view that there was no breach of duty because:* the fiduciary duty ended at the time that Mr Atta ceased his employment with Future;
* the information was not used to gain an advantage or to cause damage to Future;
* the information contained in the emails was not confidential; and
* the information provided in the emails was a part of Mr Atta's knowledge that he gained during his employment, which had since become his own skill and experience.

**(b) Facts** Future designs electronic goods and trades those goods as a wholesaler. In mid 2005, it entered into an agreement with Graphix.Under the terms of that agreement, Graphix agreed to manufacture covers for mobile phones and other electronic devices. Mr Atta, an employee of Future (employed as the National Sales Manager), signed a confidentiality agreement with Future during the course of his employment. The confidentiality agreement provided, inter alia, that Mr Atta would have access to confidential information and that he would not 'appropriate, copy, memorise or in any manner reproduce any of the confidential information', for personal use or for use by a third party. In October 2006, Mr Atta became an employee of Graphix. Future alleged that certain emails that Mr Atta had provided to Graphix (and another company, Cygnett), were provided in breach of the confidentiality agreement entered by Future and Mr Atta. Future also claimed that Mr Atta had breached the fiduciary duties that he owed to it as an employee, namely ss. 182 and183 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).**(c) The primary decision** **(i) Confidentiality and fiduciary duties: the primary Judge's decision** Future claimed that Mr Atta had used confidential information during the course of his employment and that he did not have permission to use that information. The confidential information that Future alleged had been disclosed related to the pricing of Future's products. Future claimed Mr Atta had breached:* the confidentiality agreement (by disclosing confidential information concerning suppliers); and
* his fiduciary duties owed by virtue of his employment (sections 182 and 183 of the Corporations Act 2001) as National Sales Manager (by sending emails to Graphix and (Cygnett) relevant to producing and marketing covers for electronic devices (Emails)).

Future also alleged that Mr Atta had breached his obligations by using Future's resources and producing business plans for Graphix, while he was still employed by Future. The primary judge held that Mr Atta did not breach his fiduciary duties or the relevant provisions of the confidentiality agreement.  **(ii) Copyright**The court was of the view that Graphix had infringed the copyright, owned by Future, in publishing material that it had received from Future.    There was an implied term in the agreement between Future and Graphix that Graphix would not sell, distribute, promote or advertise the covers for the electronic devices that it manufactured for Future. Graphix had prepared a brochure using the artwork that was supplied to it by Future. The primary judge was of the view that the distribution of the brochures was an infringement of Future's copyright in that artwork.  Accordingly, damages were awarded to Future for a breach of copyright.There was no dispute as to who owned the artwork and this matter was not raised in the appeal, except in relation to the amount of damages awarded. **(d) Decision of the Full Federal Court** Two issues were raised in the appeal. These concerned whether the primary judge made an error in:* holding that there was no breach of fiduciary duties by Mr Atta (by sending the Emails); and
* deciding that the disclosure of a supplier, by Mr Atta to Graphix, was not a communication of confidential information.

**(i) Breach of fiduciary duties** Future alleged that the details provided in the Emails were threatening to Future's business. In particular, the Emails were alleged to disclose details of how Future's business functioned. Future claimed that the primary judge had misapplied the case of *Independent Management Resources Pty Ltd v Brown* [1987] VR 605 (Independent Management). That case provided that a person proposing to enter a business: "when serving his master, [cannot] fraudulently undermine him by breaking the confidence reposed to him". The court was of the view that the primary judge did not consider Mr Atta's obligations (as a fiduciary) solely in the context of the test provided in the case of Independent Management. Therefore, the court was of the view that Future had wrongly treated the appeal as involving the "fraudulent undermining test". The court focused on the nature of the Emails and whether they disclosed any aspect of the way Future's business functioned or any secret process or strategy.   The court was of the view that the business plans provided by Mr Atta to Graphix by email did not contain confidential information, namely because the:* emails contained Mr Atta's thoughts;
* plans attached to those emails were unsophisticated; and
* plans provided well-known store names and these were not confidential.

Therefore, the court concluded that the relevant fiduciary duties had not been breached and as such, the claim was dismissed. In particular, the court formed the view that Mr Atta had not attempted to gain an advantage for himself or for Graphix. He had not tried to cause damage to Future. **(ii) Disclosure and confidential information** Mr Atta provided the details of a supplier to Ms Swann, the marketing director of Cygnett (a company that imports iPod accessories), in an email because he wanted to win Cygnett's business. Future argued that the disclosure of the supplier was confidential information, namely because:* Mr Atta regarded the name of a quality supplier as confidential information; and
* the name of the supplier was not generally known outside of Future.

The court was of the view that Future failed to establish sufficient evidence to demonstrate that the supplier's name was not generally known. On that basis, there was no breach of the confidentiality agreement. Future further contended that Mr Atta had breached his fiduciary duties under the Corporations Act 2001 (Cth). The court rejected that argument; it was of the view that the disclosure of the supplier's name was not a misuse of confidential information. etailed Contents**5.3 Proportionate liability does not apply when determining a retail client's complaint to a dispute resolution system of a financial services licensee**(By Annette Scardino, Freehills) Wealthcare Financial Planning Pty Ltd v Financial Industry Complaints Service Ltd [2009] VSC 7, Supreme Court of Victoria, Cavanough J, 22 January 2009. The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/janurary/2009vsc7.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2009/janurary/2009vsc7.htm%22%20%5Ct%20%22_new)or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**A retail client, N, made a complaint to the Financial Industry Complaints Service Ltd (FICS), after acting on advice from a financial planner employed by Wealthcare Financial Planning Pty Ltd (Wealthcare) to invest funds, on two separate occasions, in the Westpoint group. N's investment was lost when the Westpoint group collapsed. A panel of the FICS upheld the retail client's complaint and held that Wealthcare breached s. 851(2) of the [Corporations Act (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) and its successor, s. 945A of the Act, which deal with the requirements a financial services licensee must satisfy when providing personal advice to a retail client.  Wealthcare sought a declaration that the determination by the panel of the FICS breached its rules and that the determination had no effect.  Wealthcare argued that the FICS erred by failing to apply principles of proportionate liability when determining N's complaint. The court rejected this argument.  The court held that the FICS panel was not obliged to apply principles of proportionate liability in determining N's complaint and that the panel's decision was not in breach of the constitution and rules of FICS. The proceedings were dismissed. **(b) Facts**N invested funds in a member of the Westpoint group on the advice of a financial planner employed by Wealthcare. Some years earlier, N had invested funds in another member of the Westpoint group on the advice of the financial planner. The funds were lost when the Westpoint group collapsed. N complained to a dispute resolution service conducted by FICS. Wealthcare was a member of FICS. A panel of the FICS upheld the complaint and found that Wealthcare had breached section 851(2) of the Act and its successor, s. 945A of the Act and was negligent in advising N to invest in Westpoint.  Section 945A of the Act provides that a financial services licensee, such as a financial planner, must satisfy certain requirements when providing personal advice to a retail client. If the financial planner fails to meet these requirements, the retail client has a right to bring a civil action for damages under s. 953B of the Act.  The panel determined that Wealthcare should pay damages to N. Wealthcare sought a declaration that the determination by the FICS panel breached the constitution and rules of FICS and was of no force or effect. Wealthcare also sought relief by way of judicial review under Order 56 of the [Supreme Court (General Civil Procedure) Rules 2005 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=88231" \t "Default). **(c) Decision****(i) Requirement for a dispute resolution system**Under s. 912A(1)(g) of the Act, it is an obligation of a financial services licensee when providing financial services to retail clients to have a dispute resolution system in place that complies with s. 912A(2) of the Act. The FICS dispute resolution scheme satisfies this requirement. The FICS panel is not equivalent to a court. It is an industry based scheme for the resolution of consumer disputes through investigation, negotiation and conciliation, and making determinations by appointed adjudicators and panels.  The Rules of the FICS, in particular Rule 5, provide guidance on how the FICS is to deal with complaints. Rule 5 states that the FICS must deal with the complaint on its merits and do what, in its opinion, is fair in all the circumstances, having regard to, amongst other things, any applicable legal rule or judicial authority (including one concerning the legal effect of an express or implied term of the contract or other document). **(ii) FICS was not obliged to apply proportionate liability**Wealthcare's primary argument was that the FICS erred by failing to apply principles of proportionate liability in determining N's complaint, as there are other persons that might, if sued by N in some other forum, have been held liable to N for the same loss. This argument was rejected by the court. Cavanough J held that there is "nothing in rule 5 of the FICS rules to elevate the so-called 'norm' of proportionate liability to an 'applicable legal rule' that the panel was obliged to put into effect in this case". Cavanough J also stated Part IVAA of the [Wrongs Act 1958 (Vic)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=343" \t "Default) (Wrongs Act) that provides for proportionate liability does not have universal application and operates by reference to a court, and would not apply to the FICS proceedings, which is a domestic tribunal with a discretionary jurisdiction.   Cavanough J also pointed out that if N had brought a claim against Wealthcare in the Federal Court under ss. 851(2) and/or 945A and 953B of the Act, the claim could not have been met by any valid plea under Part IVAA of the Wrongs Act. This is consistent with the reasoning adopted by Middleton J in *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd*.   **(iii) Conclusion**The court held that Part IVAA of the Wrongs Act did not apply directly, or of its own force, to the complaint before the panel. The court also held that the FICS panel was not obliged to apply principles of proportionate liability in determining N's complaint and that the panel's decision was not in breach of the constitution and rules of FICS. The proceedings were dismissed. **(iv) Judicial review**The court did not consider whether relief by way of judicial review was available, as Wealthcare accepted that the challenge stood or fell on the proposition that the panel's decision was in breach of the FICS rules.  etailed Contents**5.4 Should a managed investment scheme be wound up where its operator is bankrupt and deceased and a trustee has been appointed to administer the estate?**(By Andrew Treloggan, Blake Dawson) Norman, in the matter of The Executors and Trustees of the Deceased Estate of McFarlane v McFarlane [2009] FCA 14, Federal Court, Mansfield J, 15 January 2009 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/janurary/2009fca14.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/janurary/2009fca14.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** The plaintiff sought orders from the court for an unregistered managed investment scheme run by the deceased McFarlane, to be wound up. McFarlane had significant creditors in his estate, many of whom were investors in the unregistered scheme, and it was unlikely those creditors' claims would be met. A Trustee was appointed as trustee of the bankrupt estate of McFarlane.   The question for the court was whether there was utility in exercising discretion to order the scheme be wound up and administered by liquidators, where a Trustee had already been appointed to administer the estate.   Mansfield J ordered the scheme to be wound up, stating that the liquidators of the scheme would be better placed than the Trustee to explore an action against McFarlane's bankers, or others involved in the administration of the funds received by the scheme. **(b) Facts**McFarlane practised as a business advisor and chartered accountant in South Australia. He died in a motor vehicle accident on 16 June 2008. It quickly emerged that there were significant creditors in his estate, and that it was unlikely that there would be sufficient assets in his estate to meet those creditors' claims. On 3 September 2008, a Trustee was appointed as trustee of the bankrupt estate of McFarlane pursuant to the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default). The Trustee ascertained that the vast majority of the creditors of the estate were persons who had deposited funds with McFarlane for investment by him. **(c) Claim** The plaintiff sought a declaration from the court that McFarlane operated a managed investment scheme (Scheme) which required registration, but was not registered under the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act), and for an order that the Scheme be wound up.   **(d) Decision**  The issues before the court were:* was the Scheme a managed investment scheme under the Corporations Act; and
* was it appropriate to make orders under section 601EE of the Corporations Act for the Scheme to be wound up and for liquidators to be appointed to deal with the assets, considering that a Trustee had been appointed to deal with creditors of the McFarlane estate.

As to the first issue, the court found that well in excess of 20 persons (the minimum number of investors required to impose upon McFarlane the obligation of registration of the Scheme) invested in the Scheme, and the Scheme had the requisite characteristics described under the Corporations Act to make it a scheme that was required to be, and was not, registered. As to the second issue, the court found the following:* The plaintiff, Norman, was an investor or member of the Scheme, and thus had standing to apply for the winding up of the Scheme under section 601EE(1) of the Corporations Act.
* Although the Court had already appointed the Trustee as trustee of the bankrupt estate of McFarlane, and there was no suggestion that the Trustee has not acted expeditiously and competently in the administration of the bankrupt estate, liquidators appointed to supervise the winding up of the Scheme would have a "more refined and clearer focus" in investigating a potential cause of action against McFarlane's bankers, or others involved in the administration of the funds received by the Scheme. The Trustee's duties are not simply to the investors in the Scheme but to the creditors of the estate generally. Mansfield J's view was that it was preferable that the Trustee not be put in the position where he was taking action focused on a cause of action available only to some creditors of the estate.
* Given there were possibly two groups of creditors of the McFarlane estate, investors in the Scheme on the one hand, and McFarlane's personal creditors on the other, at some point there was potential for the interests of those two groups of creditors to conflict. It would therefore have been unwise and unfair to the Trustee to also appoint him as liquidator of the Scheme.
* A significant number of investors in the Scheme had expressed support for the order to be made.

Finally, Mansfield J stated that the court expected the Trustee and the liquidators of the Scheme to cooperate in their respective roles so as to minimise the degree of duplication in the performance of their respective tasks.etailed Contents**5.5 Resignation of a co-trustee, co-liquidator, co-administrator and co-deed administrator**(By Lucy Spencer, DLA Phillips Fox) Condon v Watson [2009] FCA 11, Federal Court of Australia, Lindgren J, 14 January 2009The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/janurary/2009fca11.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/janurary/2009fca11.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Mr Watson was employed by Mr Condon. Together they were appointed as trustees in bankruptcy in respect of numerous bankrupt estates, as well as liquidators of various companies, voluntary administrator of one company and administrators of various deeds of company arrangement. At the time of his employment Mr Watson was also the sole trustee in bankruptcy of various bankrupt estates and liquidator of a number of companies.Mr Watson resigned from his employment and surrendered his various offices to Mr Condon. Lindgren J of the Federal Court of Australia held that Mr Condon was appointed as liquidator of certain of the companies, was entitled to continue as sole liquidator or voluntary administrator (as applicable) of the remaining companies and was entitled to continue as sole trustee of each bankrupt estate. His Honour made a range of orders accordingly. **(b) Facts** Mr Condon, a registered and official liquidator, practices under the name of "Condon Associates". On 28 March 2008, Mr Condon also a registered and official liquidator, was employed by HAS Administration Pty Ltd which provides services to 'Condon Associates'. At this time, Mr Watson was the court appointed liquidator of two companies and the liquidator of five companies in voluntary liquidation. Mr Condon and Mr Watson were appointed together as:* trustees in bankruptcy of 33 estates in bankruptcy;
* liquidators of nine companies which were the subject of court orders for winding up;
* liquidators of eight companies, the subject of creditors' voluntary windings up;
* voluntary administrators of one company; and
* administrators under a deed of company arrangement for 11 companies.

On or around 14 October 2008, Mr Watson resigned. On 19 November 2008, the parties entered into a written agreement outlining the agreed terms of this separation. These terms included a provision that Mr Watson would resign all of his appointments in favour of Mr Condon. The court was required to rule on the legitimacy and procedural complexities surrounding this action, particularly in light of the fact that different statutory regimes apply. **(c) Decision**  Lindgren J held that Mr Watson was appointed as liquidator of certain of the companies, was entitled to continue as sole liquidator or voluntary administrator (as applicable) of the remaining companies and was entitled to continue as sole trustee of each bankrupt estate. In reaching this decision Lindgren J addressed each of the offices in question: **(i) Bankrupt estates of which the parties were trustees** Lindgren J held that it was appropriate for the Court to give a direction under s. 134(4) of the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default) that Mr Condon was entitled and obliged to act as sole trustee.  His Honour found that Mr Condon and Mr Watson had intended that they be joint and several trustees. However, undisclosed intention does not, of itself, signify their appointment was as joint and several trustees.  Consequently, Mr Condon and Mr Watson were held to hold office as joint trustees.  **(ii) Companies of which Mr Watson was sole court appointed liquidator** Section 473(7) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") provides that "[a] vacancy in the office of a liquidator appointed by the court must be filled by the court". His Honour found that this section does not mean the vacancy must be filled by the court that originally appointed the liquidator. Rather, it is sufficient that the vacancy be filled by a court as is defined under the Act. Mr Condon had complied with the rules to act as liquidator under section 532(9) of the Act and rule 5.5(2) of the [Federal Court (Corporations) Rules 1999](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19255" \t "Default). As Mr Watson's resignation resulted in a total vacancy in the office of liquidator for the relevant companies, his Honour found it appropriate that Mr Condon be appointed to fill these offices.  **(iii) Companies the subject of creditors' voluntary windings up of which Mr Watson was sole liquidator**His Honour held that although the creditors had not approved the identity of the continuing liquidator, having regard to the 'inconvenience, cost and wastefulness of seeking an appointment by the creditors', the court was entitled to exercise the power under section 502 of the Act 2001 and appoint Mr Watson as liquidator.  **(iv) Companies the subject of court ordered windings up of which Mr Condon and Mr Watson were liquidators** Under section 473 (7) of the Act, where there is 'a vacancy in the office of a liquidator appointed by the court, [it] must be filled by the court'.  Lindgren J considered whether there is a 'vacancy in the office of a liquidator' only when a sole liquidator or all co-liquidators no longer holds office resulting in no one remaining in office, or whether a vacancy in the office of one co-liquidator would be considered to fall within s. 473(7) of the Act.  His Honour also considered whether the word 'must' in this section means only that if a vacancy is to be filled, it is the court and no one else that must fill it, or whether the court must fill any vacancy when it occurs, regardless of the circumstances.  His Honour referred to *Re McGrath* (2005) 54 ACSR 55 in which Barrett J held that even where there is a continuing co-liquidator, there is a 'vacancy in the office of a liquidator' requiring the court to fill the vacancy. Ultimately his Honour found that section 530 of the Act provides that Mr Condon could perform the functions and exercise the powers vested in 'the liquidators' following Mr Watson's resignation. Furthermore, there is only a vacancy in the office of a liquidator for the purposes of section 473(7) of the Act when a sole liquidator or all co-liquidators no longer hold office, regardless of the correct meaning of the word 'must'. **(v) Companies the subject of creditors' windings up of which Mr Condon and Mr Watson were liquidators** Lindgren J found that as a result of section 530 of the Act, upon the resignation of one co-liquidator the remaining liquidator may perform the functions and exercise the power of 'the liquidators'.  His Honour further noted that while section 530 does not explicitly mention joint and several appointments, its effect appears to make the appointments of multiple liquidators joint and several. **(vi) Company the subject of voluntary administration of which Mr Condon and Mr Watson were voluntary administrators** Under s. 451A(2) of the Act, Mr Condon was entitled to carry out the powers of the voluntary administrators. Furthermore, under s. 447 of the Act, which provides that '[t]he administrator of a company under administration, or a deed of company arrangement, may apply to the court for directions about a matter arising in connection with the performance or exercise of any of the administrators functions and powers', it was directed that Mr Condon had continued to be voluntary administrator of the company since Mr Watson's resignation. **(vii) Companies the subject of a deed of company arrangement of which Mr Condon and Mr Watson were deed administrators** His Honour held that under s. 451B(2) of the Act, Mr Condon was entitled and obliged to perform the functions and exercise the powers of "the administrators" of each of the 11 deeds of company arrangement unless and until the court appointed a replacement for Mr Watson. His Honour also noted that the replacement of Mr Watson would be wasteful and inconvenient for the creditors who would be required to be consulted.etailed Contents**5.6 Duty of a director to provide copies of documents to the company and indemnity for legal costs** Motor Trades Association of Australia Superannuation Fund Pty Ltd v Rickus (No 3) [2008] FCA 1986, Federal Court of Australia, Flick J, 24 December 2008(By Sarah Shnider, Freehills) The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1986.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1986.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** A director had been subject to a statutory demand for the production of documents. After unsuccessfully requesting copies of the documents provided by the director to the regulator, the company initiated proceedings against the director to obtain copies of those documents. This decision was concerned with: * whether the director owed a duty to the company to provide it with copies  of the documents if so requested; and
* the application of s. 199A(3)(a) - which prohibits a company from indemnifying an officer for legal costs incurred defending or resisting a claim in which they are found to have a liability owed to the company.

In this case, it was found that there was a duty to provide the company with copies of the relevant documents, and this duty could be characterised as a 'liability' owed to the company.  The director had filed a cross-claim and argued that as the existence of the liability owed to the company had been established during the cross-claim, he was not "defending or resisting" a claim and accordingly s. 199A(3)(a) did not apply. The court rejected this argument, noting that the cross-claim was a mere vehicle for the finding of liability, and a director cannot avoid the application of s. 199A(3)(a) by filing a cross-claim.**(b) Facts**  On 19 September 2006, the Australian Prudential Regulation Authority (APRA) issued a notice for the production of certain documents to Mr Rickus, a director and chairman of a trustee company, Motor Trades Association of Australia Superannuation Fund (Trustee).  On 24 October 2006 the Trustee requested that the director provide it with copies of the documents which had been given to APRA (Documents), which included the director's personal notes and correspondence. The director refused on the basis that the Documents were confidential and he did not want them to be provided to the board of directors who, he argued, had a conflict of interest.  The Trustee initiated proceedings (to which the director was a Respondent) seeking production of the Documents. The director filed a cross-claim seeking an indemnity in respect of his legal costs in defending the proceedings.  Prior to the commencement of proceedings in September 2007, the board of the Trustee resolved to remove Mr Rickus as chairman with effect from 10 October 2006 and as a director from 10 December 2006. **(c) Decision****(i) Whether there was a duty to provide copies of the documents to the Trustee**  Justice Flick found that in this case, Mr Rickus was under a duty to fully inform the Trustee of his response to the notice by APRA, including providing copies of the Documents and that this duty could be characterised as a "liability" owed to the Trustee. The source of the liability was Mr Rickus' duty to act in the best interests of the Trustee, and the circumstances which gave rise to the duty included:* the actual request for the Documents, the manner in which the notice was addressed and the documents sought to be produced;
* the nature of the review being undertaken by APRA and the stage the review had reached;
* the commitment of the Trustee to use the Documents, if produced, only for the purposes of its dealings with APRA; and
* the need for the Trustee to be informed so that it could properly respond to the regulator.

It was also noted that no claim for legal professional privilege was sought to be made out in respect of the Documents.  Justice Flick commented that the various statutory provisions which empower a regulator to access documents confer an authority which is a "serious intrusion into the affairs of a company" and that "it would be surprising if a director was not obliged to bring to the attention of his board a request . made of him by [APRA] to produce documents of immediate relevance to the affairs of the company". **(ii) Whether the liability was incurred by reason of holding office and "acting in the capacity of an officer of the company"** Mr Rickus' deed of indemnity (Deed) provided an indemnity for any liability incurred "by virtue of holding office as and acting in the capacity of an officer of the company".  The Trustee argued that:* the liability was not incurred whilst acting in the capacity of an officer because Mr Rickus ceased to be a director in 10 December 2006 and the proceedings were not commenced until September 2007; and
* in refusing to provide copies of the Documents, Mr Rickus was not "acting in the capacity of an officer of the company".

Justice Flick found that the liability had been incurred at the time Mr Rickus was "holding office as and acting in the capacity of an officer" of the Trustee, because:* at the time the documents were given to APRA and the demand was made by the Trustee for copies, Mr Rickus was a director of the Trustee; and
* a director could be opposed to the view of his or her company, but still act in the performance of his or her office. In this case, it was found that Mr Rickus was acting bona fide in a manner which he reasonably believed was in the best interest of the Trustee.

**(ii) Whether Mr Rickus could be indemnified for legal costs** Section 199A(3)(a) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) prohibits a company from indemnifying an officer for legal costs incurred defending or resisting a claim in which they are found to have a liability owed to the company. Mr Rickus argued that he only "defended or resisted" the relief claimed in the statement of claim. The statement of claim was abandoned and there was no finding as to liability. Further, Mr Rickus argued that in the cross-claim he was not "defending or resisting", he was the one seeking relief. Justice Flick held that the fact the finding of liability had occurred in the course of the cross-claim did not affect the application of s. 199A(3)(a) as the cross-claim was "but the vehicle whereby it was found that Mr Rickus was under a 'liability owed to the company' ". In other words, a director cannot evade the application of s. 199A(3)(a) by "simply filing a cross-claim in any 'proceeding' in which a 'liability' is sought to be established and inviting the court to enter judgment - either for or against him - in the cross-claim and the originating application". As both the Deed and the Trustee's constitution expressly limited the indemnity "to the maximum extent permitted by law", the liability claimed by Mr Rickus was precluded.etailed Contents**5.7 Circumstances surrounding letters of support can create legal obligations** (By Sara Mirabella, DLA Phillips Fox) Newtronics Pty Ltd (receivers and managers appointed)(in liquidation) v Atco Controls Pty Ltd (in liquidation) [2008] VSC 566, Victorian Supreme Court, Pagone J, 17 December 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/december/2008vsc566.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2008/december/2008vsc566.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** Letters of support had been entered into between Atco Controls Pty Ltd (in liquidation) (Atco) and its wholly-owned subsidiary, Newtronics Pty Ltd (receivers and managers appointed)(in liquidation) (Newtronics). Newtronics argued that when Atco demanded repayment of a mortgage debenture it was in breach of contract, the terms of which were evidenced by the circumstances surrounding the letters of support and the terms used in the letters. Newtronics failed to make the repayment as demanded by Atco, and Atco appointed receivers and managers (second defendants/receivers) who ultimately sold the business and assets of Newtronics. Newtronics then also brought a claim in conversion.   Pagone J held that there was a contract between the parties that Atco had breached. However, the claim for conversion was dismissed as Atco was held to continue to have rights under the mortgage debenture, despite the contract between the parties. **(b) Facts**  Atco is the parent company of Newtronics. Atco had a mortgage debenture in its favour as security for loans it made to Newtronics.    Newtronics argued that there was a 'financial support agreement' written to Newtronics' auditors which Newtronics relied upon to show the existence of a contract between it and Atco. The terms of this agreement were, briefly, that Atco would not call upon or collect or exercise any rights against Newtronics before 20 April 2002 in respect of amounts owing by Newtronics to Atco to the detriment of unsecured creditors, and that Atco would provide, amongst other things, funds to Newtronics to ensure that it could meet its current trading obligations that had been or would be incurred in the 2002 financial year.   Newtronics argued in the alternative that a 'continuing support agreement' had been entered into with Atco on similar terms to those above but without temporal limitation. (Collectively, these agreements are referred to as the 'letters of support'). On 21 December 2001, reasons for judgment were given against Newtronics in Federal Court proceedings brought by Seeley International Pty Ltd (Seeley judgment debt). On this day, Atco demanded the immediate repayment by Newtronics of all money owing to Atco secured by the mortgage debenture. Atco appointed receivers and managers on 8 January 2002, and on 26 April 2002 the receivers sold the business and assets of Newtronics to Atco Electronic Controls Pty Ltd under a process that involved offers to sell to third parties. No complaint was made about the process of sale itself. Newtronics sued Atco for breach of contract arguing that, based on the 'letters of support', Atco was to provide financial support to Newtronics and not call upon secured debts to the detriment of unsecured creditors. Newtronics also sued Atco and the second defendants for conversion for the sale of its business by claiming that the appointment of the receivers was void and of no effect. **(c) Decision**  Pagone J found in favour of Newtronics that there was a contract between Newtronics and Atco.   **(i) Was there a legally enforceable contract between Atco and Newtronics?** Pagone J held that there was a legally enforceable contract between Atco and Newtronics obliging Atco not to make demand upon the mortgage debenture when it did, and to continue to provide funds to meet Newtronics' obligations, including the Seeley judgment debt. His Honour noted that the decided cases concerning letters of comfort were relevant to the issues raised in the proceeding; the critical issue being whether, on the balance of probabilities, it was sufficiently established that there was a legally enforceable contract between Atco and Newtronics obliging the former not to make demand upon the mortgage debenture when it did and to continue to provide funds to meet Newtronics' obligations including, in effect, the debt which became the Seeley judgment debt. His Honour held that the circumstances in which the letters of support were created and the legal and commercial consequences that their provision secured for both Atco and Newtronics were persuasive. The particular factors that Pagone J took into consideration when determining whether there was a legally enforceable contract were that:* the letters contained essential terms of an agreement between Newtronics and Atco;
* the consideration for the contract was that Newtronics continued to trade;
* Newtronics could not have continued to trade without the financial support received from Atco;
* the commitment of Atco to provide Newtronics with support was represented to the auditors and the directors of Newtronics, and was the reason Newtronics' accounts were able to be prepared on a going concern basis; and
* there was nothing in the letters of support that indicated an intention by Atco to exclude claims of the kind made by Seeley. To the contrary, Atco had promised to subordinate its loan to obligations including amounts owed to Seeley, and to put Newtronics in funds to ensure Newtronics would be capable of paying the amount due to Seeley when required.

His Honour found that the letters confirmed an agreement between Newtronics and Atco which was well known to both and intended to be relied upon.   **(ii) Was there conversion of Newtronics' assets?** Pagone J noted that Newtronics' case against the receivers and Atco for conversion was not automatically established by Newtronics' success against Atco in contract. His Honour held that there was nothing to suggest that the mortgage debenture was varied or intended to be varied by reason of the contract between Atco and Newtronics. Atco therefore continued to have its rights under the mortgage debenture. Accordingly, the demand for payment by Atco under the mortgage debenture was effective to trigger the appointment of the receivers, as there had been a default by Newtronics after it failed to make the payment. This was despite the demand being a breach of promise to Newtronics. The appointment of the receivers was therefore effective and Newtronics' claim against the appointment failed. **(iii) Were the receivers relieved of liability?** The receivers submitted that in any event they should be excused from liability under section 419(3) and s. 1318 of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). While it was not necessary for the court to consider this issue, Pagone J found that the receivers' belief that they had been properly appointed was founded on reasonable grounds. His Honour also noted that relief under section 1318 would have been granted if necessary to do so, taking into account (among other matters) the liquidator's conduct between the date of appointment and the sale of Newtronics' business. **(d) Orders** Due to Atco's breach of the contract, by making the demand for payment under the mortgage debenture, Newtronics was awarded the sum of $17,361,031.69 plus interest.  etailed Contents**5.8 Is an application for winding up made by a company in accordance with a decision of its board valid?**(By Kathryn Finlayson, Minter Ellison)University of Newcastle Union Ltd [2008] NSWSC 1361, New South Wales Supreme Court, Barrett J, 17 December 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/december/2008nswsc136.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2008/december/2008nswsc136.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary**The winding up application made by UNU in accordance with a decision of its board was validly made by the company itself.  The power of directors to control the affairs and property of the company included the power to present a petition for winding up of the company.  **(b) Facts**  The applicant, University of Newcastle Union Ltd (UNU), was a company limited by guarantee which had provided social, welfare and other facilities and amenities for students at the University of Newcastle since 1999. After Commonwealth legislation, which had the effect of making membership of student bodies such as UNU voluntary came into force in 2006, UNU suffered a significant loss of members.  At the date of judgment, UNU had 804 life members but no other members including, significantly, no ordinary or associate members.UNU's assets were transferred to UON Services Limited (USL) which also assumed all liabilities. USL was established and funded by the University of Newcastle with the active concurrence and support of the board of UNU in order to provide services and facilities generally similar to those provided by UNU while it was financially able to do so. The board of UNU caused UNU to make an application under section 461(1)(k) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for a winding up order on just and equitable grounds.   **(c) Decision**  Justice Barrett granted the application. His Honour noted that it was not possible for UNU to obtain a special resolution of members for voluntary winding up under section 491 or for the making of an application to the court under section 461(1)(a) because UNU's constitution only permitted ordinary and associate members to vote and there were no members of either class.  His Honour held that the power of the directors, as defined by UNU's constitution and in particular the power to control UNU's affairs and property, was sufficient to enable them to activate UNU to make the application.  This was so despite a provision in UNU's constitution that UNU's powers must only be used in the pursuit of its objects.  Justice Barrett noted that a company's powers do not derive from or depend on the provisions of its constitution. His Honour referred to sections 124 and 125 of the Corporations Act 2001 (Cth) and the fact that section 462(2)(a) of that Act makes a company a competent applicant for its own winding up. As to the merits of the application, his Honour found the evidence supported a finding that UNU was no longer able to perform the functions for which it was established and there was no prospect of its doing so again. On that basis, his Honour ordered that UNU be wound up on just and equitable grounds.etailed Contents**5.9 Extending the time to convene a second meeting of creditors** (By Mark Cessario, Corrs Chambers Westgarth) Mentha, in the matter of Hans Continental Smallgoods Pty Ltd (Administrators Appointed) [2008] FCA 1933, Federal Court of Australia, Jacobson J, 16 December 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1933.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1933.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** The administrators of Hans Continental Smallgoods Pty Ltd (Administrators Appointed) ("Hans"), Swicker's Kingaroy Bacon Factory Pty Ltd (Administrators Appointed) ("Swicker's") and Sun Pork Foods Pty Ltd (Administrators Appointed) ("Sun Pork") sought orders under sections 439A and 447A of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("Act") for an extension of the convening period set by section 439A and for certain other relief under section 447A relating to the operation of section 439A. The application was based on the proposition that convening the second meeting of creditors within the time prescribed by the Act would have limited utility and would result in poor creditor attendance. The administrators proposed that the convening period be extended for up to 90 days to allow for the completion of the proposed sale of the Hans, Swicker's and Sun Pork businesses. Jacobson J considered the line of authority dealing with the principles which apply to an application for an extension of time to convene and hold a second meeting of creditors. His Honour compared the two different approaches to such an application; the staged approach developed by Gyles J and the single extension approach as preferred by Barrett J. Justice Jacobson applied the single extension approach allowing the extension of the convening period for up to 90 days as he found it was appropriate in the circumstances. **(b) Facts** The administrators were appointed by the boards of Hans, Swicker's and Sun Pork ("the companies") in accordance with section 436A of the Act on 28 November 2008.  Section 439A therefore required the second meeting of creditors to be held in the first week of January 2009.   The companies were related entities in the Hans group and the ultimate holding company was Japan Tobacco Inc ("Japan Tobacco").   The companies' creditors consisted of Japan Tobacco ($100m), employee entitlements ($10m) and trade and other creditors ($30m). The administrators were of the opinion that the interests of the creditors would be best served by the sale of the companies' businesses as a going concern. There was evidence before the court that advertisements had been placed in The Australian and The Australian Financial Review and confidentiality agreements had been dispatched to approximately 15 interested parties. That evidence also indicated that the administrators' view was that due diligence would take place in January 2009, indicative bids would be submitted by 30 January 2009 and that the sale process should conclude by March 2009, subject to any delays. The creditors of the companies were informed of the administrators' intention to seek an extension under section 439A(6). Three creditors of Hans expressed concerns about the length of the extension sought by the administrators because, in their views:* the Australian economy was slowing and a 90 day extension would be counter-productive to a quick and effective sale; and
* Hans was not operating profitably prior to administration, and they doubted whether the administrators would be able to return a "neutral cash" result.

The evidence put forward by the administrators dealt with the considerations they took into account in forming the view that an extension of up to 90 days was appropriate. Those considerations included (i) the difficulties arising from the December/January holiday period, (ii) the administrators' opinion was that it was in the best interests of the creditors that the companies continue to trade, and (iii) the sale process was likely to take time. The evidence also stated that:* whilst the administrators were seeking a 90 day extension, they would convene the meeting earlier if the sale process was completed in a shorter period of time than was anticipated; and
* the administrators believed that the post-appointment creditors of the companies would be paid from ordinary cash flow in respect of post-appointment liabilities.

**(c) Decision** In deciding the issue, Jacobson J considered a series of cases which set out the principles to be applied to an application for an extension of time to convene and hold a second meeting of creditors:* Justice Barrett in *Re Diamond Press Australia Pty Limited* [2001] NSWSC 313 at [10], reiterating the principle put forward by Young J in *Mann v Abruzzi Sports Club Ltd* (1994) 12 ACSR 611 at 612, who stated that the court must "strike an appropriate balance between . the expectation that the administration would be a relatively speedy and summary matter and . the requirement that undue speed should not be allowed to prejudice sensible and constructive actions directed towards maximising the return for creditors";
* The impact of the extension on persons whose claims are affected by the statutory moratoriums arising from Pt 5.3A of the Act should be considered (*Lehman Brothers Australia Ltd* [2008] NSWSC 1132 at [4] per Barrett J); and
* The court has on occasion granted an extension and, at the same time, reserved consideration of any application to further extend a convening period if a case is made out for further extension.  The effect of this approach would be for an extension of time to be dealt with in stages (Hayes, in the matter of *Estate Property Group Ltd (Administrators Appointed)* [2007] FCA 935 per Gyles J) ("staged approach").

Justice Jacobson stated that the staged approach was not appropriate in the circumstances of this case because:* the cases indicated that the extension of two and a half to three months was not unusual where there was a relatively complex sale process;
* the extension was for "up to 90 days", which was appropriate given the administrators' evidence that they would convene the meeting earlier if possible;
* the administrators' evidence was that it was their opinion the cash flow would be sufficient to meet post-appointment liabilities; and
* the staged approach would have been costly and thus diverted more resources from the completion of the sales process.

In allowing the application, Justice Jacobson ordered the meetings of creditors of each of the companies required to be held under section 439A of the Act be extended to midnight on 30 March 2009.etailed Contents**5.10 Is a liquidator of a corporation personally liable for GST payable on the sale of the corporation's assets?**(By Justin Fox and Haley Aprile, Corrs Chambers Westgarth) Deputy Commissioner of Taxation v PM Developments Pty Ltd [2008] FCA 1886, Federal Court of Australia, Queensland District Registry, Logan J, 12 December 2008The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1886.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1886.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a)   Summary** The question to be determined was whether a liquidator of a corporation is personally liable for GST payable on the sale of a premises owned by the corporation. The sale was entered into and effected after a winding up order was made. Logan J held that the corporation, PM Developments Pty Ltd, and not the liquidator was liable for the GST and related general interest charge on the sale of the premises.   In doing so, Logan J emphasised the importance of being able to point to clear and unambiguous language of a statute in order to establish an intention to impose a tax or duty. Logan J considered that the lack of express words in [A New Tax System (Goods and Services Tax) Act 1999 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=14447" \t "Default) (the "GST Act") imposing a personal liability on the liquidator for GST, meant that such an intention could not be read into the statute.**(b) Facts** Prior to it being wound up, PM Developments had been the developer of a residential project on the Gold Coast. Contracts for the sale of seven of the eight lots, each of which comprised residential units, had been completed.   PM Developments was wound up pursuant to an application made by the Deputy Commissioner of Taxation (the "Commissioner"), and Mr Greig was appointed the sole liquidator. At the time of the winding up order, there was an uncompleted sale contract for Lot 8, which was later terminated by the liquidator. PM Developments was at all times the registered proprietor of Lot 8.  Title to the property was never vested in the liquidator.  After the winding up, a further contract was entered into for the sale of Lot 8, which included an acknowledgement that PM Developments was in liquidation and that the liquidator would not be personally liable to satisfy any liability arising under the contract.After the sale was completed, the Commissioner made a private ruling that as the sale was made by Mr Greig, in his capacity as liquidator, Mr Greig was personally liable for the GST on the sale, by virtue of the operation of Division 147 of the GST Act.**(c) Decision** Logan J found that PM Developments, and not the liquidator in his personal capacity, was liable for the GST. Logan J began by noting that the imposition of a tax on a person requires clarity of language. He referred with approval to the statements quoted by Rich and Dixon JJ in Anderson v Commissioner of Taxes (Vict.) (1937) CLR 233 that:"The intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shown by clear and unambiguous language and cannot be inferred from ambiguous words" (see *Brunton v Commissioner of Stamp Duties* (1913) AC 747, at p 760). Logan J thought this was particularly the case where the subjection of a particular person to tax is counter intuitive to what would be expected, having regard to the prevailing general law position, and the otherwise usual incidence of the tax in question. Logan J then moved on to the substantive question.  The Commissioner argued that Division 147 of the GST Act, which provides that the representatives of incapacitated entities must be registered for GST purposes, affects the operation of section 9-5, so as to make the liquidator liable to pay the GST in respect of the sale.  Section 9-5 provides as follows:You make a taxable supply if:(a) you make the supply for consideration; and(b) the supply is made in the course or furtherance of an enterprise that you carry on; and(c) the supply is connected with Australia; and(d) you are registered, or required to be registered.However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.The substance of the Commissioner's argument was that it should be inferred from the fact that Division 147 requires the liquidator to register for GST, that the liquidator should thereafter be treated as the entity running the business and the entity that made the taxable supply to which GST attaches. Logan J rejected that argument.  In doing so, Logan J noted that the ordinary position under the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) is that the making of a winding up order does not affect the beneficial ownership of the assets of the corporation unless the liquidator obtains a vesting order under section 474(2). Logan J did not see in Division 147 of the GST Act any clear direction to move away from that basic position, so that a liquidator should be deemed to be carrying on the business of the corporation and to have made the taxable supply in the liquidator's personal capacity. Logan J concluded that the Commissioner's argument gave to the provisions of Division 147 "a weight that their language cannot bear, especially so as to create a counter intuitive taxation liability on the part of the liquidator. In coming to his conclusion, Logan J noted specifically that:* Division 147 can be contrasted with sections 153-55 and 153-60 of the GST Act which deal with the effect of a principal-agent arrangement on the making of a taxable supply.  The latter two provisions state that the taxable supply will be taken to be that of the agent in certain circumstances.  The absence of an equivalent deeming mechanism in Division 147 was, to Logan J's mind, significant.
* Division 147 makes no reference to section 9-5 of the GST Act, which his Honour held to be the "pivotal" provision within the GST Act.  Logan J thought it unlikely that Division 147 was intended in any aspect to be given primacy over section 9-5 in the absence of any express intention to that effect. Although Division 147 requires a liquidator to be registered, his Honour noted that this only brings the liquidator within one of the four cumulative elements of section 9-5, and does not carry with it the other three.
* It is possible to read Division 147 as an acknowledgement that even though a representative does not carry on the incapacitated entity's business, the representative is nonetheless required to be registered.  Logan J commented that it is "a larger and more difficult thing to construe 147-5 as carrying with it the implication that the representative is to be deemed to be carrying on that incapacitated person's enterprise and making its supplies and acquisitions".

His Honour held therefore that the liquidator was not personally liable for the GST, but that it was, instead, an obligation of PM Developments. Logan J held that the GST, being a post liquidation debt of PM Developments, had payment priority pursuant to section 556(1)(a) of the Corporations Act. As this debt was one of a number of equal ranking post liquidation debts, section 559 of the Corporations Act dictated that the liquidator must effect proportionate payment. **(d) Government announcement to overturn decision** On 6 February 2009, the Assistant Treasurer, Chris Bowen MP, announced that the Government will amend the GST law, with effect from 1 July 2000, to overturn the decision in *Deputy Commissioner of Taxation v PM Developments Pty Ltd*, "to ensure that representatives of incapacitated entities are liable for GST on post-appointment transactions." According to the Assistant Treasurer's statement, the Government will shortly release, and consult on, draft legislation to implement this tax measure. The Assistant Treasurer stated: "The Court's finding is contrary to the underlying policy intention and the way the law has been administered since the introduction of GST. In the interests of providing certainty for all representatives of incapacitated entities, the Government is announcing today its intention to amend the GST law to restore the status quo . "The amendments will apply from the commencement of the GST law [1 July 2000] and restore the policy intent stated in the Explanatory Memorandum to the law introducing GST. The amendments will also ensure that refunds are not available where the correct amount of GST has been paid in respect of transactions occurring during the period of the representative's appointment. "Ensuring that the representative of an incapacitated entity is liable for GST on taxable transactions during their period of appointment will provide certainty and minimise potential complexities arising from the Court's decision for both representatives and the administration of the law." "The amendments will be introduced into Parliament at the earliest possible opportunity after consultation on the draft legislation has taken place."etailed Contents**5.11 The privilege dilemma**(By Jehan Mata, Clayton Utz) AWB Limited v ASIC [2008] FCA 1877, Federal Court of Australia, Gordon J, 11 December 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1877.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1877.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary**The Respondent, the Australian Securities and Investments Commission (ASIC), commenced an investigation pursuant to sections 13 and 19 of the [Australian Securities and Investments Commission Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "Default) (the ASIC Act) into the activities of AWB Limited (AWB), AWB (International) Ltd (AWBI) and a number of other individuals arising out of or in connection with the supply of wheat to Iraq as part of the United Nations Oil for Food Programme. ASIC gathered information through the exercise of its compulsory powers under the ASIC Act.  This information included 19 transcripts and 14 signed witness statements (the AWB Information). Subsequently, ASIC received a request from the Australian Federal Police (the AFP) in relation to the disclosure of the AWB Information to the AFP. ASIC authorised the disclosure of the AWB Information to the AFP under section 127(4) of the ASIC Act, subject to certain conditions (the Decision). The Applicant, AWB, commenced proceedings to challenge the Decision of the Respondent under the [Administrative Decisions (Judicial Review) Act 1977 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "Default) (the ADJR Act) and section 39B of the [Judiciary Act 1903 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7694" \t "Default) (Judiciary Act). The court held that none of the grounds of review claimed by AWB were made out and the application was dismissed with an order for costs made in favour of ASIC.   **(b) Facts** In early 2008, ASIC received a request from the AFP for the disclosure of the AWB Information. Accordingly, ASIC contacted the current and former employees who had been examined by them. ASIC informed them of the possible disclosure of the information, but that it would provide each of them with the opportunity to make submissions to ASIC in relation to the proposed release of their s. 19 examinations. On 1 April 2008, AWB wrote to ASIC seeking to be heard and to make submissions in relation to the proposed release and conditions of release of the AWB Information. ASIC was of the view that during the course of the s. 19 examinations, sufficient protocols were put in place so that no privileged communication was disclosed and the release of the information would not affect AWB's confidentiality.  AWB sought to prevent disclosure of the AWB information to the AFP to the extent that the communication was subject to AWB's legal professional privilege (LPP) and suggested two possible alternatives:* appointment of an independent third party to review the AWB Information; or
* pursuant to s. 127(4A) of the ASIC Act, attach conditions to the disclosure.

On 2 September 2008, ASIC authorised the disclosure of the AWB Information to the AFP subject to certain conditions. On 11 September 2008, AWB commenced proceedings under the ADJR Act and the Judiciary Act on the following grounds:* constructive failure to exercise jurisdiction and absence of power;
* error of law;
* failing to take into account relevant considerations;
* taking into account irrelevant considerations; and
* denial of natural justice.

**(c) Section 19 examination protocol** The protocol included an acknowledgement by ASIC that documents that were subject to a claim for LPP by AWB and which were inadvertently disclosed would not be seen as having waived the privilege and none of the consequences of waiver would follow. However, as AWB was not under examination, it sought to attend each of the examinations to protect its LPP and put forward a submission outlining its position regarding attendance at these examinations. ASIC was not prepared to permit AWB to be present at the examinations and did not make a direction under the ASIC Act for such representation.   **(d) Issue**The crux of this matter relates to a request to disclose the AWB Information to the AFP under section 127(4). This information includes materials disclosed  by examinees or witnesses either inadvertently or deliberately over which AWB claims privilege and where AWB was not given an opportunity to protect its privilege by ASIC.   **(e) Decision** **(i) Legislation**  The decision to disclose the AWB Information to the AFP was made under section 127(4) of the ASIC Act, which is an exception to the general principle of confidentiality put forward in section 127(1). **(ii) Power of ASIC** **No provision in the ASIC Act abrogating legal professional privilege** There is no express provision in the ASIC Act abrogating LPP or supporting the contention that the abrogation of LPP is a necessary implication. Consistent with authority on the matter, the ASIC Act proceeds on the premise that the holder of the privilege must consent to the disclosure of the privilege. The court went further and pointed out that when an examinee (whether employee, director or third party) was privy to privileged communications, then ASIC could not compel production of that privileged communication. However, if the witness or the examinee lacked the standing (requisite authority) to assert the third party privilege, in such circumstances the information should be disclosed.  The court held that, although ASIC cannot compel the production of legally privileged material, that does not mean that it cannot receive such communications altogether. In the present case, ASIC was not prevented from the receipt of legally privileged communications from the examinees and the witnesses as they were not the holder of the privilege. The court went on to state that a voluntary grant by ASIC of a limited right to AWB to be present at the examination would have forestalled the issues raised in these proceedings. Furthermore, AWB and AWBI took no further steps to review this decision. **ASIC entitled to make use of the AWB information notwithstanding the possible claim of privilege**  In the present circumstance, ASIC had put in place protocols giving the examinees and the witnesses a reasonable opportunity to claim LPP on their own behalf or to raise third party privilege (even though it is not required as a matter of law). Furthermore, the court outlines preventative measure that the third party could have taken in order to prevent disclosure of the privileged communications. **(iii) Dismissal of the proceedings** The court rejected AWB's submissions on the following grounds: **Constructive failure to exercise jurisdiction and absence of power - ss. 5(1)(c) and (d) of the ADJR Act**  Although ASIC cannot directly compel the production of legally privileged communications that does not mean that it cannot receive information other than through compulsion. Moreover, s. 127(4) provides that the delegate of ASIC must consider whether the "particular information" will enable or assist the AFP to perform its functions. The section expressly confers powers upon ASIC to disclose information properly obtained to third parties.  **Error of law and failure to take into account relevant considerations - ss. 5(1)(e), (f) and (j) of the ADJR Act** The court held that "the fact that the [communication] was and remains privileged does not prevent [a party] from making use of the document". Furthermore, with respect to whether confidentiality would be destroyed, the court noted that ASIC had carefully considered the issue and had imposed conditions on the disclosure to the AFP designed to preserve confidentiality and limit further disclosure. It was important to reiterate that because any privilege belonging to AWB still existed and had not been waived, it was still open to AWB to oppose, on the ground of LPP, the AWB Information being used against it in any legal proceeding. **Taking into account irrelevant considerations - s. 5(1)(e) of the ADJR Act**  The court held that there was no obligation on ASIC to provide AWB with any opportunity to protect those rights in the first instance such as "the right to be present at the examinations or otherwise interject privilege objections", and in any event, AWB did not challenge ASIC's decision to exclude it from the information-gathering process. ASIC obtained the information other than by compulsion of the privilege-holder and was entitled to use it. **Denial of natural justice - s. 5(1)(a) of the ADJR Act** There was no denial of natural justice as AWB was "given the opportunity to put submissions before [ASIC] relating to matters requiring the non-disclosure of information by [ASIC]" and AWB took advantage of that opportunity by making numerous submissions opposing the disclosure. His Honour found this was enough to satisfy any requirements of natural justice in the circumstances.etailed Contents**5.12 Non-government legal aid service not a "trading corporation"** (By Benjamin Kiely, Mallesons Stephen Jaques) Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)[2008] WASCA 254, Western Australian Industrial Appeal Court, Steytler P, Pullin and Le Miere JJ, 10 December 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/december/2008wasca254.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2008/december/2008wasca254.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary** In a 2:1 decision, the Western Australian Industrial Appeal Court held that a non-profit corporation which is contracted by the Commonwealth to provide free legal assistance to indigenous Australians is not a trading corporation for the purposes of section 51(xx) of the Australian Constitution. **(b) Facts** The Aboriginal Legal Service of Western Australia Inc ("ALSWA") is a not-for-profit incorporated association that provides pro-bono legal services to indigenous Australians in Western Australia pursuant to a contract with the Commonwealth.  Under its contract, ALSWA received $23.5m in funding for its services. ALSWA won the contract following a competitive tender process, and providing the contracted services accounted for essentially all of its activities. One of ALSWA's former employees filed a claim under Western Australia's [Industrial Relations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=15295" \t "Default). ALSWA argued that this claim should be dismissed, as ALSWA was a trading corporation within section 51(xx) of the Australian Constitution, therefore the Commonwealth's Workplace Relations Act excluded the operation of the state Act. At first instance, the Western Australian Industrial Relations Commission rejected ALSWA's argument. ALSWA appealed to the Commission's Full Bench, which upheld the initial decision. ALSWA then appealed to the Western Australian Industrial Appeal Court. **(c) Decision** Both the majority and minority accepted the established test that, to determine whether a body is a trading corporation, regard must primarily be had to its current activities.   Accordingly, the principal question for the court was whether ALSWA's activities pursuant to the Commonwealth contract were "trading" activities". Given that ALSWA's activities under the contact accounted for essentially everything it did, there was no argument that these activities might not be substantial or central enough to affect the ALSWA's characterisation: cf *R v Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 208, 233. **(i) Majority's view** Steytler P, with whom Pullin J agreed, essentially characterised ALSWA's activities pursuant to the contract as a special form of legal services of a significant public welfare nature, which were undertaken as a result of an agreement with the Commonwealth that ALSWA would be reimbursed for most of its costs.  They lacked an essential "commercial" aspect required to elevate them to the level of "trade"; indeed they were activities "removed from ordinary concepts of trade or trading, whether for reward or otherwise, in much the same way as those of a government-run legal aid agency": at [74]. Therefore ALSWA was not a trading corporation. Notwithstanding this finding, his Honour recognised that, ordinarily, the provision of large scale legal services, for reward, would be trading and the fact that an activity is not done for profit does not necessarily mean that it is a non-trading activity. Furthermore, the fact that the services under the contract could have been provided by an entity which sought to make a profit from them (such as a private law firm) did not affect the characterisation of ALSWA's activities per se, for ALSWA was undertaking them in a fundamentally different form than a private law firm would.  It simply wasn't the case that ALSWA provided ordinary legal services for the purpose of assisting indigenous Australians (which would have suggested trading, as the ends a corporation serves by trading are irrelevant to their characterisation). Rather it was that the very nature of the legal services that ALSWA provided was different, un-commercial, and meant that ALSWA did not engage in trading. Steytler P's judgment also comprehensively reviewed the leading cases in this area and summarised their key principles as:* a corporation may be a trading corporation, even though trading is not its predominant activity;
* however, trading must be a substantial and not merely a peripheral activity;
* in this context, "trading" is not given a narrow construction (it extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services);
* the making of a profit is not an essential prerequisite to trade, but is its usual concomitant;
* the ends which a corporation seeks to serve by trading are irrelevant to its characterisation (thus the fact that these activities are conducted in the public interest or for a public purpose does not necessarily exclude them from being in "trade");
* whether the trading activities of a corporation are sufficient to justify its characterisation as a "trading corporation" is a question of fact and degree;
* the current activities of a corporation, which are an important criterion for determining its characterisation, are not the only criterion (regard should also be had to the body's intended purposes); and
* the commercial nature of the activity is an element in deciding whether the activity is in trade or trading.

**(ii) Minority findings** Conversely, Le Miere J characterised ALSWA's activities under the contract as amounting to the provision of basic legal services in consideration for fees paid by the Commonwealth.  Characterised this way, they did amount to "trading".  The fact that ALSWA's clients did not pay the fees themselves was not relevant, as there are instances of corporations "indisputably engaged in trading" which are paid by one person to provide services to another.  Since providing services for reward lies at the heart of trade, whether these services turn a profit for the organisation is a secondary question. Lack of a profit motive could be relevant if the status of the activities was equivocal, but that was not the case here.  Le Miere J rejected the majority's suggestion that there was something intrinsically "non-trading" about ALSWA's activities under the contract - they were simply the provision of legal services, not some special form of nebulous "public welfare" activities of a legal nature. **(iii) Rejection of Full Bench's approach** Notwithstanding their different conclusions, both judgments rejected the Full Bench's approach, which had sought to separate entry into the contract with the Commonwealth (which was a trading activity) and the provision of pro-bono legal services pursuant to the contract (which was not a trading activity), and argue that the first activity was not substantial enough to determine the body's characterisation.  In this regard, the majority held that such a distinction was "conceptually unsustainable" - if the contract was entered into in the course of trade, then so too would be acts that were done to perform the contract.  etailed Contents**5.13 Liquidators' application for order that they would be justified in deferring a dividend to unsecured creditors when doubting the solvency of the company from whom the funds are being received**  (By Julie Lyons, Blake Dawson) Hall in the matter of Australian Capital Reserve Limited (in Liquidation) (ACN 089 189 502) [2008] FCA 1895, Federal Court of Australia, Jacobson J, 9 December 2008 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1895.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2008/december/2008fca1895.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** This case involved an application by the liquidators of Australian Capital Reserve Limited (in Liquidation) ("ACR") for an order under section 511(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) that they would be justified in not declaring any interim or final dividend to ordinary unsecured creditors of ACR that would involve the distribution of funds received (or to be received) under a particular deed until the expiry of a period of at least six months following the respective dates of receipt of the funds. The court found that the liquidators would be justified in not declaring the dividend, that it was appropriate for the liquidators to seek the guidance of the court in this matter and that the making of the order would be of advantage to the liquidation.   **(b) Facts** ACR went into voluntary administration on 28 May 2007 with liabilities of approximately $335 million.  Of this, $332 million was owed to a trustee for note holders. ACR, as a fundraising vehicle, would raise funds from the public in a note issue and then on-lend the funds to various companies in the Estate Property Group Limited ("EPG Group"), which was in the business of residential property development.  In September 2007, a series of agreements were entered into between the administrators of the EPG Group and Becton Investment Management Limited in its capacity as the trustee of the Becton Everest Fund ("Becton"). The effect of this series of agreements was that Becton took control of the property development part of the EPG Group. One of the agreements entered into with Becton was a Receivables Acquisition Deed, which together with a Heads of Agreement (and some contracts for the sale of land) provided that certain payments were to be made by Becton to ACR. The payments were to be made in three instalments, with the final instalment due on 1 December 2008.  On 18 November 2008, Becton wrote to the liquidators of ACR proposing to defer payment of the final instalment and to make payment of that final instalment in further instalment payments, with the final instalment being made on 30 September 2009.  The letter of 18 November 2008 included a summary of the unsuccessful efforts made by Becton to fund the payment of the final instalment due under the Receivables Acquisition Deed on its due date of 1 December 2008. Those efforts included negotiations by Becton for a loan facility which was subsequently rejected, and discussions with other proposed replacement financiers. The liquidators entered into an Amending Deed on 3 December 2008 ("Amending Deed") which amended the terms of the Receivables Acquisition Deed so that the final amount payable would be made in further instalments as Becton proposed.  This Amending Deed was approved by a committee of creditors of ACR. The amount of $17.5 million was paid by Becton on 3 December 2008 in accordance with the Amending Deed. However, although the liquidators previously paid two interim dividends to creditors of ACR out of funds received from Becton, the liquidators did not declare a further interim dividend utilising the $17.5 million received from Becton on 3 December 2008.  Instead, on 3 December 2008, the liquidators wrote to note holders stating that the liquidators proposed to seek directions from the court concerning the timing of further distributions to note holders and creditors. Approximately 500 note holders wrote to the liquidators opposing this deferral. **(c) Decision**  In considering whether it was appropriate for the liquidators to seek directions from the court on this issue, Justice Jacobson cited the case of *Re Ansett Australia Ltd (No 3)* [2002] FCA 90; (2002) 115 FCR 409 where Justice Goldberg reviewed all of the relevant authorities relating to the principles which govern the exercise of the court's power to give directions to a liquidator.  In that case, the effect of Justice Goldberg's judgment was that there must be something more than the making of a business or commercial decision before a court will give directions. It may be a legal issue or an issue of power, propriety or reasonableness.  Justice Jacobson was satisfied that the issue of reasonableness had arisen in this particular case because liquidators have a primary duty to expedite the winding up of the company and to bring it to an early conclusion and here, the liquidators were actually seeking to extend the winding-up of the company by deferring payments to note holders and creditors.  Justice Jacobson found it "appropriate" for the liquidators to seek the guidance of the court as to whether it is reasonable to postpone the payment of further dividends and made orders accordingly.  In coming to this conclusion, he considered that the note holders did oppose the deferral of the payments, but balanced this against the liquidators' view (which was based on matters referred to in a confidential statement) that there was a "real possibility" that Becton may not be able to remain in existence as a going concern. His Honour found it sufficient to say that the liquidators considered (amongst other things) that Becton's survival depended upon certain assumptions being fulfilled. If those assumptions were not fulfilled, any payment made to note holders could be challenged as a preference, and the liquidators may be liable to "disgorge" funds which had already been paid out to the note holders. His Honour also noted that he took into account the view that the court's power is limited under section 511 of the Corporations Act, the authority for this proposition being Young J in *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 212 ("Dean-Willcocks"). In that case, Justice Young was of the view that because section 511(2) provides that a court may accede to an application where it is "just and beneficial", the court has a discretion as to whether the making of an order under section 511 will be of advantage in the liquidation.  Justice Jacobson was also satisfied that in this particular case, this test was satisfied.  His Honour also noted that Justice Young in Dean-Willcocks had considered that it was appropriate to make such an application "ex parte" and concluded in this case that it was also appropriate.etailed Contents |

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