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| **Index** | mail lawlex helpdesk@lawlex.com.au |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007_files/spacer%281%29.gif |

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 | http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007_files/spacer%281%29.gif |

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| **Bulletin No. 116**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Stock Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#h1)
2. [Recent ASIC Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#h2)
3. [Recent ASX Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#h3)
4. [Recent Takeovers Panel Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#h4)
5. [Recent Corporate Law Decisions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#h5)
6. [Contributions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#h6)
7. [View previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new)
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| **Detailed Contents**  | own |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007_files/spacer%281%29.gif |

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| [1. Recent Corporate Law and Corporate Governance Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#1)[1.1 FRC assesses the impact of the Combined Code](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#011)[1.2 Concern expressed over ASX waiver system](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#012)[1.3 Australia’s investment funds](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#013)[1.4 IOSCO annual conference summary](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#014) [1.5 Personal property securities discussion paper released](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#015) [1.6 Proposed changes to internal control reporting requirements in Canada](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#016) [1.7 APRA figures show superannuation assets reach $1.0 trillion](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#017) [1.8 New prudential standards and guidance for Australian life insurance industry](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#018)[1.9 Proposed enhancements to executive compensation disclosure in Canada](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#019)[1.10 Australian Senate inquiry into private equity](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#110)[1.11 US House Financial Services Committee passes Bill to give shareholders a vote on executive pay](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#111)[1.12 Wider access for UK retail customers to hedge funds and other alternative investments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#112)[1.13 New Zealand Takeovers Panel to investigate schemes and amalgamations](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#113)[1.14 SEC publishes text of rules facilitating foreign private issuer deregistration](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#114)[1.15 UK review on issuer liability – discussion paper](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#115)[1.16 FSA publishes review of the commodities market](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#116)[1.17 Draft financial services regulations published for comment](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#117) [1.18 Reserve Bank analysis of private equity](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#118) [1.19 US securities class action settlements increase significantly in 2006](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#119) [1.20 FSA move towards a more principles-based and proportionate approach to general insurance regulation](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#120)[1.21 EU Commission acts to improve efficiency of EU investment fund market](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#121) [1.22 Report on developments in clearing and settlement arrangements for OTC derivatives](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#122) [1.23 Employee share ownership in Australia: new research report](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#123)[1.24 Research report: Do Australian institutional investors aim to influence the human resource practices of investee companies?](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#124) [2. Recent ASIC Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#2)[2.1 ASIC launches new superannuation calculator](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#021)[2.2 ASIC proposes prospectus relief for foreign scrip takeovers](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#022) [2.3 ASIC releases its joint bids policy](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#023) [3. Recent ASX Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#3)[3.1 Reserve Bank PSNA approval](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#031)[4. Recent Takeovers Panel Developments](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#4)[4.1 Magna Pacific (Holdings) Limited 02 - Panel decision](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#041) [5. Recent Corporate Law Decisions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#5) [5.1 Operation of section 588E(8) presumptions of insolvency](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#051)[5.2 Exercising a casting vote at a creditors’ meeting: the chairperson's duties](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#052)[5.3 Should summary judgment have been given in a case raising alleged unconscionability in relation to a secured guarantee?](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#053) [5.4 Application to discharge examination summons filed by special purpose liquidator fails](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#054) [5.5 Directors’ fiduciary and statutory duties of disclosure when notifying shareholders of general meeting and shareholder’s claims to inspect books of company](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#055) [5.6 Strict proof of service required for extension of time application](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#056)[5.7 Can a stayed costs order be a due and payable debt for the purposes of winding–up?](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#057)[5.8 Execution of deeds and obligations under loan agreements, mortgages and guarantees](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#058)[5.9 Liquidators obtaining the benefits of orders made on application by previous liquidators](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#059)[5.10 Application by industry association to intervene in litigation depends on whether contribution is "useful and different"](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#510)[5.11 Action for compensation: claiming privilege against exposure to a civil penalty provision](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#511)[5.12 When excluding an individual from the management of a company amounts to oppression under section 232 of the Corporations Act](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#512) [6. Contributions](file:///C%3A/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLKB9/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007.htm#6)  |

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| **1. Recent Corporate Law and Corporate Governance Developments**  |  | ext Section |

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| http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No%20116%20April%202007_files/spacer%281%29.gif |
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| **1.1 FRC assesses the impact of the Combined Code** On 18 April 2007, the UK Financial Reporting Council initiated an assessment of the progress made in implementing the Combined Code on Corporate Governance. The FRC is inviting views on issues such as whether the Code has helped to improve board performance, its impact on smaller listed companies, and the effectiveness of the “comply or explain” mechanism. Views are sought from listed companies, directors, investors and other interested parties by 20 July 2007. The FRC will publish its findings before the end of 2007.The Financial Reporting Council (FRC) is the UK’s independent regulator responsible for promoting confidence in corporate reporting and governance. The Combined Code on Corporate Governance sets out standards of good practice in relation to issues such as board composition and development, remuneration, accountability and audit and relations with shareholders. All companies incorporated in the UK and listed on the Main Market of the London Stock Exchange are required under the Listing Rules to report on how they have applied the Combined Code in their annual report and accounts, and either to confirm that they have complied with the Code's provisions or - where they have not - to provide an explanation (known as “comply or explain”). Copies of the consultation paper and the Combined Code can be found at: [http://www.frc.org.uk/corporate/combinedcode.cfm](http://www.frc.org.uk/corporate/combinedcode.cfm%22%20%5Ct%20%22_new). Responses to the consultation paper are requested by 20 July 2007 and should be sent to: codereview@frc.org.uk. etailed Contents**1.2 Concern expressed over ASX waiver system** Waivers to shareholder rights enshrined in Listing Rules administered by the ASX should be clearer, more transparent and disclosed on a more timely basis according to research published by the Australian Council of Superannuation Investors (ACSI) on 16 April 2007.ACSI’s call for reforms to the ASX waiver system draws on findings made in a study, commissioned by ACSI and carried out by Institutional Shareholder Services (ISS) Australia. The study reviewed every Listing Rule waiver granted by the ASX between June 2005 and December 2006 (nearly 1100 waivers). In the study, ISS formed the view that around 6% of waivers raised issues of concern about the erosion of shareholder rights. The Listing Rules lay down the disclosure obligations and shareholder protections required of every company listed on the ASX.ACSI’s Chief Executive Officer, Phillip Spathis, said the main finding of the study was that while the vast majority of waivers appeared sensible, there were some areas of emerging concern, notably waivers affecting voting rights, executive remuneration, related party transactions and pre-emptive rights. For example, a waiver was given to mining company Perilya, enabling it to grant 5 million options to its incoming CEO without a shareholder vote. This grant was equivalent to 2.65% of the company’s shares on issue. The shares underlying these options are now worth over $14 million.Waivers have also been granted to infrastructure vehicles, enabling them to by-pass the one-share one-vote listing rule. Under these waivers, a majority of the fund’s directors are appointed by the external manager – rather than by shareholders.ACSI has called for a deeper and more timely disclosure of the reasons given for waivers. ACSI is calling for the ASX to adopt a waiver disclosure model similar to that used by the New Zealand Exchange. When a NZ company receives a waiver from the NZX, the information is usually immediately disclosed to the market along with a detailed explanation of the decision. NZ companies are also required to disclose any waivers granted or relied on during the year in their annual report. The reform will enable the market to respond on a timely basis to the precedents being established and the corresponding effect on shareholder rights.Further information is available on the [ACSI website](http://www.acsi.org.au/documents/Media%20Release.ASX%20Waiver.16.04.07.doc%22%20%5Ct%20%22_new).etailed Contents**1.3 Australia’s investment funds** Australia’s investment funds asset pool continues to be the fourth largest in the world, according to the September quarter 2006 statistics released by the US-based Investment Company Institute (ICI) on 12 April 2007. Australia’s funds under management have grown more than 150 per cent since 2000, with a compound annual growth rate of 16.8 per cent.The United States leads the world investment funds market, with a 48.1 per cent share. Luxembourg and France were second and third, accounting for 9.8 per cent and 8.2 per cent of global investment fund assets managed respectively.Australia has the largest pool of investment funds in the Asia Pacific, with a global market share of 3.8 per cent, up from 2.9 per cent at the end of 2000. Australia’s share of total assets is well above that of Hong Kong (2.8 per cent) and Japan (2.6 per cent).According to InvestorSupermarket Market Wrap, the top 30 fund managers in Australia dominate the industry with a market share of 77 per cent. Of the top 30 fund managers, 17 are foreign-owned, and manage 46 per cent of total (unconsolidated) assets.Further information is available at: [http://www.axiss.gov.au/](http://www.axiss.gov.au/%22%20%5Ct%20%22_new).etailed Contents**1.4 IOSCO annual conference summary** On 12 April 2007, the International Organization of Securities Commissions (IOSCO) published a summary of the issues discussed at its latest annual conference, which include: IOSCO Memorandum of Understanding; Implementation of IOSCO Objectives and Principles; Initiative to raise standards of cross-border cooperation; Credit rating agencies; Multinational disclosure and accounting; Regulation of secondary markets; Regulation of market intermediaries; Enforcement and exchange of information; and Investment management. The summary is available on the [IOSCO website](http://www.iosco.org/news/pdf/IOSCONEWS103.pdf%22%20%5Ct%20%22_new).etailed Contents**1.5 Personal property securities discussion paper released** On 30 March 2007, the Australian Attorney-General Philip Ruddock released the second discussion paper on the reform of Australia’s personal property securities laws for public comment.The reforms are being considered by the Standing Committee of Attorneys-General. The second discussion paper deals with legal issues arising as part of the proposed reforms, including priorities, conflict of laws, enforcement and insolvency rules.Comments on the discussion paper are invited. The deadline for submissions is 18 May 2007. The discussion paper is available at: [http://www.ag.gov.au/pps](http://www.ag.gov.au/pps%22%20%5Ct%20%22_new)etailed Contents**1.6 Proposed changes to internal control reporting requirements in Canada** On 30 March 2007, the Canadian Securities Administrators (CSA) announced they are seeking comments on revised National Instrument 52-109 Certification of Disclosure in Issuers’ Annual and Interim Filings and related Companion Policy and Forms. The proposed revisions to the Instrument set out certification requirements for all reporting issuers other than investment funds. The proposals introduce a new requirement for the CEO and the CFO to certify that they have evaluated the effectiveness of their internal control over financial reporting and disclosed their conclusions, including information about identified deficiencies, in the Management’s Discussion and Analysis.The proposed Rule, related Companion Policy and Forms, and CSA Notice and Request for Comments are available on CSA members’ websites. The comment period is open until 28 June 2007.The CSA, the council of the securities regulators of Canada’s provinces and territories, co-ordinates and harmonizes regulation for the Canadian capital markets.Further information is available on the [CSA website](http://www.csa-acvm.ca/html_CSA/news/07_11_canadian_reg_seek_comment_internal_control_reporting_requirements.htm%22%20%5Ct%20%22_new).etailed Contents**1.7 APRA figures show superannuation assets reach $1.0 trillion** Total superannuation assets in Australia have reached the $1.0 trillion mark, according to figures released on 29 March 2007 by the Australian Prudential Regulation Authority (APRA). APRA’s Quarterly Superannuation Performance publication shows total superannuation assets rose during the December 2006 quarter by 6.9 per cent to $1.0 trillion, which represents a 19.2 per cent increase over the year.Contributions to funds with at least $50 million in assets over the December quarter were $18.1 billion, with employers contributing $11.3 billion (62.5 per cent) and members $6.4 billion (35.3 per cent). Other contributions, including spouse contributions and government co-contributions, totalled $411 million. Retail funds received 45.8 per cent ($8.3 billion) of total contributions over the quarter, industry funds 26.1 per cent ($4.7 billion), public sector funds 23.0 per cent ($4.2 billion) and corporate funds 5.0 per cent ($914 million).At the end of December 2006, funds with at least $50 million in assets had 30.5 per cent of superannuation assets ($220.4 billion) invested in wholesale trusts and 22.4 per cent ($161.7 billion) invested in life insurance companies. Individually managed mandates, with asset portfolios tailored for or chosen by the trustee, comprised 21.0 per cent ($151.4 billion) of superannuation assets. The remaining assets were invested in other items including pooled superannuation trusts, unlisted public offer unit trusts and directly invested assets.The combined return on assets was 5.3 per cent for the December quarter. The return for corporate funds was 5.9 per cent, retail funds 5.4 per cent, industry funds 5.1 per cent and public sector funds 5.0 per cent.Copies of the December 2006 Quarterly Superannuation Performance publication are available on the [APRA website](http://www.apra.gov.au/Statistics/Superannuation-Institutions-Statistics.cfm%22%20%5Ct%20%22_new).etailed Contents**1.8 New prudential standards and guidance for Australian life insurance industry** On 29 March 2007, the Australian Prudential Regulation Authority (APRA) released final prudential standards and guidance on risk management and business continuity management for the life insurance industry, including friendly societies. The standards, developed in consultation with the industry, provide a set of principles-based requirements for risk management and business continuity management. Institutions have the flexibility to develop their own approaches to meet the requirements in order to best suit their particular circumstances.The package contains:* Prudential Standard on risk management (LPS 220);
* Prudential Practice Guides on:
	+ risk management;
	+ asset and liability management;
	+ conflicts of interest under section 48 of the [Life Insurance Act 1995 No. 4 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6638" \t "_default) (duties of directors to policyholders);
	+ operational risk;
	+ insurance risk and reinsurance management; and
* Prudential Standard (LPS 232) and Prudential Practice Guide on business continuity management.

The new prudential standards also replace seven existing friendly society standards, including a standard on risk management.The two new prudential standards come into effect from 1 January 2008, instead of 1 July 2007 as previously proposed. Individual life companies can approach APRA to seek additional transition arrangements if necessary.These standards harmonise APRA’s approach to risk management across general insurers, banks, superannuation funds and life companies. Further information is available at: [http://www.apra.gov.au/Life/Prudential-Standards.cfm](http://www.apra.gov.au/Life/Prudential-Standards.cfm%22%20%5Ct%20%22_new) and [www.apra.gov.au/Life/Life-Insurance-PPGs.cfm](http://www.apra.gov.au/Life/Life-Insurance-PPGs.cfm%22%20%5Ct%20%22_new).etailed Contents**1.9 Proposed enhancements to executive compensation disclosure in Canada** On 29 March 2007, the Canadian Securities Administrators (CSA) announced they are seeking comments on Proposed Form 51-102F6 Statement of Executive Compensation, designed to improve existing disclosure rules for executive compensation by all reporting issuers.The proposed Form will require companies to clearly define their compensation policies and objectives, and will provide the total compensation, in tabular form, for each named executive officer and director. In addition, the Form will require disclosure of key aspects of executive compensation such as salary, bonus, stock and option awards, payments upon termination or change in control, and pension entitlements. Proposed Form 51-102 F6 Statement of Executive Compensation, the related CSA Notice and Request for Comments, and related documents are available on various CSA members’ websites. The comment period is open until 30 June 2007. Further information is available on the [CSA website](http://www.csa-acvm.ca/html_CSA/news/07_10_canadian_reg_seek_comment_exec_compensation_disclosure.htm%22%20%5Ct%20%22_new).etailed Contents**1.10 Australian Senate inquiry into private equity** On 29 March 2007, the Australian Senate referred an inquiry into private equity investment and its effects on capital markets and the Australian economy to the Standing Committee on Economics. The terms of reference for the inquiry are as follows:That the Senate, noting that private equity may often include investment by funds holding the superannuation savings or investment monies of millions of Australians, and because of the actual and potential scale of private equity market activity, refers the following matters to the Economics Committee for inquiry and report by 20 June 2007: * an assessment of domestic and international trends concerning private equity and its effects on capital markets;
* an assessment of whether private equity could become a matter of concern to the Australian economy if ownership, debt/equity and risk profiles of Australian business are significantly altered;
* an assessment of long-term government revenue effects, arising from consequences to income tax and capital gains tax, or from any other effects;
* an assessment of whether appropriate regulation or laws already apply to private equity acquisitions when the national economic or strategic interest is at stake and, if not, what those should be; and
* an assessment of the appropriate regulatory or legislative response required to this market phenomenon, if any.

The Committee invites written submissions, which should be sent to:Committee SecretarySenate Economics Committee Department of the SenatePO Box 6100Parliament HouseCanberra ACT 2600Australiaetailed Contents**1.11 US House Financial Services Committee passes Bill to give shareholders a vote on executive pay** On 28 March 2007, the United States House Financial Services Committee passed legislation to allow shareholders of public companies to vote on a company’s executive compensation plans. The Bill, H.R. 1257, the “Shareholder Vote on Executive Compensation Act” will not set any limits on pay, but will ensure that shareholders have an opportunity to give a non-binding vote on the company’s executive pay practices beginning in 2009. The vote is advisory in nature, meaning, the board and the CEO of a company can ignore the will of the shareholders if they so choose. The legislation passed by the committee also contains a separate advisory vote if a company gives a new, not yet disclosed, “golden parachute” while simultaneously negotiating to buy or sell a company. Advisory votes on compensation have been successfully used in the United Kingdom and Australia. The Bill will now be reported to the full House of Representatives for consideration. etailed Contents**1.12 Wider access for UK retail customers to hedge funds and other alternative investments** On 27 March 2007, the UK Financial Services Authority (FSA) set out proposals that would allow UK retail consumers to invest in funds of hedge funds and other alternative investments sold by firms authorised in the UK. Retail investors in the UK are already able to obtain exposure to hedge funds and other alternative products in a variety of ways, including structured products. The FSA now believes the time is right to allow the development of retail-oriented Funds of Alternative Investment Funds (FAIFs) within its regulatory regime. This would bring substantial structural and operational safeguards including the requirement to have an independent depositary, strict rules on independent valuation of underlying assets and timely redemption of investments. A key element in the FSA's approach is its expectation that the fund manager will operate with ‘due diligence’. This sets out FSA requirements in a more principles based way, and the FSA proposes guidance for the fund manager in the matters the FSA believes need to be considered in making, and maintaining, significant investments into unregulated schemes. The FSA has also accompanied the Consultation Paper with a case study illustrating the respective responsibilities of providers and distributors of these products, and would welcome comment upon that as well.The FSA proposals would:* Introduce retail-oriented FAIFs into the existing FSA regulatory regime for Non-UCITS Retail Scheme (NURS);
* Lift the existing 20% investment restriction into unregulated collective investment schemes for NURSs, thereby allowing the development of FAIFs.
* Apply due diligence guidance for fund managers producing FAIFs, to guide them on the matters to consider in making their initial and on-going investment decisions.
* For existing NURSs, leave the current rules unchanged, although a few consequential changes would be necessary to ensure overall consistency in the regime.
* Ensure the regime for Qualified Investor Schemes (QISs) is in line with the FSA’s revised approach for NURSs.

The consultation will close on 27 June 2007. The FSA will then finalise the draft rules in light of the responses and publish a Policy Statement giving feedback towards the end of the year. This will set out the rule changes and the date on which they will come into effect.Further information is available on the [FSA website](http://www.fsa.gov.uk/pages/Library/Policy/CP/2007/07_06.shtml%22%20%5Ct%20%22_new).etailed Contents**1.13 New Zealand Takeovers Panel to investigate schemes and amalgamations** On 27 March 2007, the New Zealand Commerce Minister, Lianne Dalziel, asked the Takeovers Panel to undertake work to look at the issue of schemes of arrangements and amalgamations potentially being used in ways that may not align with the Takeovers Code. Further information is available on the [New Zealand Takeovers Panel website](http://www.takeovers.govt.nz/%22%20%5Ct%20%22_new).etailed Contents**1.14 SEC publishes text of rules facilitating foreign private issuer deregistration** On 27 March 2007, the US Securities and Exchange Commission published its new rules for deregistration by foreign companies as adopted by the Commission on 21 March 2007. By eliminating conditions that had been considered a barrier to entry, the amended rules will encourage participation in US markets and increase investor choice.On 21 March 2007, the Commission voted unanimously to adopt changes to the rules that govern when a foreign private issuer may terminate the registration of a class of equity securities under Section 12(g) of the Securities Exchange Act of 1934 and the corresponding duty to file reports required under Section 13(a) of the Exchange Act, and when it may cease its reporting obligations regarding a class of equity or debt securities under Section 15(d) of the Exchange Act. Under the current rules, a foreign private issuer may exit the Exchange Act registration and reporting regime if the class of the issuer’s securities has less than 300 record holders who are US residents. Because of the increased globalization of securities markets since the current rules were adopted, a foreign private issuer may find it difficult to terminate its Exchange Act registration and reporting obligations despite the fact that there is relatively little interest in the issuer's securities among United States investors. Moreover, currently a foreign private issuer can only suspend, and cannot terminate, a duty to report arising under Section 15(d) of the Exchange Act.New Exchange Act Rule 12h-6 will permit the termination of Exchange Act reporting regarding a class of equity securities under either Section 12(g) or Section 15(d) of the Exchange Act by a foreign private issuer that meets a quantitative benchmark designed to measure relative U.S. market interest for that class of securities. Instead of counting the number of the issuer's U.S. security holders, the new benchmark will require the comparison of the average daily trading volume of an issuer's securities in the United States with its worldwide average daily trading volume.**(a) Highlights of the adopted rules** **(i) Trading volume standard**Rule 12h-6 will:* permit a foreign private issuer to terminate its Exchange Act registration and reporting obligations regarding a class of equity securities, assuming it meets all the other conditions of Rule 12h-6, if the U.S. average daily trading volume of the subject class of securities has been no greater than 5 percent of the average daily trading volume of that class of securities on a worldwide basis for a recent 12-month period; and
* require an issuer that delists in the U.S. or terminates a sponsored American Depositary Receipts facility prior to deregistering under Rule 12h-6 to meet the trading volume standard at the date of delisting or termination or else wait 12 months before it can proceed with deregistration in reliance on the trading volume standard.

**(ii) Other conditions for equity securities registrants**Rule 12h-6 will also require an equity securities registrant to:* have been an Exchange Act reporting company for at least one year, to have filed or submitted all Exchange Act reports required for this period, and to have filed at least one Exchange Act annual report;
* have not sold its securities in a registered offering in the United States, except for specified offerings, during the preceding 12 months, but will allow exempted securities offerings; and
* have maintained a listing on one or more exchanges for at least a year in a foreign jurisdiction that, either singly or together with one other foreign jurisdiction, constitutes the primary trading market for the issuer's subject class of securities.

**(iii) Other rule 12h-6 provisions**Rule 12h-6 will also apply to a foreign private issuer that:* terminated or suspended its Exchange Act reporting obligations under the current exit rules before the effective date of Rule 12h-6, as long as it meets specified conditions; or
* has succeeded to the Exchange Act reporting obligations of another company following a merger, acquisition or other similar transaction, by permitting that issuer to take into account the Exchange Act reporting history of its predecessor when determining whether it meets the conditions for deregistration under Rule 12h-6.

**(iv) Rule 12g3-2(b) amendments**The adopted rule amendments will permit a foreign private issuer to claim the Rule 12g3-2(b) exemption:* immediately upon its termination of Exchange Act reporting under Rule 12h-6, rather than having to wait 18 months as is currently required; and
* upon the condition that it publish in English its home country materials required by Rule 12g3-2(b) on its Internet website or through an electronic information delivery system that is generally available to the public in its primary trading market.

The adopted rule amendments will further permit a non-reporting company that has received or will receive the Rule 12g3-2(b) exemption, upon application to the Commission and not pursuant to Rule 12h-6, to publish in English its required home country documents on its Internet website or through an electronic information delivery system in its primary trading market, rather than submitting them in paper to the Commission, as is currently required.The effective date of the adopted rules will be 60 days from their publication in the Federal Register.The text is available on the [SEC website](http://www.sec.gov/rules/final/2007/34-55540.pdf%22%20%5Ct%20%22_new). etailed Contents**1.15 UK review on issuer liability – discussion paper** On 27 March 2007, the UK Treasury published a discussion paper as part of the Davies Review on issuer liability for issuer misstatements. The discussion paper sets out an analysis of how the law on liability for issuer misstatements to the market currently works in practice and seeks views on certain issues. The review asks for responses to 9 questions:Question 1: What should be the basis of liability? Should the basis of liability be simple negligence? Would gross negligence be available as a possible basis for liability in the British context? Is fraud an appropriate basis for liability?Question 2: Should the statutory regime should be extended in principle to ad hoc statements?Question 3: Should liability for dishonest delay be imposed in the narrow circumstances identified above or should delay be sanctioned only through public enforcement via the FSA?Question 4: If the statutory regime were to be extended to ad hoc announcements, should it be (a) confined to disclosures of inside information (the most pressing case), (b) applied to all RIS announcements or (c) confined to announcements made under the FSA’s Disclosure and Transparency Rules (ie excluding ad hoc announcements made under the Listing Rules)?Question 5: Should section 90A of the Financial Services and Markets Act 2000 apply to non-regulated markets? (Section 90A was introduced as a part of the implementation of the Transparency Directive. It provides that only the issuer is liable to compensate an investor who acquires securities and suffers loss as a result of an untrue or misleading statement or omission in a periodic financial report required by the Transparency Directive or in a preliminary statement. An issuer will only be liable to investors where a director knew or was reckless as to whether the statement was untrue or misleading or knew that the omission was a dishonest concealment of a material fact.) Does your answer differ according to whether section 90A is extended to cover ad hoc statements?Question 6: Should the claims of investors for damages under section 90A or any extension of it be subordinate to the claims of other unsecured creditors?Question 7: Should statutory liability for fraudulent misstatements be extended to those who make the statement on behalf of the company?Question 8: Should statutory protection be extended to sellers and holders of securities as well as to buyers?Question 9: Should the deceit or the negligence measure of damages be adopted in the statutory regime?The discussion paper is available on the [UK Treasury website](http://www.hm-treasury.gov.uk/independent_reviews/davies_review/davies_review_index.cfm%22%20%5Ct%20%22_new). etailed Contents**1.16 FSA publishes review of the commodities market** On 26 March 2007, the UK Financial Services Authority (FSA) published a paper which examines the recent growth in investment in commodity markets. The paper, 'Growth in commodity investment: risks and challenges posed for commodity market participants', concludes that markets have changed significantly bringing new issues which need to be understood and acted upon by participants.**(a) Market changes**The recent growth in commodity markets with record prices, high volatility, and the high returns to be gained have attracted a wave of new investors and firms into what was previously viewed as a specialist market. These new entrants include hedge funds, pension funds, high net worth individuals and even a small number of retail investors. The level of funds being invested is expected to grow and, unlike previous cycles, to remain. **(b) Risks and challenges for market participates**The FSA as part of its oversight of commodity markets regulates both participant firms and infrastructure providers. In its assessment of the impact of the growth in the market the FSA has identified the risks and challenges facing the regulated community as including: **(i) Staffing/compliance resource** The pool of experienced staff with commodity market experience is limited by the small size originally of the market. Due to the growth in the market all regulated participants, including both firms and exchanges, face increased difficulties in recruiting appropriately skilled and experienced staff.**(ii) System capacity** Large volume increases pose challenges to trading system infrastructure especially following the switch by many exchanges to electronic trading. Exchanges must ensure they have sufficiently robust systems to handle the growth in trading volume and trading flows in terms of both processing and monitoring.**(iii) Risk management** Firms are facing increased volatility in some markets which raises risk of failure. Firms need to ensure they have appropriate risk management systems and procedures in place, including thorough testing and modelling of their algorithmic trading systems to ensure appropriate behaviour in any given set of circumstances. Those firms who invest in physical assets e.g. power stations will also need to consider the change in risk profile that this brings.**(iv) New users**New participants though familiar with other markets may not share the same level of knowledge or understanding as traditional participants. These new entrants may also introduce new trading techniques which traditional operators including exchanges need to be aware of.**(v) Market abuse** While no more open to abuse than any other types of financial markets, firms need to ensure they have adequate systems and controls in place to prevent abuse taking place. As a result of the growth in activity on these markets the FSA will focus more attention on monitoring them. **(c) Risks and challenges facing consumers**Although direct investment by retail investors is limited at present, financial firms are responding to growing consumer interest by developing products which will allow individuals to gain an element of exposure to commodity markets. These changes combined with a shortage of financial services professionals who understand the market could result in consumers buying products they don't fully understand. Indirect exposure of retail investors is also increasing through pension fund investment. The paper is available on the [FSA website](http://www.fsa.gov.uk/pubs/other/commodity_invest.pdf%22%20%5Ct%20%22_new).etailed Contents**1.17 Draft financial services regulations published for comment** On 26 March 2007, the Australian Treasury published for public comment draft financial services regulations. In 2006, the Honourable Chris Pearce MP, Parliamentary Secretary to the Treasurer, released the Corporate and Financial Services Regulation Review Consultation Paper (Paper) for consultation. The Paper set out ideas for improving a variety of aspects of corporate and financial services regulation, including in relation to financial services regulation, corporate governance, auditor independence, company reporting obligations, collective investments and dealing with regulators. The release of the Paper coincided with the release of the Government response to the Report of the Taskforce on Reducing the Regulatory Burden on Business. This taskforce was appointed by the Prime Minister to identify practical options for alleviating the compliance burden on business from Government regulation. The Paper sought comments from consumer and industry representatives on 56 topics for simplifying and improving aspects of financial services regulation. Over 80 submissions were received from academia and a range of industry and consumer representatives, including professional associations and individual firms and practitioners. The Parliamentary Secretary announced his plan to progress the reforms in the Corporate and Financial Services Regulation Review Consultation Paper in a press release on 14 August 2006. He indicated that there would be three key mechanisms for doing this: the Simpler Regulatory System Bill, focused projects and amendments to regulations.The Simpler Regulatory System Bill is underway. The Corporate and Financial Services Regulation Review Proposals Paper was released for public consultation on 16 November 2006 seeking comment on the reforms it contained. In light of analysis of the responses received, the Bill is currently being developed and further consultation is taking place as necessary. The focused projects are being progressed concurrently.The paper published on 26 March 2007 progresses the amendments to regulations and addresses those reforms expected in the press release of 14 August 2006 to be implemented by regulations. There are also three miscellaneous amendments that have been drafted in response to market developments and other reforms together with a series of amendments to correct errors or anomalies appearing in the current [Corporations Regulations 2001 No. 193 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default).The matters dealt with in the 26 March paper are: Repetition of information in a Statement of Advice; Issue of disclosure documents when product or advice is rejected; Provision of a Financial Services Guide by a third party custodian; Combining a Financial Services Guide and Prospectus; Updating Financial Services Guides; Standardised Financial Services Guide; Treatment of superannuation trustees; Treatment of employers; ‘Bundled’ general insurance products; ‘Badging’ of disclosure documents; Australian financial services licence holders acting on behalf of others; Offshore branches; Dollar disclosure for general insurance; Incorporation by reference in disclosure documents; Exemption from FSR retail client obligations for secondary service providers; Oral disclosure; Sickness and accident insurance; Licensing of actuaries; Enhanced fee disclosure and investment life insurance products; Australian Standard on complaints handling; Member reporting; Correction of legislative errors and anomalies.Further information is available on the [Treasury website](http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1244" \t "_new). etailed Contents**1.18 Reserve Bank analysis of private equity** On 23 March 2007, the Reserve Bank of Australia published an analysis of private equity as part of its semi-annual financial stability review. The matters dealt with in the analysis are:* the size of the market;
* the funding of LBOs;
* why has private equity increased;
* policy and regulatory issues (the issues discussed in this section are corporate gearing, depth and quality of public capital markets, corporate conduct, the exposure of the banking system, and the exposure of retail investors).

In relation to corporate conduct, it is stated in the analysis that:"... some private equity transactions may create pressures that alone or in combination, can lead to poor behaviour or misconduct that threatens the integrity of the markets in which transactions take place. While the same issues arise in many other capital market transactions, private equity transactions may create incentives for misconduct in areas not always present in more traditional mergers and acquisitions activity. In LBOs in which senior executives are offered the opportunity to participate in the bidding consortium there can be a tension between their personal interests and their duty to act in the interests of the existing shareholders. Conflicts can arise, for example, if these executives:* participate in decisions that are directly or indirectly relevant to the consortium’s proposed acquisition;
* have access to confidential information that is relevant to the consortium’s valuation of the company; or
* are unable to devote sufficient attention to the duties to the company as a result of their involvement in the bidding process.

“Managing these conflicts is not always straightforward, particularly if limiting the participation of conflicted executives in key management decisions is not in the best interests of the current shareholders. In some situations, it may not be possible to adequately manage a conflict. In that case, the appropriate course of action is to ensure that the conflict is avoided. “Conflicts of interest can also arise for advisers. This is particularly evident in a situation in which a person who is engaged as an adviser to a company wishes to participate in, or provide advice to, a consortium bidding for the company. The potential for conflict can also arise if an adviser:* has multiple private equity clients who are interested in pursuing the same company;
* places more importance on establishing or maintaining a close relationship with a private equity firm, which can generate lucrative fees on an ongoing basis, than on maintaining existing relationships with target companies;
* has the opportunity to participate in the consortium as a debt or equity provider, thereby increasing its potential earnings from a particular transaction; or
* has established a relationship with senior executives in an advisory role, and uses that relationship to work with those senior executives on a buy-out proposal.”

It is also stated in the analysis that private equity transactions can also increase the risk that price sensitive information will be improperly disclosed or misused.The analysis notes how these issues are addressed by the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and ASX listing rules. It is also stated in the analysis that “Many of the potential problem areas noted above can be dealt with by ensuring that advisers and participants in private equity transactions have robust and effective information barriers such as those described above. It is the responsibility of private equity funds, directors, advisers and others involved in private equity transactions to ensure that their conduct is appropriate and complies with all legal requirements.”The Reserve Bank’s March 2007 financial stability review, which contains the private equity analysis, is available on the [Reserve Bank website](http://www.rba.gov.au/PublicationsAndResearch/FinancialStabilityReview/Mar2007/Html/financial_stability_review_0307.html%22%20%5Ct%20%22_new). etailed Contents**1.19 US securities class action settlements increase significantly in 2006** Securities class action settlements in the US in 2006 have exceeded, by a significant amount, all totals from previous years according to a report released on 21 March 2007 by Cornerstone Research. The US$6.6 billion partial settlement in the Enron matter approved in 2006 brought the total Enron settlement fund to US$7.1 billion, making it the largest securities case settlement fund to date, surpassing the previous record holder, the 2005 WorldCom settlement fund of US$6.2 billion. Excluding these two cases, the total value of settled cases in 2006 grew to US$10.6 billion, topping the 2005 US$3.5 billion total by more than 300 percent.The 300 percent increase from 2005 in the total value of cases settled in 2006 was due to an increase in the average settlement size, rather than an increase in the number of cases settled. The five-fold increase in the average settlement size is driven in part by the number of 2006 “mega-settlements” – fourteen cases that settled for amounts of US$100 million or more (five of which were in excess of US$1 billion) – which far exceeded the 2004 and 2005 records for mega-settlements – seven and nine, respectively. The average market capitalization decline associated with these settlements was in excess of US$40 billion. In contrast, the median settlement increased only slightly from US$6.7 million for previous post-Reform Act years (1996- 2005) to US$7.0 million in 2006. The median represents the point at which half the data points are greater and half are smaller (i.e., the midpoint).Other findings in the study include that, derivative actions, mainly lawsuits brought by shareholders of the corporation against officers and/or directors, accompanied over 45 percent of the cases settled in 2006, an increase over 2005. Additionally, class action settlements that are accompanied by monetary settlements with the SEC for related actions – a trend that began in earnest in 2004 – continued to increase in 2006.A full copy of Cornerstone Research’s “Securities Class Action Settlements: 2006 Review and Analysis” is available at: [http://securities.cornerstone.com/](http://securities.cornerstone.com/%22%20%5Ct%20%22_new) etailed Contents**1.20 FSA move towards a more principles-based and proportionate approach to general insurance regulation** An interim report published by the UK Financial Services Authority (FSA) on 21 March 2007, demonstrates that consumer experiences and risk of detriment vary substantially across the various markets for general insurance products. The FSA has decided, therefore, to consider a differentiated and more principles-based approach to insurance conduct of business (ICOB) regulation. The review focused on how effectively general insurance markets are working for retail consumers. For general insurance products such as household or motor policies, the review found that markets work reasonably well in the interests of consumers, and that most consumers do not rely on disclosure documents from firms, which are prescribed by ICOB rules, when making purchasing decisions. The FSA is therefore looking at removing most of the ICOB requirements for firms that go beyond minimum EU Directive requirements. The essential safeguards to protect consumers would be retained, including the Principles for Businesses.By way of contrast, the review found that existing regulation of firms' selling practices has an important role in reducing the risk of consumer detriment for those buying personal protection products, such as payment protection and critical illness. These long-term products are usually second or tertiary purchases and consumers lack confidence and experience when buying them. Reflecting the greater risks with personal protection products and their sale, the FSA is also considering a small number of measures to improve selling practices of protection products and to enable customers to receive better information about the nature of the sale and the product. The FSA's ideas for rebalancing its general insurance regime are at an early stage and it will publish a consultation paper on possible rule changes in June 2007. Any rule changes are likely to be made in December 2007. The report is available on the [FSA website](http://www.fsa.gov.uk/pubs/other/ICOB_review.pdf%22%20%5Ct%20%22_new).etailed Contents**1.21 EU Commission acts to improve efficiency of EU investment fund market** On 19 March 2007, the European Commission took action in two specific areas to improve the efficiency of the EU single market for retail investment funds. These funds, known as 'UCITS', provide consumers with access to professionally managed investments on affordable terms and now account for over €5500 billion of assets. First, the Commission has adopted legally binding guidance on whether new financial instruments can be included in investment funds. Second, it has issued guidance on how host country authorities should exercise limited scrutiny powers when UCITS are notified for sale in their country. These clarifications will ensure consistency in the authorisation and marketing of investment funds across the EU. The Commission will propose a more fundamental redesign of the EU 'passport' for investment funds later in 2007.**(a) Financial instruments eligible for inclusion in EU investment funds.**The Commission has specified, in the form of an implementing Directive, criteria for assessing whether different types of financial instrument are eligible for inclusion in UCITS funds. This measure will help to remove uncertainty as to whether UCITS can properly invest in the following financial instruments: asset backed securities; listed closed end funds; Euro Commercial Paper; index based derivatives; and credit derivatives.The Commission proposed the implementing Directive taking into account advice from the Committee of European Securities Regulators (CESR). The proposal has received the approval of the European Parliament and of Member States. Member States now have 12 months to implement the Directive in national law. The Commission will carefully monitor this process to ensure even application throughout the EU.The implementing Directive is complemented by additional work within CESR to codify the day-to-day application of these criteria by national enforcement authorities. This will further ensure their consistent implementation. This CESR guidance is available on the [CESR website](http://www.cesr.eu/index.php?page=groups&mac=0&id=28" \t "_new). **(b) Marketing of investment funds in another Member State**Under the EU UCITS Directive, a fund authorised in one Member State can be marketed in any other provided that it is notified to the authorities of that Member State (the 'host' authority). Under this procedure, the host authority has up to two months to review the notification and can specify how the fund should be advertised and promoted in its territory. However, national authorities are sometimes uncertain of how to apply the procedure correctly and of the borderline between the responsibilities of the Member States concerned. This has led to escalating administrative and compliance costs and significant delays in bringing authorised funds to market in other Member States.The Commission has now clarified the relevant rules, in the form of an Interpretative Communication. In particular, the Commission has reaffirmed that an investment fund's home supervisory authority has sole responsibility for monitoring compliance with EU rules, and that the notification procedure cannot be used by Member States to challenge authorisation of UCITS granted in another Member State.Further information is available on the [Europa website](http://ec.europa.eu/internal_market/securities/ucits/index_en.htm%22%20%5Ct%20%22_new). etailed Contents**1.22 Report on developments in clearing and settlement arrangements for OTC derivatives** On 16 March 2007, the Committee on Payment and Settlement Systems (CPSS) issued a report on new developments in clearing and settlement arrangements for OTC derivatives. The report analyses existing arrangements and risk management practices in the broader OTC derivatives market and evaluates the potential for risks to be mitigated by greater use of, and enhancements to, market infrastructure. The report focuses on the risks created by delays in documenting and confirming transactions; the implications of the rapidly expanding use of collateral to mitigate counterparty credit risks; the potential for expanding the use of central counterparty (CCP) clearing to reduce counterparty risks; the implications of OTC derivatives prime brokerage; the risks associated with unauthorised notations of contracts; and the potential for significant market disruptions from the closeout of OTC derivatives transactions following the default of a large market participant.The report concludes that, over the past few years, the clearing and settlement infrastructure of OTC derivatives markets has been significantly strengthened. However further progress is needed in some areas:* institutions need to extend the successful efforts to reduce confirmation backlogs in credit derivatives to other OTC derivative products, using automated systems whenever possible. To mitigate the risks of remaining backlogs, more systematic use of economic affirmations is appropriate and over time dealers should work toward daily portfolio reconciliations with their most active counterparties; and
* market participants should identify steps to mitigate the potential market impact of replacing contracts following the closeout of one or more major participants.

In addition, as the market infrastructure moves further in the direction of centralised processing of trades and post-trade events, several issues will assume greater importance: * providers of essential post-trade services for OTC derivatives should provide open access to their services and should aim to achieve convenient and efficient connectivity with other systems; and
* central banks and supervisors will need to consider whether certain existing standards for securities settlement systems, CCPs or systemically important payment systems should be applied to providers of clearing and settlement services for OTC derivatives that are not already subject to those standards.

Further information is available on the [Bank for International Settlements website](http://www.bis.org/cpss/index.htm%22%20%5Ct%20%22_new). etailed Contents**1.23 Employee share ownership in Australia: new research reports** The Employee Share Ownership Project at Melbourne Law School has produced four reports on employee share ownership. The reports are:* an overview of existing data on employee share ownership in Australia;
* employee share ownership: a review of the literature;
* employee share ownership plans in Australia: the corporate law framework; and
* employee share ownership plans in Australia: the taxation law framework.

The Employee Share Ownership project, funded by the Australian Research Council, is a joint initiative of the Centre for Corporate Law and Securities Regulation, the Centre for Employment and Labour Relations Law and the Tax Group, The University of Melbourne. The project seeks to produce the first comprehensive analysis of how current legal regulation structures and constrains the use of employee share ownership in Australian enterprises. Further details on the project and the reports are available at: [http://cclsr.law.unimelb.edu.au/go/centre-activities/research/employee-share-ownership-plans-current-practice-and-regulatory-reform/index.cfm](http://cclsr.law.unimelb.edu.au/go/centre-activities/research/employee-share-ownership-plans-current-practice-and-regulatory-reform/index.cfm%22%20%5Ct%20%22_new). etailed Contents**1.24 Research report: Do Australian institutional investors aim to influence the human resource practices of investee companies?** A new research report has been published by the Corporate Governance and Workplace Partnerships Project in the Faculty of Law at the University of Melbourne. The title of the research report is “Do Australian Institutional Investors Aim to Influence the Human Resource Practices of Investee Companies?” The authors are Kirsten Anderson, Shelley Marshall and Ian Ramsay. Following is a summary of the research report.There has been considerable speculation regarding the effects of the growing prevalence of institutional investors in the equity markets on investee company behaviour. It has been posited that the growth of institutional investors may lead to the pursuit of what is generally referred to in the human resource literature as ‘high commitment’ employment practices in investee companies. This may be because institutional investors are using ‘voice’ mechanisms to pressure investee companies to adopt ‘high commitment’ human resource practices. These labour management practices typically involve managerial attempts to motivate and manage workers through a series of workplace practices that incorporate the interests of employees rather than through strict command and control structures. These might include investment in staff training and development, employment security, flexible workplace practices and self-directed work teams, investment in occupational health and safety, incentive pay, and ‘partnerships’ and consultation with employees and/or their representatives. The purpose of this study is to discover whether it is the intention of institutional investors to encourage investee companies to adopt ‘high commitment’ employment practices through case studies of twelve prominent institutional investors with funds invested in the Australian equities market and the Australian Council of Superannuation Investors (an industry body representing 39 superannuation funds). In the event that the institutional investor did seek to influence investee companies, the authors asked (i) why they seek to influence the companies, and (ii) what mechanisms they use to exert this influence. In the event that they did not seek to influence investee companies in this way, the authors asked (iii) why they did not and what barriers exist to taking into account companies’ employment practices. The authors also sought to discover (iv) whether institutional investors take into account the employment practices of companies when making investment decisions, and if so, (v) what kinds of practices they take into account. In addition, the authors enquired into (vi) whether there are any differences between institutional investors, based on type, in relation to whether or not they have an intention to influence investee company employment practices, or the ability to do so. The authors are particularly interested in the difference between industry superannuation funds and other types of institutional investors. This difference is significant, firstly, because under the [Superannuation Industry (Supervision) Act 1993 No. 78 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "_default), Part 9, industry superannuation funds are required to have equal representation of employers and members on their boards. In the case of industry superannuation funds, which are operated by parties to industrial awards, these representatives are usually employer associations and unions.Secondly, industry superannuation funds often manage their funds via external fund managers, whereas other institutional investors generally manage their funds internally. It is possible that these two characteristics of industry superannuation funds might result in different attitudes and responses concerning the human resource practices of investee companies compared with other types of institutional investors. The research report is available on the [SSRN website](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976295" \t "_new). etailed Contents |

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| **2. Recent ASIC Developments** |  | ext Section |

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| **2.1 ASIC launches new superannuation calculator**On 5 April 2007, the Australian Securities and Investments Commission (ASIC) launched a new superannuation calculator to help consumers saving up for retirement.The superannuation calculator, together with a comprehensive User Guide, is available from ASIC on its consumer website [FIDO](http://www.asic.gov.au/fido/fido.nsf/byheadline/Superannuation%2Bcalculator?openDocument" \t "_new).etailed Contents**2.2 ASIC proposes prospectus relief for foreign scrip takeovers** On 28 March 2007, the Australian Securities and Investments Commission (ASIC) released a policy proposal paper (PPP) on relief from the requirement to prepare a prospectus or Product Disclosure Statement (PDS) when securities are offered as consideration under a foreign regulated takeover. The requirement to prepare a prospectus or PDS may deter a bidder under a foreign regulated takeover from offering securities to Australian members of a foreign target as an alternative to cash. This means that Australian members may be deprived of the ability to receive their consideration in the form of securities. Granting relief from the requirement to prepare a prospectus or PDS could allow Australian members to receive the same offer as their foreign counterparts.The proposed relief is subject to conditions, including that Australian residents hold no more than 10% of the target securities, and the target securities are quoted on an approved foreign market.The PPP also proposes licensing relief for the provision of general advice that is contained in a bid document for a foreign regulated takeover.Comments on the PPP are due by Friday 4 May 2007 and should be sent to:Anthony GrahamSenior LawyerRegulatory Policy Australian Securities & Investments CommissionGPO Box 9827Melbourne VIC 3001Fax: 03 9280 3306Email: anthony.graham@asic.gov.auAlternatively, you can call the ASIC Infoline on 1300 300 630. The policy proposal paper is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ASIC_policy_proposal_Disclosure_relief_foreign_scrip.pdf/%24file/ASIC_policy_proposal_Disclosure_relief_foreign_scrip.pdf%22%20%5Ct%20%22_new). etailed Contents**2.3 ASIC releases its joint bids policy** On 28 March 2007, the Australian Securities and Investments Commission (ASIC) announced amendments to its Policy Statement 159: “Takeovers, compulsory acquisitions and substantial holding notices [PS 159]” to incorporate its policy on joint takeover bids. Joint bids involve bidders who together have more than 20 per cent voting power in the target company.ASIC is willing to facilitate joint bids provided that the other shareholders of the target are not disadvantaged by the block created when two or more bidders come together to make the bid. The conditions ASIC will impose on this relief are designed to address the risks that the increased pre-bid stake of the joint bidders could discourage rival bids and any auction for control of the target.ASIC initially granted relief for a joint bid in 2001. The terms of this relief were announced in Media Release [MR 01/295] “ASIC clarifies its policy on joint bids”. ASIC has made some technical changes to joint bid relief it has granted since then. Policy Statement 159 reflects ASIC’s current policy on joint bids: see [PS 159.288] to [PS 159.299]. The policy statement is available on the [ASIC website](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps159.pdf/%24file/ps159.pdf%22%20%5Ct%20%22_new).etailed Contents |

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| **3. Recent ASX Developments** |  | ext Section |

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| **3.1 Reserve Bank PSNA approval**As noted in the March issue of the Corporate Law Bulletin, the Reserve Bank has conditionally approved ASX Settlement and Transfer Corporation's (ASTC's) application for approval of the multilateral netting arrangement operated by it under section 12 of the [Payment Systems and Netting Act 1998 No. 83 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5859" \t "_default). ASTC is the settlement system for the Australian equities market and for related markets including some derivatives.This approval will protect the netting undertaken by ASTC from legal challenge in the event that a party to the arrangement enters external administration. The approval is subject to a number of rule amendments being made to the ASTC Settlement Rules. These rule amendments were formally lodged with the Australian Securities and Investments Commission on 27 March 2007 and are subject to a 28 day disallowance period. Once this process is complete, the Reserve Bank will issue its formal approval.Further information is available on the [ASX website](http://www.asx.com.au/%22%20%5Ct%20%22_new).etailed Contents |

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| --- | --- | --- |
| **4. Recent Takeovers Panel Developments** |  | ext Section |

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| **4.1 Magna Pacific (Holdings) Limited 02 - Panel decision**On 17 April 2007, the Takeovers Panel advised that following additional disclosure, and some changes to the lock-up agreement, it has decided not to commence proceedings in relation to an application from Lionsgate Australia Pty Ltd, a wholly owned subsidiary of Lions Gate Entertainment Inc. in relation to the affairs of Magna Pacific (Holdings) Limited (see TP07-14). Lionsgate is currently making an off-market, cash takeover bid for Magna Pacific. The Panel has previously received an application in relation to Lionsgate's Bidder's Statement from Magna Pacific (Magna Pacific 01 see TP07-07 and TP07-11).Lionsgate dispatched a replacement bidder's statement to Magna Pacific on 26 March 2007 following a Panel decision dated 21 March 2007.On 30 March 2007 destra Corporation Ltd and Magna Pacific announced their intention to implement a scheme of arrangement (Proposed Scheme) under which destra would acquire all the issued capital in Magna Pacific. Lionsgate's application related to issues including:* the recommendation by the Magna Pacific board to vote in favour of the Proposed Scheme when Lionsgate submits that the Proposed Scheme is not currently capable of acceptance;
* whether Magna Pacific has provided adequate information and explanations in relation to the Proposed Scheme and the related conditions, in particular the funding arrangements; and
* whether the break fee arrangements meet the requirements in Guidance Note 7 - Lock-Up Devices.

Following additional disclosure by Magna Pacific which the Panel requested, and some changes that Magna and destra have agreed to make to the lock-up agreement (which the Panel also requested), the Panel decided not to commence proceedings.Further information is available on the [Takeovers Panel website](http://www.takeovers.gov.au/display.asp?ContentID=1202" \t "_new).etailed Contents |

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| --- | --- | --- |
| **5. Recent Corporate Law Decisions** |  | ext Section |

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| **5.1 Operation of section 588E(8) presumptions of insolvency**(By Peter Sise, Clayton Utz)Dwyer v R-Jay Pty Ltd [2007] SASC 115, Supreme Court of South Australia, Debelle J, 30 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc115.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc115.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**Dwyer v R-Jay Pty Ltd is a case about the operation of the presumption of insolvency created by section 588E(8) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) ("Corporations Act"). Debelle J found that:* for the purposes of section 588E(8), a matter has not "been proved" if a party simply concedes the matter in another proceeding; and
* a liquidator can waive their right to rely on the presumptions created by sub-sections 588E(8) and 588E(9).

His Honour did not decide whether the court could order that the presumption under section 588E(8) not apply to certain proceedings.**(b) Background legislation**Section 588FF(1)(a) of the Corporations Act gives a court the power to order that a person pay to a company in liquidation all or some of the money which the company paid to that person under a transaction which is “voidable” because of section 588FE. Section 588FE deems various transactions to be “voidable”. A transaction may be “voidable” if it is an “insolvent transaction” within the meaning of section 588FC. Section 588E(8)(a) creates a presumption that a transaction is an “insolvent transaction” if it has already been proven in another proceeding. Section 588E(8)(a) also states that any matter referred to in section 588FC can be presumed to be the case if that matter was proven in another proceeding. The insolvency of a company is one of the matters which is referred to in section 588FC. Section 588E(9) states that a presumption created by section 588E(8) can be rebutted. It is the presumption under section 588E(8)(a) which is the subject of Dwyer v R-Jay Pty Ltd [2007] SASC 115.**(c) Facts and issues** The plaintiffs were the liquidators of Harris Scarfe Ltd (“HSL”) and Harris Scarfe Wholesale Pty Ltd (“HSW”) which are both companies in the Harris Scarfe group. The liquidators of HSL and HSW (the “Liquidators”) sought to set aside various payments made by HSL and HSW on the grounds that they were voidable transactions. HSL and HSW had made five payments, totalling $355,258.89, to R-Jay Pty Ltd (“R-Jay”). Whether HSL and HSW were insolvent at the time of these payments was in issue. Other creditors were concerned that if HSL and HSW were found to be insolvent during this proceeding, the Liquidators could use the presumption created by section 588E(8)(a) to show that HSL and HSW were insolvent in other proceedings which involved them. The Liquidators stated that they would waive their right to use the presumption under section 588E(8)(a). The creditors questioned whether the Liquidators were able to do this. The creditors also questioned whether a judgment in the District Court of South Australia, where the insolvency of HSL and HSW was conceded by a particular creditor, could give rise to a presumption of insolvency. Hence, Debelle J was presented with three specific questions:* Question 1: Did a presumption of insolvency arise because of a concession made in the District Court of South Australia?
* Question 2: Are liquidators able to waive their right to rely on the presumption in sub-sections 588E(8) and (9)?
* Question 3: Is the court able to direct that the presumption under section 588E does not apply to specific actions?

**(d) Decision****(i) Question one**Section 588E(8) states that a presumption arises in relation to a matter if that matter “has been proved” in another proceeding. In the District Court of SA case of Lindsay Maxstead & Michael Dwyer v HP Laundering Holdings Pty Ltd, the defendants conceded that HSL and HSW were insolvent. Debelle J had to decide whether a concession amounted to insolvency having “been proved”. His Honour concluded that insolvency had not been proved because the question was specifically conceded.Debelle J referred to section 588FF(1) which requires a court to be “satisfied that a transaction of the company is voidable because of section 588FE”. His Honour said that there is a difference between the meaning of “proved” and “satisfied”. His Honour did not follow Finkelstein J in Crosbie v Commissioner of Taxation (2003) 130 FCR 275 at [2], who thought that a court cannot be satisfied that a transaction is voidable “unless it has facts before it which will establish that conclusion”. Instead, Debelle J followed Austin J in Dean-Willcocks v Commissioner of Taxation (No 2) (2004) 49 ACSR 325 and Lander J in Cooper v Commissioner of Taxation (2004) 139 FCR 205 and concluded that a court may be satisfied of a company’s insolvency “without formal proof. The court may act on an admission or on the fact that a question of insolvency is not put in issue”. Although the District Court was “satisfied” that HSL and HSW were insolvent for the purposes of section 588FF(1) because the defendants had conceded the point, the matter had not “been proved” for the purposes of section 588E(8) because no proof was presented to the District Court.**(ii) Question two** Debelle J concluded that the Liquidators were capable of waiving their right to rely on any presumption established by section 588E. His Honour based this finding on the following:* the Corporations Act does not prevent a party from waiving or contracting out of section 588E; and
* there is no public policy ground preventing a liquidator or another party from waiving a presumption established by section 588E.

Debelle J acknowledged that the presumptions have the public benefit of preventing matters from being re-litigated but said that it will be rare that a party will waive the presumption and re-litigate a matter and hence this concern is not great. **(iii) Question three**Debelle J elected not to decide whether a court could order that a presumption under section 588E will not apply to a specific proceeding. His Honour thought that the question had become hypothetical in light of his answers to Questions One and Two and should be left to be determined when a real dispute required it. Debelle J did, however, say that:“The court has the power to prevent abuse of its process. Subject to that fact, it is very doubtful whether the court has any power to make orders inconsistent with the provisions of s 588E.” This suggests that a court may not be able to order that a presumption does not apply to a specific proceeding. etailed Contents**5.2 Exercising a casting vote at a creditors’ meeting: the chairperson's duties** (By Lisa Thomas, DLA Phillips Fox)Ausino International Pty Limited v Apex Sports Pty Limited [2007] NSWSC 289, New South Wales Supreme Court, Barrett J, 30 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc289.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc289.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**Apex Sports Pty Ltd (“Apex”) entered into a deed of company arrangement on 27 June 2005 ("Deed"). A meeting of creditors held on 20 and 21 November 2006, considered two resolutions- that the Deed be continued; and if that first resolution was not passed, that the Deed be terminated and the company instead be wound up. A poll was taken at the meeting on both resolutions, and neither was passed, as both a majority of creditors in number and by value was not obtained either for or against either resolution. The chairperson (one of the administrators of the Deed) declined to exercise the casting vote, stating that firstly, he had doubts as to whether voting entitlements of creditors were properly recognised; and secondly, given that legal proceedings had already been undertaken with regard to insolvency issues of the company, it was more appropriate for the Court to decide the fate of the deed of company arrangement. His Honour considered whether these reasons were relevant to the chairperson's decision in relation to the exercise of the casting vote.Additionally, at the meeting of creditors the chairperson stated that he was inclined to exercise the casting vote against continuation of the Deed. His Honour also considered whether the chairperson's reasons for the inclination to vote against the continuation of the Deed were relevant and rational, and whether the chairperson should have voted in accordance with his stated inclination.His Honour made an order under section 600C(3)(a) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (“the Act”) that the second resolution to terminate the Deed and that the company be wound up, was taken to have been passed at the meeting of creditors held on 20 and 21 November 2006. **(b) Facts** Ausino International Pty Limited (“Ausino”), the major creditor of Apex by value, made an application for relief in order to overturn or displace the Deed. When Ausino’s application came before the court for final hearing on 21 September 2006, Apex and the administrators of the Deed sought an adjournment, on the basis that when creditors considered whether to enter into of the Deed, the material before them was misleading. An adjournment was granted at that time, on the basis that the Deed administrators would call a further meeting of creditors to consider whether the Deed should continue or be terminated, in light of the correct and updated material. A further meeting of creditors was held on 20 and 21 November 2006. Two resolutions were submitted for determination at the meeting:1. "That the deed of company arrangement dated 27 June 2005 is confirmed by creditors."
2. "That the deed of company arrangement be terminated and the company be wound up."

On a poll, 23 creditors, representing $1,268,598.33 of value, voted in favour of the first resolution. However, three creditors with a total representative value of $3,407,571.83, voted against the first resolution, and as such it was not passed. On a poll of the second resolution, the three creditors that had voted against the first resolution now voted in favour of the second resolution and the 23 other creditors voted against, and as such it was also not passed. As a majority vote of creditors in number and by value was not obtained on either resolution, it necessitated a casting vote to be made by the chairperson, available under regulation 5.6.21(4) of the [Corporations Regulations 2001 No. 193 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default) ("the Regulations"). However, the chairperson declined to exercise his casting vote, stating that significant objections had been raised concerning the voting rights and entitlements of certain creditors, and given that court proceedings were already on foot, it was more appropriate for the court to decide whether or not the Deed should continue. The chairperson stated that if he was to vote, he would be inclined to exercise his casting vote against the resolution to continue the Deed. Ausino submitted that by failing to exercise his casting vote, the chairperson had abdicated a legal responsibility and to remedy this, the court should exercise its power under section 600C of the Act, deeming the second resolution to have been passed at the creditors' meeting, in accordance with the chairperson's stated intention. **(c) Decision** **(i) Duties of the chairperson** Barrett J considered the duties of a chairperson in relation to the exercise of a casting vote available under regulation 5.6.21(4) of the Regulations. His Honour stated that the intention of the exercise of a casting vote is to provide a means by which a tie or deadlock is resolved. Further, Barrett J stated that an administrator of a deed of company arrangement is considered an “officer” of the Company as defined by section 9 of the Act. As a result, in determining whether or not to exercise a casting vote, the chairperson is subject to the duties imposed on officers under the Act, such as the duty to act with care and diligence, the duty to exercise powers and discharge duties in good faith and in the best interests of the company (and in the best interests of creditors in an insolvency situation), and for a proper purpose, as per sections 180 and 181 of the Act. In light of those duties, Barrett J stated that the chairperson should proceed to exercise a casting vote in order to resolve a deadlock unless there is a good reason not to do so. His Honour also stated that to fail to exercise a casting vote for an irrational or irrelevant reason was inconsistent with the chairperson’s execution of those duties of an officer. **(ii) The chairperson's reasons for failing to exercise the casting vote**Barrett J found that the reasons given by the chairperson to abstain from exercising the casting vote were not valid. His Honour held that the first consideration given by the chairperson (regarding the existence of significant objections by creditors of the voting entitlements of other creditors) was irrelevant to the chairperson's proper discharge of his functions. His Honour noted that decisions on proof of debt for voting purposes must be completed before creditors have voted, yet by the time it became necessary for the chairperson to cast his vote, the creditors had already voted, and thus consideration of this issue was irrelevant.Barrett J then referred to the chairperson's second reason for refraining to exercise the casting vote, namely, that legal proceedings were already on foot and hence, the court could decide whether or not to continue the Deed. His Honour held that by not voting on that basis, the chairperson overlooked the purpose of the adjournment, which was to allow the question of the future of the Deed to be placed in its original decision-making forum (a meeting of creditors), with the opportunity to use corrected and updated materials to come to a decision. As a result, his Honour found the Chairperson's reasoning irrelevant to the proper decision of whether or not to exercise the casting vote.**(iii) Court order under section 600C of the Act**Barrett J considered whether the Court should make an order under section 600C of the Act, deeming a resolution to have been passed. His Honour, referring to Metal Manufacturers Ltd v ACN 063 086 126 Pty Ltd [2001] QSC 106, found that in the situation of non-exercise of a casting vote, knowledge of how the chairperson would have exercised that casting vote, is a relevant consideration for a section 600C Court order.Barrett J then considered whether it was “manifestly unreasonable” for the chairperson to have abstained from exercising the casting vote in accordance with his expressly stated inclination. His Honour held that the chairperson's decision not to exercise the casting vote in accordance with his stated inclination was a result of irrelevant considerations and therefore, was manifestly unreasonable. His Honour ordered that the second resolution was taken to have been passed at the meeting of creditors held on 20 and 21 November 2006 and as a result, that the Deed be terminated and the company be wound up.etailed Contents**5.3 Should summary judgment have been given in a case raising alleged unconscionability in relation to a secured guarantee?** (By Justin Fox and Megan Walters, Corrs Chambers Westgarth)Leslie v GE Commercial Corporation (Australia) Pty Ltd [2007] WASCA 65, Supreme Court of Western Australia, Court of Appeal, Steytler P, McLure JA and Buss JJA, 28 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/wa/2007/march/2007wasca65.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2007/march/2007wasca65.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 appellant, Mrs Leslie, appealed successfully from an order of summary judgment in favour of GE Commercial Corporation in its claim against her for monies owed under a secured guarantee. The Court of Appeal held that the primary Judge erred by summarily rejecting the appellant’s evidence that she did not understand what she was signing and that she was under the undue influence of her husband. The judge also erred in not recognising that the appellant had a number of arguable defences which should have been considered at trial.**(b) Facts** This is an appeal against orders made by Blaxell J on 4 March 2005 entering summary judgment against the appellant and her 3 co-defendants (Brevtex Pty Ltd, Seabay Enterprises Pty Ltd and Mr Jeffrey Leslie). At the material times, the appellant was married to, but separated from, Mr Leslie, and she was a director and shareholder of the corporate defendants. GE Commercial Corporation Pty Ltd (GE) claimed against all four defendants for monies allegedly owing under a credit facility arrangement and related Secured Guarantees, and sought summary judgment. In June 2001, GE approved a $500,000 credit facility for Brevtex, conditional upon four Secured Guarantees and four Acknowledgements of Guarantor (signed by the appellant and Mr Leslie, one each for the companies and one for each of them in their personal capacities). GE also required caveats to be placed on three properties owned by the Leslies. Between 2002 and 2004, the credit limit was progressively extended and further Guarantees and Acknowledgements were provided, purportedly signed by the appellant and Mr Leslie. In February 2004, GE advanced money to the appellant to purchase a property at 59 Hobbs Ave Dalkeith, in return for the Leslies discharging the registered mortgage over one of the properties that was the subject of the original credit transaction. At trial, the appellant and Mr Leslie deposed to several facts including:* The appellant played no part in the management or decisions of the companies of which she was a director.
* The appellant signed cheques and documents for the companies when Mr Leslie asked her to, without reading or understanding them.
* The appellant claimed that she never believed or understood that the documents she signed would put her personal assets at risk.
* The appellant was unaware that the money for purchasing 59 Hobbs Ave came from GE or that it was related to the credit transaction.
* Mr Leslie corroborated his wife’s evidence and also stated that the appellant was unaware of the credit limit increases. Mr Leslie gave evidence that he had inserted the appellant’s signature on the further Guarantee Acknowledgements, including on one occasion in the presence of a manager of GE.

At trial, the Judge considered whether there were any arguable defences available to the appellant, including unconscionable conduct, undue influence or breach of duty of care by GE. In relation to the original credit transaction, the primary judge rejected the appellant’s evidence that she did not know or understand what she was signing, holding that any adult of average intelligence understands the meaning of the word ‘Guarantee’. The Judge also found that the appellant was not under a special disability in relation to GE, that the appellant failed to establish undue influence by her husband and that GE did not owe the appellant a duty of care to ensure that she was independently advised. In relation to the increase of the credit limit above $500,000 the judge found the appellant to have an arguable case, based on Mr Leslie’s evidence.Blaxell J granted summary judgment against the appellant for $500,000 and ordered her to execute a legal mortgage over the property at 59 Hobbs Ave Dalkeith. His Honour also entered summary judgment against Brevtex, Seabay and Mr Leslie for $1,514,173 (these 3 defendants had no arguable defence in relation to the credit limit increases). There were no appeals from the other 3 defendants. The appellant appealed on the grounds that the trial judge erred in not finding that there was a triable issue. **(c) Decision** The Court of Appeal’s decision was delivered by McLure JA, with Steytler P and Buss JA in agreement. The court held that the appellant had a number of arguable defences to GE’s claim and therefore the primary Judge erred in granting summary judgment to GE.The court noted that the primary judge had correctly applied the legal principles governing an application for summary judgment and agreed with Blaxell J’s observation that:"The power to grant summary judgment must be exercised with great care, and should never be exercised unless it is clear that there is no real question to be tried (Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87,99). In order to obtain leave to defend, all a defendant need do is show that there is an arguably good defence or that the case ought to be heard (Clarke v Union Bank of Australia Ltd (1917) 23 CLR 5, 8). Even when the facts asserted are inconclusive, if it is not possible to say without doubt on the whole of the material that there is no question to be tried, there should be leave to defend (Fancourt (ibid) at 99)."The court found that the primary Judge failed to consider all the defences that arose on the evidence, in particular the principle in Yerkey v Jones (1939) 63 CLR 649, and also that the Judge erred in summarily rejecting the appellant’s evidence as to non-understanding of the documents. The evidence should have been properly assessed in the context of the relationship between GE and the Leslies, including the fact that one of the Secured Guarantees contained unusual commercial terms and was not a straightforward guarantee. Considering the circumstances in which the appellant signed the documents and the scope of her alleged obligations, the evidence should not have been summarily rejected.The court also found that the primary Judge’s focus on equitable unconscionability was too narrow, since the Judge only considered principles laid down by the High Court in Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447. The court stated that the principle in Yerkey v Jones was distinct from the Amadio doctrine and followed the High Court’s decision in Garcia v National Bank of Australia Ltd (1998) 194 CLR 395, which held that the Yerkey principle continues to apply post-Amadio. This appeal did not specifically apply Yerkey v Jones to the facts of the case, but the court held that there was an arguable case that GE breached the Yerkey principle.The court also held that there were arguable issues in relation to the proper construction of the Secured Guarantee, including the extent to which the Guarantee can be taken to alter the terms of the primary credit agreement and whether or not that Guarantee applied to the purchase of the Hobbs Ave property.For the above reasons, the court found that the appellant had arguable defences to GE’s claim and that the primary Judge erred in ordering summary judgment. The Judge’s orders were set aside and the court made special orders relating to the Hobbs Ave property.etailed Contents**5.4 Application to discharge examination summons filed by special purpose liquidator fails** (By Liam Gilchrist, Blake Dawson Waldron) Onefone Australia Pty Ltd v One.Tel Ltd [2007] NSWSC 268, Supreme Court of New South Wales Equity Division, Barrett J, 27 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc268.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc268.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 Special Purpose Liquidator of One.Tel (SPL) successfully applied for an examination summons requiring relevant individuals to attend examinations in relation to the cancellation by the One.Tel Board of a $132 million renounceable rights issue that occurred on 29 May 2001. The present proceedings were brought by five of the examinees seeking a discharge of the examination summons. Barrett J dismissed the applications, concluding that the SPL was undertaking the examinations on the perfectly legitimate basis of seeking further information in order to determine the strength and viability of any potential causes of action available.**(b) Facts** On or about 29 May 2001, One.Tel, now in liquidation, decided not to proceed with a $132 million renounceable rights issue that had already been announced to the market. Because the liquidators who had been appointed to One.Tel faced a potential conflict of interest in relation to this event, a special purpose liquidator (SPL) was appointed to One.Tel by order of the court on 23 December 2003 to examine whether this particular event could give rise to any causes of action.A key issue in any such cause of action involved the timing of the insolvency of One.Tel, and in particular whether, at the time the decision not to proceed with the rights issue was made, One.Tel was already insolvent and would have remained insolvent even if the rights issue had proceeded. It was expected that this would also be a key issue in a case that had already been initiated by the Australian Securities and Investments Commission, ASIC v Rich, judgment in which is still to be handed down.It was therefore decided that the SPL would not proceed with any examinations until the outcome of ASIC v Rich was known. As the various causes of action being considered by the SPL under the [Fair Trading Act 1987 No. 68 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=3955" \t "_default) and section 588FB(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) expired three years from the date of the transaction (the transaction date being in May 2001), the potential examinees gave an undertaking to the court that they would not plead any limitations of action defence to any action brought within 6 years after the relevant transaction (extending the relevant time to May 2007). A court order was made under section 588FF(3) to extend the period of limitation for an action brought under section 588FB(1).It was consequently determined that the SPL would not seek to examine any relevant persons until the earlier of the outcome of ASIC v Rich becoming known, or the date six months before the extended expiration date of the causes of action. In December 2006, as the decision in ASIC v Rich was not yet handed down, the SPL filed an interlocutory process seeking the issue of examination summons for various individuals under Part 5.9 of the Corporations Act. The application was granted on 21 February 2007.The examinees applied for a discharge of the summons, which was the subject matter of this case.**(c) Decision** The applicants' argument was that the examination summons should be discharged on the basis that they were "oppressive, unfair or an abuse of process". In his approach to this question, Barrett J was guided by the analysis of Buchanan JA in Sent v Andrews (2002) 6 VR 317 at 320:"Where an examination relates to proposed or current litigation, in general terms the question is whether the examination is genuinely for the information of the liquidator to aid him in considering whether there is a cause of action upon which he will proceed; and the court will be alive to the possibility of oppression where the application is merely to advance the action, whether actual or proposed…" (citations omitted).The applicants had three major lines of argument, all of which were dismissed by Barrett J.**(i) Previous examination of the applicants**Two of the applicants argued that their examination summons should be discharged because they had already been examined by the other One.Tel Liquidators, and by ASIC under section 19 of the [Australian Securities and Investment Commission Act 2001 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "_default) in relation to the relevant matters, so it was not necessary for the SPL to examine them further. This argument was rejected on the basis that evidence from the previous examinations provided a sound basis for an inference that the applicants knew relevant information that they had not yet disclosed.**(ii) The SPL had no grounds for an action under section 588FE of the Corporations** The next argument of the applicants was that the potential action that the SPL may consider taking under section 588FF(1) of the Corporations Act, under which the court would be able to make various orders if it was satisfied that the decision not to go ahead with the renounceable rights issue could be deemed to be an insolvent transaction under section 588FC, was unfounded. The key aspect of this argument was that if One.Tel was already insolvent by more than $132 million at the date the decision to cancel the renounceable rights issue was made, then the transaction could not be deemed to have resulted in One.Tel's insolvency. However without examining this issue in detail, Barrett J stated that at this stage it was not necessary to analyse the strengths of any potential proceedings against the examinees, since it is sufficient that the SPL is conducting the examinations in order to seek further information to assist the SPL in deciding what potential causes of action may be available. **(iii) Any examinations should await the outcome of ASIC v Rich**The applicants also argued that the examinations should not proceed until ASIC v Rich is determined, since that case goes to a key issue in any proceedings that may be brought by the SPL. The applicants submitted that the SPL would not be prejudiced by such delay because the applicants were prepared to extend the time period for the limitations of action to six months after the ASIC v Rich decision becomes known. Barrett J rejected this argument on the basis that it was not free from doubt whether the court order previously granted to extend the limitations period under section 588FF(3) of the Corporations Act could subsequently be varied, since on a plain reading of the section, it is arguable that any application or order to extend the limitation period must be made within three years of the relation-back day, which had now passed. His Honour concluded that this uncertainty meant that whether the SPL could subsequently rely on a further time extension, even if agreed to by the applicants, was not “so free from doubt that it would be unreasonable, irrational or oppressive for a liquidator offered consent to the making of such a varying order not to accept the offer, rather than pressing on with his investigations”. **(iv) Conclusion**The court did not discharge the examination summonses, concluding that the SPL was not using the examinations for an improper purpose, and to proceed with the examinations was not unfair or oppressive. The court also briefly dismissed two further related applications of the applicants to disclose the affidavit filed in support of the application for the examination summonses under section 596C, and to restrict the scope of the examinations to matters concerning the cancellation of the rights issue on 29 May 2001.etailed Contents**5.5 Directors’ fiduciary and statutory duties of disclosure when notifying shareholders of general meeting and shareholder’s claims to inspect books of company** (By Ben Morawetz, Freehills)ENT v Sunraysia [2007] NSWSC 270, New South Wales Supreme Court, Austin J, 27 March 2007The full text of the judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc270.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc270.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 directors of a company sent a notice of meeting to shareholders regarding the sale of the whole of the issued share capital in its wholly owned subsidiary. The plaintiff shareholder sought to enjoin the holding of the meeting, on the grounds that the notice of meeting had not complied with the directors’ fiduciary duty of full and fair disclosure, had contravened the disclosure requirements in section 249L(3) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (Corporations Act), or had constituted misleading and deceptive conduct under section 52 of the [Trade Practices Act 1974 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default). The plaintiff also sought to lift an order limiting the use of certain books that had been allowed for inspection on a limited basis in a previous hearing.Austin J found that the directors had failed to discharge their fiduciary duty to provide full and fair disclosure in relation to the notice of company meeting, and that as such, in the absence of corrective disclosure, the meeting should not proceed to substantive business. Austin J also agreed to lift the limitation order in relation to the inspected documents.**(b) Facts**The directors of Sunraysia Television Limited (Sunraysia) called a general meeting of the company’s shareholders to approve the sale of business of its wholly owned subsidiary and main undertaking, Swan Television & Radio Broadcasters Pty Ltd (Swan TV), to PBL Media Pty Ltd (PBL). Sunraysia’s directors supported the sale of Swan TV, and intended to propose a share buy-back of all the company’s issued shares with the sale’s proceeds. While not formally a takeover of Sunraysia for the purposes of Chapter 6 of the Corporations Act, the sale and subsequent share buy-back had a similar economic effect, given that Swan TV represented 95% of Sunraysia’s net consolidated assets and 99.7% of its revenue.In calling the meeting, the directors sent a notice of meeting together with an Explanatory Memorandum, a letter from the chairman, and a document entitled “Frequently Asked Questions” (explanatory material). The explanatory material outlined, among other things, the directors’ unanimous recommendation of the proposed sale, the book value of Swan TV’s assets and liability which exposed its poor recent financial performance, and various details relating to the proposed share buyback in the event that Swan TV was sold.The plaintiff, ETN Pty Ltd (ETN) held approximately 26.7% of the issued shares in Sunraysia. ETN brought proceedings to obtain a final injunction to enjoin the general meeting, based on an alleged lack of information in the explanatory material regarding the sale of Swan TV. In a first hearing before Austin J, certain books were allowed for inspection by the plaintiff, but limited to use for the purposes of pursuing the injunction application and deciding whether to attend the shareholder meeting and/or vote in favour of the sale proposal. The application was then heard on a final basis on 23 March 2007.**(c) Decision****(i) Duties of disclosure in notification of general meeting**Austin J noted that, in this instance, there was no contravention of section 249L(3) of the Corporations Act (which requires information in a notice of meeting to be “worded and presented in a clear, concise and effective manner”), as the alleged problems with the notice of general meeting did not stem from any lack of clarity or expression in the notice, but rather from a “failure to make adequate substantive disclosure of material matters.” As such, his Honour held that the allegations were better addressed by examining the director’s fiduciary duty of disclosure and the law of misleading and deceptive conduct under section 52 of the Trade Practices Act.In relation to the directors’ fiduciary duty, Austin J reviewed the authorities and noted that:* where directors urge, recommend or advise members to exercise powers in general meeting, they are in general required to make full and fair disclosure of all matters within their knowledge which would enable the members to make a properly informed decision: Bulfin v Bebarfald’s (1938) 38 SR (NSW) 423;
* the question to be asked is what effect the documents will have on the ordinary shareholder who scans or reads the document quickly as an ordinary man or woman in commerce or as an ordinary investor. If a deficiency is identified, the court should consider whether any reasonable grounds exist for supposing that the deficiency would cause shareholders to vote, or abstain from voting, under a serious misapprehension of the position: Devereaux Holdings Pty Ltd v Pelsart Resources NL (No 2) (1985) 9 ACLR 956;
* the adequacy of the information provided in documentation is to be assessed in a practical, realistic way having regard to the complexity of the proposal: Fraser v NRMA Holdings Ltd (1995) 55 FCR 452 at 468; and
* the need to make full and fair disclosure must be tempered by the need to present a document that is intelligible to reasonable members of the class to whom it is directed and is likely to assist rather than to confuse: Devereaux Holdings at 959.

In this context, Austin J also noted that there is a close relationship between the directors’ fiduciary duty of disclosure and the application of section 52 of the Trade Practices Act, and that disclosure was also required pursuant to ASX Listing rule 11.2 which regulates the circumstance where an entity disposes of its main undertaking. His Honour also noted that, given that the sale proposal and the proposed buy-back of shares were part of a two-step process, the directors were required to provide adequate disclosure in relation to the buy-back as well as the sale of business.Following the principles cited above, Austin J held that the Sunraysia notice of general meeting was deficient in a number of respects, and that these deficiencies were significant enough to cause a serious misapprehension amongst shareholders voting or abstaining from voting on the sale of business matter. In particular, his Honour found that the directors should have disclosed:* whether they believed that the sale price was a fair price for Swan TV, and the basis for that opinion (particularly given that the sale proposal was planned to precede a cash distribution to shareholders by way of a share buy-back);
* the historical trading information of the company, if the directors had formed their opinion as to the value of the subsidiary and the adequacy of the sale price based on that historical trading information;
* whether they were aware of any circumstances likely to give rise to claims under the warranties in the Share Purchase Agreement (and if so, what those circumstances were, whether they had any belief as to whether substantial claims were likely, and if they did, what their belief was and the basis for it);
* a number of issues in relation to the proposed buy-back of shares following the sale proposal, including whether the buy-back would be selective or an equal access scheme, how the amount distributed in the buy-back would be calculated, and general advice relating to the tax effect of the proposals.

As such, Austin J ordered that, unless corrective disclosure was implemented by the Board, the general meeting should not proceed to substantive business.**(ii) Limitation on use of information obtained from inspection of books**Austin J held that the limitation order passed at the first hearing, which restricted the use of information obtained from an inspection of the defendant’s books to pursuing the injunction application and deciding whether to attend the shareholder meeting and/or vote in favour of the sale proposal, should be removed. In reaching this conclusion, Austin J placed weight on the fact that the plaintiff had tendered minutes of a meeting which showed that it had sought inspection of the books in good faith and for a proper purpose, as required by section 247A(1) of the Corporations Act. A further consideration, in relation to one of the documents, the Share Purchase Agreement between Sunraysia and PBL, was that “the information that might be particularly sensitive in a takeover context cannot be readily isolated so as to be the subject of a special limitation, and indeed any order limiting the use of the information contained in the Agreement to certain purposes excluding any takeover-related purpose would be impossible to administer.”More generally, while the defendant had argued that the limitation on use was necessary due to the sensitive nature of the documents and the possibility of their use in a takeover context, Austin J noted that, in Unity APA Ltd v Humes Ltd [1987] VR 484, the court held that a limitation order should not be made merely to allay a defendant’s fears that information sought for a proper primary purpose might also be used improperly. Similarly, the fact that the plaintiff may benefit from inspection for some other purpose was not sufficient to warrant a limitation order (see Acehill Investments Pty Ltd v Incitec Ltd [2002] SASSC 344 at [29]).etailed Contents**5.6 Strict proof of service required for extension of time application** (By Kristy Zander, Senior Associate, Clayton Utz)In the Matter of Harris Scarfe Limited (Receivers & Managers Appointed) (In Liquidation); Dwyer v Canon Australia Pty Limited [2007] SASC 100, Supreme Court of South Australia, Debelle J, 23 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc100.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc100.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 liquidators failed to prove that service of important court documents had been properly effected. In particular, the court required evidence that the particular documents had actually been posted. Evidence of the office practices pursuant to which the documents would have been posted was not sufficient. The court also required evidence, in relation to service by facsimile, that the documents were actually received by the intended recipient in complete and legible form. Proof that the facsimile was correctly addressed and that the correct number of pages had been transmitted without an error report was not sufficient.**(b) Facts**The liquidators of Harris Scarfe were granted an order, pursuant to section 588FF(3) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) extending the time within which they could commence preference claims under section 588FF against a number of creditors of Harris Scarfe (one of whom was Canon Australia Pty Limited ("Canon")).The extension of time was granted by a Master of the court, on the basis that the affected creditors had been served with the extension application. The solicitors for the liquidators said that they had served notice of the application by post and facsimile on Canon's registered office. They had sent 27 other such applications to various creditors in the same way on the same day.Canon claimed that it had not been served with the extension application and sought to set the extension order aside.**(c) Decision**Justice Debelle held that the liquidators had not adequately proved service of the documents, either by post or facsimile. Accordingly, his Honour set aside the order made by the Master extending the time in which the liquidators could commence a preference claim against Canon, although the liquidators were granted liberty to serve the extension application again.**(i) Service by post**To prove service by post, the liquidators had to prove that the documents were contained in an envelope that:* was properly addressed to Canon at its registered office;
* had pre-paid stamping; and
* was posted as a letter.

If the liquidators were able to prove the above matters, service would have been presumed to have been effected at the time at which the letter would be delivered in the ordinary course of post, in accordance with the presumptions in section 109X of the Corporations Act 2001 (Cth) and section 29 of the [Acts Interpretation Act 1901 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "_default).Canon would only have been able to rebut the presumption if it could prove that the documents were not delivered. In this case, Canon could prove that it did not receive the documents, but could not prove non-delivery. Justice Debelle noted that non-receipt is not necessarily the same as non-delivery, and that proof of non-delivery is required to rebut the presumption.However, whilst the liquidators were able to prove that the documents were properly addressed to Canon at its registered office, they were not able to prove that the envelope had actually been posted.The liquidators relied on an affidavit sworn by their solicitor, who deposed to the Firm's office practice for posting letters. However, the solicitor was not able to depose to the actual posting of the specific documents in question. In fact, the solicitor could only swear that she had drafted the letter and asked her administrative assistant to have it signed by her supervising partner and posted, and that the letter had not been returned by the postal service as undeliverable. The court held that was not sufficient to prove that the documents had actually been sent by post. Accordingly, the liquidators were not entitled to rely on the presumption of service by post.**(ii) Service by facsimile**The liquidators claimed that the documents were also served by facsimile.The court held that service by facsimile would be a permissible form of service if the liquidators could prove that the documents sent by facsimile were received by Canon in complete and legible form.Since the presumptions regarding service by post did not apply to service by facsimile, it was not sufficient for the liquidators to prove that the documents had been sent by facsimile; they had to prove that the documents were actually received by Canon.The court held that, even though the liquidators could prove, by way of a transmission sheet, that the facsimile had been sent to the correct facsimile number and that all 20 pages were marked as having been sent without error that was not sufficient to prove that the facsimile was actually received in a complete and legible form by Canon. His Honour referred to the "common experience" that, not infrequently, blank or illegible pages may be received by facsimile due to human or mechanical error. His Honour did not indicate what the liquidators could have done to prove that Canon received the facsimile, short of an admission or acknowledgement of receipt by Canon.etailed Contents**5.7 Can a stayed costs order be a due and payable debt for the purposes of winding–up?** (By Myles Tehan, Mallesons Stephen Jaques)Australian Beverage Distributors Pty Ltd v Evans & Tate Premium Wines Pty Ltd [2007] NSWCA 51, New South Wales Court of Appeal, Beazley, Hodgson and Santow JJA, 22 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswca57.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswca57.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 New South Wales Court of Appeal (“Court”) (Beazley JA, Hodgson and Santow JJA agreeing) confirmed that a stay of a costs order does not transform the status of the costs order as a debt that is presently payable. Consequently, it is possible to bring an action for the winding-up of a company based upon a debt arising from such a costs order.The court also considered when an action for winding-up will constitute an abuse of process.**(b) Facts****(i) The parties**Australian Beverage Distributors Pty Ltd (“ABD”) is a wine distributor which purchased stocks of wine from Evans & Tate Premium Wines Pty Ltd (“ETPW”). Evans & Tate Limited (“ET”), the parent company of ETPW, had executed a Deed of Cross-Guarantee in relation to ETPW.**(ii) Prior proceedings**There was a series of proceedings which led to the court’s decision.In 2004, ETPW served a statutory demand on ABD under section 459E of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (“the Act”), seeking payment of a debt of approximately $217,000. The debt arose from goods which ETPW had sold and delivered to ABD. ABD alleged an off-setting claim of approximately $244,000, and sought to have the demand set aside. The application to set aside the demand was rejected, as ABD could only establish an off-setting claim of approximately $84,000.ABD did not pay the balance of the debt alleged in the statutory demand, giving rise to a presumption of insolvency. ETPW filed an application for ABD to be wound up. However, ABD proved its solvency, and the winding-up application was dismissed. ETPW was ordered to pay ABD’s costs of the winding-up proceedings (approximately $80,000), and ABD was ordered to pay ETPW’s costs of the statutory demand proceedings (approximately $17,000).Before the costs judgment was executed, ABD brought proceedings in the District Court of New South Wales for damages for breach of contract (“District Court proceedings”). That claim was based upon the same circumstances upon which ABD had relied when it sought to have the statutory demand set aside.In 2006, ABD commenced winding-up proceedings against ETPW and ET in the Equity Division of the New South Wales Supreme Court. ETPW and ET sought to have these winding-up applications summarily dismissed. ETPW also sought to have ABD restrained from executing the earlier costs order. At first instance, White J ordered that the costs orders be stayed until the final determination of the District Court proceedings. His Honour also dismissed the winding-up applications against both ET and ETPW. The Court of Appeal’s judgment which is the subject of this casenote concerned appeals from these orders made by White J.**(c) Decision****(i) The granting of a stay of the costs order**White J granted a stay of the costs order, pending the determination of the District Court proceedings.Beazley JA held that White J’s discretion to order the stay had miscarried, inter alia, because the costs order was a debt that was separate from the other debts in the District Court proceedings, and could not be used as a set-off against those disputed debts.As a result, the order to stay the costs order was overturned. Nonetheless, the court considered the effect which a stay, if valid, would have had on the winding-up application.**(ii) The effect of the stay of the costs order**White J held that the stay of the costs order meant that ABD would lose its status as a creditor of ETPW. Consequently, it was not able to bring a winding-up application under section 459, because it was not a contingent or prospective creditor pursuant to section 459P(1)(b) of the Act.Beazley JA overturned this finding. Her Honour referred to a line of authority that an order which restrains the enforcement of a judgment debt does not mean the debt ceases to be one that is due and payable. As a result, Beazley JA held that ABD was entitled to a debt presently payable, and so had standing under section 459P(1)(b) to bring the application.**(iii) Abuse of process**White J held that filing an application to wind-up ETPW in circumstances where there was a dispute as to the enforceability of the debt, and as to the debt itself, constituted an abuse of process by ABD.Beazley JA held that there was no dispute as to the enforceability of the debt. There had already (in the earlier proceeding resulting in the costs order) been an adjudication as to the indebtedness of each party, and so ABD’s filing of the application did not constitute an abuse of process.Further, Beazley JA found that ABD’s application was based on the debt arising from the order for costs, and not the debt that was the subject of the District Court proceedings. As long as ABD was of the opinion that ETPW was insolvent without taking into account the disputed debt, then the court should allow the winding-up application to proceed. Beazley JA found that ABD held this belief, hence White J erred in dismissing the application on that ground.White J also held that ABD’s subjective intention in making the application was to either deter ETPW from pursuing its claim to stay the enforcement of the costs order, or to persuade a liquidator not to pursue a claim for a stay, or in retaliation against ETPW for bringing such a claim. Each of these purposes, according to White J, constitutes an abuse of process.While Beazley JA agreed that each of those purposes would constitute an abuse of process, her Honour disagreed that ABD’s subjective intention was as White J had construed it. Amongst other things, her Honour considered the action of ABD in releasing a press statement about the litigation was merely an example of a party in legal proceedings seeking to place itself in a more advantageous position than its opponent. Without more, such action cannot constitute an abuse of process.**(iv) The Publication Rule**Rule 5.6 of the [Supreme Court (Corporations) Rules 1999 No. 703 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=19658" \t "_default) (“Rules”) provides that a party seeking to wind up a company must publish a notice of the application. The Rules further specify that the notice must be published at least 3 days after the originating process is served on the company.The in-house legal counsel for ABD issued a press release to the West Australian newspaper on the afternoon that the winding-up notice was filed and served. Amongst other things, the release stated that ABD was of the opinion that the value of shares in the ET group were “worthless as evidenced by the financial accounts”.Beazley JA upheld White J’s finding that the Rules contained an implied restraint on advertising a winding-up application in any other way, and that ABD’s press release had breached this restraint.Section 467A of the Act provides that a winding-up application could not be dismissed merely as a result of a “defect or irregularity”. White J held that the breach of the restraint was more than a defect or irregularity, and so the application could be dismissed.Beazley JA disagreed. However, her Honour held that as ABD’s statement was intended to cause harm, White J was able to exercise his discretion to dismiss the application. This discretion arose because the actions of ABD had caused substantial injustice to ETPW and could not be otherwise remedied.**(v) The final result**The court upheld White J’s dismissal of ABD’s application for the winding-up of ETPW. However, White J’s stay of the execution of the costs order was overturned, and ET and ETPW were ordered to pay 75 per cent of ABD’s costs of the appeal. The court also set aside the orders which restrained ABD from bringing another application for winding-up based on the same debt.etailed Contents**5.8 Execution of deeds and obligations under loan agreements, mortgages and guarantees** (By Anita Siassios, DLA Phillips Fox)Gibbons v Pozzan [2007] SASC 99, Supreme Court of South Australia, Full Court, Duggan J, Gray J and White J, 22 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc99.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc99.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**Pozzan, the respondent, commenced an action against Gibbons, the appellant, seeking payment of the sum of $300,000 plus interest, together with an order for possession of three properties (“Properties”) which had been mortgaged by Gibbons to Pozzan. Pozzan had provided a loan to Kangaroo Island Ferries Pty Ltd (“KIF”), a company associated with Gibbons and Gibbons had acted as guarantor for the loan and had mortgaged the Properties as security. KIF was subsequently placed in liquidation. The trial judge gave judgment for Pozzan, and on appeal, it was argued by Gibbons that the trial judge should have found that the loan agreement was ineffective and that the memorandum of mortgage was unenforceable.Gibbons argued that: * the terms of mortgage between him and Pozzan were inconsistent with the terms of the loan agreement, which consequently made the mortgage unenforceable;
* the loan agreement was not properly executed in accordance with section 127 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) (“Act”);
* section 41(4) of the [Law of Property Act 1936 No. 2328 (SA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28637" \t "_default) was inconsistent with section 127 of the Act;
* his obligations as guarantor had been discharged due to a lack of consent to a later variation to the loan agreement; and
* the default interest rate under the mortgage agreement was a penalty.

The Full Court unanimously dismissed the appeal for the reasons outlined below.**(b) Facts**In September 2004, KIF, a company associated with Gibbons, purchased a vessel and established a new ferry service between Sunset Cove Resort and Kangaroo Island. The ferry service ceased operating at about the time of the appointment of an administrator of KIF, on 3 February 2005. KIF obtained a $300,000 loan from Pozzan in order to provide part of the funding necessary to establish the business. The particulars of this loan were entered into a document titled 'deed of loan agreement' ("Loan Agreement"), and executed on 28 November 2003. Gibbons is referred to as the guarantor in the Loan Agreement, under which he offered the Properties as security for repayment of the loan. Although Gibbons is referred to as the 'guarantor', there are no terms in the Loan Agreement which amount to a contract of guarantee. The only obligation placed upon Gibbons under the Loan Agreement is to execute documents so as to ensure that the loan is secured by the mortgage over the Properties. There is no reference in the Loan Agreement to the terms upon which the Properties are to be mortgaged. On 16 July 2004, Gibbons executed a memorandum of mortgage ("Mortgage"), under which Gibbons mortgaged the Properties in favour of Pozzan, as consideration for the loan by Pozzan to KIF. The Mortgage imposed a primary liability on Gibbons as mortgagor to repay the principal sum on the date of the termination of the loan.The loan was not paid by KIF by the due date in November 2004. Pozzan attended a meeting with three KIF directors in early December 2004, at which Gibbons was also present. At this meeting, it was revealed that KIF did not have sufficient funds to repay the loan and the company requested an extension of time to make the repayment. At this time, Pozzan agreed to an arrangement whereby the money would be paid back in three monthly instalments from December 2004 through February 2005. Evidence presented to the trial judge showed that at this meeting Gibbons commented that "everyone is exposed" as a result of the non-payment by KIF. **(c) Decision****(i) Were the terms of mortgage inconsistent with the terms of the Loan Agreement, consequently making the mortgage unenforceable?**The terms of the Loan Agreement required KIF to repay the principal sum of $300,000 and interest on or before the termination date of the loan. The Loan Agreement stated that where there was any inconsistency between the provisions of the Loan Agreement and those contained in any security agreement, the Loan Agreement was to prevail. Gibbons argued that there was an inconsistency between the Loan Agreement and the Mortgage, as the Loan Agreement contemplated that he was under a secondary obligation as a guarantor (that would not be activated unless there was a default by KIF), whereas the mortgage imposed a primary liability on Gibbons as mortgagor to repay the principal sum on the date of the termination of the loan. As a result, Gibbons argued that the principal obligation provided for in the Mortgage had no effect. Justice Duggan, in writing the majority opinion, found that the Mortgage was not inconsistent with the Loan Agreement, that the mortgaging of the Properties was to be interpreted in accordance with the Loan Agreement, and that Gibbons therefore incurred the primary obligation. His Honour considered that the imposition of a primary obligation on the mortgagor to pay the loan ensured the effectiveness of the security which had been given, albeit that it did not do so by way of a secondary obligation. Pozzan’s undertaking in the mortgage was in the nature of an indemnity which imposed an original and not a collateral obligation. Further, Justice Duggan found that although the appellant is described as a 'guarantor' in the Loan Agreement, there is no provision in that agreement which would require the subsequent mortgage to provide for a secondary as opposed to a primary obligation on the mortgagor in relation to the loan monies.**(ii) Was the Loan Agreement properly executed in accordance with section 127 of the Act?**Gibbons then argued that the Loan Agreement was ineffective because it had not been properly executed by KIF as a deed, and therefore there was no liability by way of the guarantee. Gibbons asserted that the Loan Agreement had not been worded and executed in accordance with section 127 of the Act, and therefore it was an ineffective document. The Loan Agreement had not been executed under seal, but had been signed on behalf of the sole director and company secretary at execution, thus satisfying section 127(1)(c) of the Act. However, Gibbons argued that the document did not explicitly contain the words "executed as a deed", and was therefore in breach of section 127(3) of the Act. Section 127(3) of the Act provides that a company may execute a document as a deed if the "document is expressed as a deed" and is executed in accordance with the other provisions of that section.Justice Duggan's opinion determined that the precise phrase "executed as a deed" as used in the Act did not need to be included in the document to comply with section 127(3), interpreting that section 127 permitted the court to look to the substance and intention of the document, and that it dispensed with certain common law formalities which were originally required for the execution of a deed.Justice Duggan noted that the phrase "expressed to be executed as a deed" is wide enough to refer not only to the title of the document, but to the wording of other parts of the document such as the testatum, the testimonium and the attestation clauses. His Honour noted that the title, recital and testatum sections referred to a "deed" and in the body of the document it was described as both a "deed" and an "agreement", although the word "agreement" dominates.The court determined that when the Loan Agreement was read in its entirety, it supported the trial judge's conclusion that it had been adequately expressed to be executed as a deed. In supporting its conclusion, the court referred to the trial judge's reliance on section 41(4) of the Law of Property Act 1936 (SA), which provides that the execution will be valid if there is external evidence to the deed to support that the party intended to be bound by it. Justice Duggan further stated that he saw no reason why the Loan Agreement could not take effect even if it was not a deed, as it was nonetheless considered to be an agreement under hand, and there was no statutory requirement for the document to be under seal. Furthermore, there was a clear intention to create a legal relationship, the parties had expressed the terms of their agreement in writing, and the requirement for consideration had been met. **(iii) Is section 41(4) of the Law of Property Act 1936 (SA) inconsistent with section 127 of the Act?**Gibbons then argued that there was an inconsistency between section 41(4) of the Law of Property Act and section 127 of the Act, and that the State act was invalid to the extent of the inconsistency, by operation of section 109 of the Commonwealth Constitution. The court concluded that there was no inconsistency between the Law of Property Act and the Act, finding that section 127 was solely concerned with defining methods of execution of documents which may be adopted by a company. Conversely, section 41(4) of the Law of Property Act permitted the validation of a defective execution in the event that there is evidence that the party who attempted to execute the document, but did so in an incorrect manner, intended to be bound by it. Accordingly, the court found that the South Australian provision was a valid enactment.**(iv) Were Gibbons’ obligations as guarantor discharged due to a lack of consent to variation?**Gibbons argued that as a result of the variation of the Loan Agreement by the extension of time for repayment, he, as guarantor under the Loan Agreement, should be discharged from liability under the agreement, as the variation had occurred without his consent. Gibbons referred the court to the majority decision of Mason ACJ, Wilson, Brennan and Dawson JJ in Ankar Pty Ltd v National Westminster Finance (Aust) Ltd (1987) 162 CLR 549 which established that a guarantor's rights are discharged when conduct on the part of a creditor has the effect of the altering the guarantor's rights. However, liability will not be affected if the guarantor consents to the variation.Gibbons' argued that the creditor, by varying the principal contract or extending time, had altered the surety's rights without consulting it, and that it was not permitted to do so. The evidence before the trial judge indicated Gibbons was present at the meeting between Pozzan and the three KIF directors in early December 2004, and that Gibbons commented at this meeting that "everyone is exposed" as a result of the non-payment. The court dismissed Gibbons' argument based on the evidence before the trial judge, concluding that the trial judge correctly found that any variation was with the consent of Gibbons. Accordingly, the court held that Gibbons' obligations as guarantor were to stand.**(v) Was the default interest rate under the mortgage a penalty?**Both the Mortgage and the Loan Agreement provided that the interest rate to be charged on the loan amount was to be 20%, however, the rate was reduced to 13% if payments were made on time. Gibbons argued that this should be considered a penalty, and this would therefore render the clause ineffective. His Honour determined that the provisions in the Loan Agreement and the Mortgage relating to the interest provided an incentive for punctual payment. Accordingly, consistent with the principles established in David Securities Pty Ltd v Commonwealth Bank of Australia (1990) 23 FCR 1, the default interest clause was not considered to be a penalty, and was therefore not rendered ineffective.The Full Court therefore unanimously dismissed the appeal.etailed Contents**5.9 Liquidators obtaining the benefits of orders made on application by previous liquidators** (By Mark Cessario, Corrs Chambers Westgarth) Gazal Apparel Pty Ltd v Davies [2007] SASC 91, Supreme Court of South Australia, Doyle CJ, Duggan and David JJ, 16 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc91.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/march/2007sasc91.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**These proceedings concerned claims made by the current liquidators of Harris Scarfe Limited and Harris Scarfe Wholesale Limited (collectively “Harris Scarfe”) that certain transactions were voidable transactions under section 588FE of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), and in which the current liquidators sought payment of moneys by Gazal Apparel Pty Ltd (“Gazal”) under section 588FF of the Corporations Act.Section 588FF (3) requires such proceedings to be commenced within 3 years of the relation-back day, or such other period as the Court orders on an application under section 588FF(3)(b) by the liquidator within those 3 years.The current proceedings were not commenced within the 3 year period. However, the previous liquidators of Harris Scarfe obtained an order extending the time in which the proceedings could be commenced. That order allowed “the plaintiffs” to commence the proceedings within the extended period.When the proceedings were commenced by the current liquidators Gazal sought to strike out the Statement of Claim, or obtain a permanent stay of the proceedings, on the basis that the order was only made for the benefit of the original liquidators and could not be relied on by the current liquidators.At first instance, the argument was rejected and it was held that the current liquidators could rely on the extension of time order.On appeal, the same conclusion was reached on the basis that it was sufficient that the application for the extension of time was made by the liquidator of Harris Scarfe, and that the current proceedings were commenced by the liquidators of Harris Scarfe. It did not matter that there was a change in the person occupying the office of liquidator.**(b) Facts**Mr Davies and Mr Nicol were the current liquidators of Harris Scarfe. The current liquidators were appointed as liquidators of Harris Scarfe in January 2005, after the removal of the original liquidators.In September 2005 the current liquidators commenced these proceedings against Gazal claiming that certain payments were insolvent payments for the purposes of section 588FC of the Corporations Act, or were unfair preferences for the purposes of section 588FA, and were therefore voidable transactions by virtue of section 588FE. The current liquidators sought payment of the moneys under section 588FF(1).Section 588FF(3) provides that:“An application under subsection (1) may only be made:(a) within 3 years after the relation-back day; or(b) within such longer period as the court orders on an application under this paragraph made by the liquidator within those 3 years.”The current proceedings were not issued within 3 years of the relation-back day.However, on 31 March 2004 (which is within the 3 years after the relation-back day), the original liquidators of Harris Scarfe made an application to extend the time in which proceedings could be commenced under section 588FF.On 14 April 2004 a Master made orders, including the following order:“The period within which the plaintiffs may make an application under s 588FF(1) of the Corporations Act 2001 with respect to transactions alleged by them to be or to possibly be voidable transactions (not being transactions with identified creditors) be extended so as to expire at the conclusion of 2 October 2005.”It was not disputed that the order, although awkwardly worded, had the effect of permitting an application to be made against Gazal within the period expiring on 2 October 2005.After the current liquidators commenced these proceedings in September 2005, Gazal applied for an order striking out the Statement of Claim or permanently staying the proceedings. Gazal relied on the fact that the order extending the time for the commencement of the proceedings was made in favour of “the plaintiffs”. Gazal argued that this meant the order was for the benefit of the original liquidators, and therefore could not be used by the current liquidators.At first instance the Judge found that the current liquidators were entitled to rely on the orders of the Master. Gazal appealed against that decision.**(c) Decision**Doyle CJ, with whom Duggan and David JJ agreed, also held that the current liquidators could rely on the order made by the Master.His Honour considered that because the proceedings were not commenced within 3 years of the relation-back day, the question to be answered was whether the proceedings were commenced within a longer period ordered by the court “on an application … made by the liquidator” within the 3 year period. The ulimate question therefore being whether the Master’s order could be said to be made on an application made by the liquidator.Doyle CJ rejected Gazal’s submission the order was not made on an application by the liquidator, but rather was an order made on application by Mr Dwyer and Mr Maxstead (the former liquidators of Harris Scarfe).That submission was rejected by Doyle CJ, and his Honour held there is no reason to read the provisions of section 588FF in such a way that only the same person who obtained an order fixing a longer period can bring an application under section 588FF(1) within that longer period, relying on that order. Doyle CJ found that it was sufficient that the current proceedings were commenced by the liquidators of Harris Scarfe and the proceedings were made within the period fixed by an order made on an application by the liquidators of Harris Scarfe. A change in the person or persons occupying that office was not relevant.His Honour also considered that there was no reason to read the reference to “the plaintiffs” as turning the order into an order permitting the institution of proceedings only by the original liquidators.Therefore, the appeal was dismissed.etailed Contents**5.10 Application by industry association to intervene in litigation depends on whether contribution is "useful and different"** (By Rebecca Young, Blake Dawson Waldron) Australian Securities and Investments Commission v Citigroup Global Markets Pty Limited (CAN 003 114 832) (No 3) [2007] FCA 393, Federal Court of Australia, Jacobson J, 15 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/march/2007fca393.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/march/2007fca393.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 judgment involved an application by the Australian Financial Markets Association (AFMA) for leave to intervene in the ongoing ASIC v Citigroup litigation. AFMA sought to intervene in relation to the interpretation and operation of section 912A(1)(aa) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). In exercising its discretion to allow or disallow an application for intervention, the court considered the requirements of order 6, rule 17(2) of the [Federal Court Rules 1979 No. 140 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "_default). The court focussed on whether the intervener's contribution will be "useful and different" from those of the parties.The court was not satisfied that AFMA's contributions would be useful or different. AFMA was granted liberty to renew its application upon 48 hours notice to the court if, in the course of proceedings, it emerged that AFMA's perspective would become useful or different from that of the parties.**(b) Facts** This case arises out of ongoing litigation between ASIC and Citigroup in relation to Citigroup's actions as adviser to Toll Holdings Ltd (Toll) in its $4.6 billion takeover bid for Patrick Corporation Ltd (Patrick). ASIC’s investigation into Citigroup identified substantial proprietary trading by Citigroup in Patrick securities on the last business day prior to Toll announcing the bid to the market. The issue upon which AFMA wished to intervene was the interpretation, scope and operation of section 912A(1)(aa) of the Corporations Act 2001 (Cth). Section 912A(1)(aa) provides that a financial services licensee must have adequate arrangements in place for the management of conflicts of interest that may arise. ASIC opposed AFMA's application to intervene, describing AFMA as essentially a lobby group for the industry.AFMA is an association of 141 participant members, including Citigroup and ASIC (as affiliate member). AFMA's core functions include the pursuit of policy outcomes that facilitate confidence and certainty in the market. AFMA has established a conflict of interest working group which examines conflicts of interest policy and its impact on members' business. AFMA contended that its position allowed it to make submissions on the issue of the adequacy of conflict management arrangements from a broader perspective. This included submissions relating to the implications for the entire wholesale banking and financial markets.**(c) Decision** AFMA's application is stood over generally with liberty granted to AFMA to renew its application on 48 hours notice.**(i) Criteria for intervention**In considering AFMA's application, the court emphasised that relevant criteria, both under order 6, rule 17(2) and more generally, included:* Whether the intervention would unreasonably add to the length of the hearing;
* Whether the intervention would unreasonably interfere with the ability of parties to conduct proceedings as they wish; and
* Whether the intervener's contribution will be useful and different from the contribution of the parties.

Despite satisfying the first two criteria, the last criterion proved problematic for AFMA. Jacobson J recognised as forceful ASIC's submission that AFMA's position cannot be readily distinguished from that of its members. Jacobson J also pointed out that given the substantial teams of counsel and solicitors representing the parties "it is likely that the matters to which AFMA would refer will be addressed by Citigroup". Jacobson J emphasised the importance of the intervener's submissions providing a useful and different perspective. AFMA's proposed intervention failed to do this. **(ii) Limited role of interveners**A limited intervention is more likely to satisfy requirements of not unreasonably lengthening proceedings or interfering with parties' cases. AFMA's proposed submissions had limited scope. AFMA would not advance factual findings to be made by the court and its submissions would be based upon the competing factual contentions of the parties. The court agreed with ASIC's submissions "that it would be inappropriate to permit AFMA to intervene so as to permit AFMA to put submissions as to the proper application of the law to the facts of the case, whether on competing factual assumptions or otherwise". This indicates that in addition to more established criteria, the scope of the proposed intervention is relevant.**(iii) Industry associations as interveners** The court recognised that industry associations whose members' interests may be affected by the outcome of litigation, may be an appropriate class of intervener. AFMA's status as an industry association was not, of itself, reason to deny its application to intervene. **(iv) ASIC as a litigant**It was contended that ASIC would be influenced by tactical or forensic considerations in its submissions about adequate arrangements to manage conflicts of interest. In response, Jacobson J pointed out that ASIC's duty as a litigant is analogous to that of the executive branch of government. This involves a duty to assist the court to arrive at the proper and just result.etailed Contents**5.11 Action for compensation: claiming privilege against exposure to a civil penalty provision** (By Andrew Healer, Freehills) Scott Darren Pascoe in his capacity as liquidator of Charter Workforce Pty Ltd (In Liq) v Divisional Security Group Pty Ltd [2007] NSWSC 211, New South Wales Supreme Court, White J, 14 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc211.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc211.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 company is alleged to have incurred debts while insolvent, or to have become insolvent as a result of incurring those debts. An action for compensation by the liquidator against the parent holding company and a director of the company did not amount to a declaration of contravention of a civil penalty provision or exposure to such a declaration. The holding company and the director could not rely on privilege to avoid providing discovery or filing evidence.**(b) Facts** Scott Pascoe (‘the plaintiff’) is the liquidator of Charter Workforce Pty Ltd. The claim against Divisional Security Group Pty Ltd (‘the first defendant’) is that it was the holding company of Charter Workforce Pty Ltd when it incurred debts while insolvent or became insolvent as a result of incurring those debts, and that there were reasonable grounds for the holding company suspecting that the subsidiary was insolvent or would become so. It is therefore alleged that there was a breach of section 588V(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), and that compensation should be awarded under section 588W. The claim against the director (‘the third defendant’) is that he was a director of Charter Workforce Pty Ltd at the time the debts were incurred and that he had reasonable grounds for suspecting that the company was insolvent or would become so.It is therefore alleged that there was a breach of section 588G(2) of the Corporations Act 2001 (Cth), and that compensation should be awarded under section 588M(2).Section 588G(2) is a civil penalty provision under section 1317E(1)(e). Both defendants submitted that neither of them should be required to file verified or certified defences, provide discovery or serve affidavits before the close of the plaintiff’s case. They submitted that requiring them to do so would breach the third defendant’s right to privilege against exposure to a penalty. This is because a finding that the third defendant contravened section 588G(2) could be relied on by ASIC in a separate proceeding to seek the imposition of a civil penalty. **(c) Decision** White J considered the judgment of Bergin J in One.Tel Limited (In Liq) v Rich (2005) 53 ACSR 623, which was relied on by the defendants as establishing that even where compensation orders are sought against a corporation in an action not for the imposition of a civil penalty, a defendant should still not be required to file evidence that could potentially be used to establish their liability in latter proceedings.**(i) Declaration of contravention under section 1317E unavailable**White J held that even if he found the third defendant to have breached section 588G(2), this did not require the declaration of a contravention of a civil penalty provision under section 1317E(1)(e). The liquidator had no standing to apply for such a declaration under sections 1317J(1) and (4). As such, any finding made in this case could not be relied on in latter proceedings seeking such a declaration. However, this was also the situation in One.Tel Limited (In Liq) v Rich (2005) 53 ACSR 623.**(ii) Privilege in claims in proceedings for redress of civil injury**A review of English and Australian decisions established that there is a distinction between two kinds of cases: a proceeding for the recovery of a penalty, and a proceeding to redress civil injury (Derby Corporation v Derbyshire County Council [1897] AC 550; The King v Associated Northern Collieries (1910) 11 CLR 738; Refrigerated Express Lines Pty Ltd v Australian Meat & Livestock Corporation (1980) 44 FLR 455). In the second kind of case there is no general rule precluding making an order for discovery or requiring the production of evidence. This case was of the second kind.A rare exception could apply when the court is satisfied that there are reasonable grounds for believing that the production of the document or giving of an answer may tend to prove that the person has committed an offence or is liable to a penalty (Refrigerated Express Lines Pty Ltd v Australian Meat & Livestock Corporation (1980) 44 FLR 455; Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328). Although this line of authority was not discussed in One.Tel Limited (In Liq) v Rich (2005) 53 ACSR 623, White J distinguished that case on the basis that it fell within the rare exception as ASIC was already bringing proceedings against the company. **(iii) Verified and certified defences** For the above reasons, it was unnecessary to separately decide whether the defendants should not be required to file a defence, or alternatively, a verified defence or a defence certified by their solicitors.In any event, White J did not accept that he had any power to dispense with the requirement for certification under section 347 of the [Legal Profession Act 2004 No. 112 (NSW)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=82258" \t "_default); this legislation is directed at the conduct of the legal profession and applies equally to civil penalty provisions.**(iv) Position of corporate defendant**The first defendant, Divisional Security Group Pty Ltd, was not alleged to have contravened a civil penalty provision. Privilege applies only to self-exposure to a civil penalty. The third defendant, the director, was not entitled to claim privilege against exposure via documents produced by third parties. etailed Contents**5.12 When excluding an individual from the management of a company amounts to oppression under section 232 of the Corporations Act** (By Thea Schwartz, Mallesons Stephen Jaques)Mopeke Pty Ltd v Airport Fine Foods Pty Ltd [2007] NSWSC 153, New South Wales Supreme Court, Brereton J, 2 March 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc153.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/march/2007nswsc153.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**Mopeke Pty Ltd (“Mopeke”), the first plaintiff, and Lagerlow (Holdings) Pty Ltd (“Lagerlow”), the second defendant, each appointed executive directors to Airport Fine Foods Pty Ltd(“the Company”). Lagerlow appointed two executive directors and Mopeke appointed one - Mr Petrovski.The plaintiffs claimed, inter alia, that the defendants acted oppressively by excluding Mr Petrovski from the day-to-day management of the Company.Brereton J held that the plaintiffs had a legitimate expectation that Mr Petrovski would be engaged in the business as a full-time executive director. As such when the defendants used their majority voting power to dismiss Mr Petrovski, they acted oppressively by failing to give the plaintiffs the option to withdraw their capital at fair value.**(b) Facts** The Company, the first defendant in these proceedings, conducted a business involving the retail supply and export of Australian gourmet food, through the operation of concession stores at the international terminals at Sydney, Brisbane and Perth airports.Entities associated with the Bradfield family, including Mopeke, Mr Petrovski and his wife Katrina as trustee for the S&K Petrovski Trust (“the Bradfield interests”), held 40% of the shares in the Company.Entities associated with the Lagerlow family, including Lagerlow Holdings Pty Ltd and the third defendant Airsas Pty Ltd (“the Lagerlow interests”), held 60% of the shares in the Company.The Company’s three executive directors were Mr Steven Petrovski, Mr John Lagerlow and Mr Gordon Lagerlow. Some time during 2003, John and Gordon Lagerlow met with Mr Petrovski and raised concerns about his performance as executive director of operations of the Company. On 28 January 2005, the board of directors of the Company required Mr Petrovski to resign as a working executive director. Mr Petrovski was told that he could either resign, in which case he would be paid $10,000, or else be dismissed. After some discussion, Mr Petrovski agreed to tender his resignation in return for the payment of $25,000. However, within hours of agreeing to tender his resignation, Mr Petrovski purported to withdraw from that agreement. Mr Petrovski furnished no signed letter of resignation, and the Company had paid no money to Mr Petrovski at the time of trial.From 28 January 2005 Mr Petrovski was excluded from the Company’s management meetings and was prohibited from entering the premises of the Company. On 2 February 2005, John Lagerlow handed Mr Petrovski a letter which stated that Mr Petrovski no longer had executive or managerial authority in relation to Airport Fine Food’s business, but that he remained a director of the Company.The Bradfield interests claimed relief for oppression under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) sections 232 and 233. They contended that:* the Company acted in a way that was oppressive by funding the litigation, thereby expending resources of the company on the support of the majority;
* the way that the Company conducted directors meetings was unfairly prejudicial to the plaintiffs; and
* Mr Petrovski’s exclusion from the day-to-day management of the Company amounted to oppression.

**(c) Decision** **(i) Unfair prejudice in relation to litigation costs**Brereton J found that the initial Statement of Claim by the Bradfield interests included claims which the Company itself had a distinct interest in resisting despite the fact that at trial the issues were limited to those that conventionally arise in an oppression suit.In light of this, his Honour concluded that the legal fees incurred by the Company were reasonable, and oppression was not made out on this ground.**(ii) Unfair prejudice in relation to the board minutes and caucusing**The Plaintiffs asserted that the manner in which the Company’s directors’ meetings had been conducted and recorded, particularly since 28 January 2005, amounted to oppressive conduct. The Plaintiff’s submitted that:* the truth of what actually occurred at the meeting was being suppressed;
* the Chairman was given authority over the meeting and minutes in a way that made it impossible for minority shareholders to participate in a meaningful way;
* the Chairman and majority shareholders had control over the minutes; and
* any debate was merely a formality.

Brereton J held that it is not oppressive for the majority (of a Board) to discuss an issue between themselves prior to a Board meeting or to prevail on a vote, provided the rights of the minority are recognised. He stated, “Insofar as it was suggested that Mr Bradfield and Mr Petrovski were excluded from decision making at board meetings, the complaint is really no more than the majority prevailed in case of dispute.”**(iii) Exclusion from management constituting oppression**The plaintiffs contended that since 28 January 2005, the defendants had breached the legitimate expectation that the Bradfield interests would be entitled to participate in the day-to-day management of the Company through Mr Petrovski’s position as Executive Director of Operations.His Honour quoted extensively from Lord Hoffman’s judgment in O’Neill v Phillips [1999] 1 WLR 1092. The main principle that Brereton J drew from this case was that an applicant under section 232 does not necessarily have to show a breach of promise or breach of undertaking. The denial of a “legitimate expectation” arising out of the dealings of the parties may be sufficient to constitute oppression.His Honour concluded that a number of factors were pertinent to the plaintiff’s claim:* the Lagerlow interests needed the involvement of the Bradfield interests to complete the acquisition of the Company, and perceived there to be an urgency about completing that acquisition;
* there was no discount for minority interest in the investment by the Bradfield interests in the Company;
* although negotiations for a shareholders’ agreement were not completed, the parties through their negotiations for that agreement manifested an intention that there was more to the relationship between the members than what was evidenced by the articles of association;
* the company was a proprietary company with restrictions on the transfer of shares so that a member could not take out his or her stake and go elsewhere; and
* there was an understanding between all participants that Mr Petrovski be engaged in the business on a full time basis as an executive director.

It was a combination of these factors which made it oppressive for the majority to remove Mr Petrovski from participation in the daily management of the business without giving the Bradfield interests the opportunity to sell their stake in the Company at a fair price.**(iv) Remedy**Brereton J held that the appropriate remedy was a buy out of the Bradfield interests on just terms.etailed Contents |

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