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

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| **1.1 Government amendments to the Trade Practice Act 1974**On 19 June 2007, the Australian Treasurer, the Honourable Mr Peter Costello, announced that following extensive consultation with small business, the Government will introduce the [Trade Practices Legislation Amendment Bill (No 1) 2007 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96935" \t "default) (the Bill) to amend section 51AC and section 46 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 Act). The Bill will improve protection for small business from unconscionable conduct and from the misuse of market power, such as predatory pricing. The Bill substantially implements the Government's response to the March 2004 Senate Economics References Committee (SERC) report on the effectiveness of the Act in protecting small business.Based on the discussions with small business, the Government will change its legislation, to provide that: * for the purposes of section 46, more than one corporation can have a substantial degree of power in a market;
* a corporation can have a substantial degree of market power even though it does not substantially control a market;
* a corporation can have a substantial degree of market power in a market even though it does not have absolute freedom from constraint in that market by the conduct of its competitors or persons to or from whom the corporation supplies or acquires goods or services; and
* in regard to below-cost or predatory pricing, the court may have regard to any conduct that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services, and the reasons for that conduct.

An earlier proposal to insert reference to a reasonable prospect or expectation of being able to recover losses incurred by below cost pricing as a factor in section 46 will not be pursued, in light of concerns that it may limit the ability of the court to find breaches of section 46 in cases of predatory pricing.These changes are in addition to amendments in the Bill already announced by the Government, which will:* prevent leveraging of market power, by providing that a corporation must not take advantage of a substantial degree of market power, either in the market in which the power is held or in any other market;
* take account of coordinated market power, by allowing courts to have regard to any market power the corporation has that results from any agreements it has with parties outside its corporate group;
* amend section 51AC of the Act to provide that a court may consider unilateral variation of contract terms when determining whether a corporation has acted unconscionably, and raise the price limitation under the section from $3 million to $10 million, extending its application to a wider range of transactions entered into by small business that supply or acquire goods and services; and
* establish a second Deputy Chairperson position for the ACCC, with the position to be filled by a candidate who is experienced in small business matters.

The Bill follows the changes contained in the [Trade Practices Legislation Amendment Bill (No 1) 2005 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=83207" \t "default) (Dawson Act) last year which:* Allowed a simpler notification scheme when small businesses collectively bargain, making the process quicker, easier and cheaper.
* Increased the penalties for anticompetitive conduct, to the greater of $10 million, or three times the benefit from the contravention (where the gain cannot be readily ascertained, the maximum penalty will be 10 per cent of the value of the turnover of the corporation and related bodies). These changes represent a significant increase in the penalties available to a court when considering a breach of the [Trade Practices Act 1974 No. 51(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default), greatly boosting its deterrent effect.
* Increased the powers of the ACCC, to grant it search and seizure powers. This new right to enter premises and inspect documents is similar to the search warrant provision in section 10 of the [Crimes Act 1914 No. 12 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6050" \t "default).
* Retained the 'per se' prohibition for third line forcing in the Act, so that third line forcing continues to be regarded as being anti competitive, regardless of whether is has the purpose, effect, or likely effect of substantially lessening competition.

etailed Contents**1.2 Auditors' liability: Commission publishes results of consultation on possible reform of liability rules in the EU**On 18 June 2007, the European Commission (Europa) published a summary of 85 replies to the public consultation on the possible reform of auditors' liability regimes in the EU, launched in January 2007 (see IP/07/60). The consultation was based on an independent study on the economic impact of current auditors' liability regimes and on insurance conditions in Member States.The audit profession considers there is a need for a Commission initiative on auditors' liability. Outside the audit profession, the majority of respondents from countries where limitation exists also support a Commission initiative on this issue, whereas the majority of the respondents from countries without limitation reject any Commission action.Regarding the different approaches to limiting auditors' liability proposed in the consultation paper, the audit profession prefers limitation based on capping, whereas the other respondents who support a Commission initiative would prefer a solution based on proportionate liability. Nevertheless, some respondents stress that if a Commission recommendation is adopted, it should give maximum flexibility to Member States in relation to the method of limitation at national level. Choice in the audit market is recognised as an important issue that could jeopardise the efficiency of financial markets. However, not all respondents agree that limiting auditors' liability would be, by itself, an appropriate way to address the issue.The responses authorised for publication and the summary of all responses are available on the [Europa](http://ec.europa.eu/internal_market/auditing/liability/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.3 UK executive director remuneration survey** While the UK's biggest companies are increasingly gearing their executive remuneration packages towards performance-related pay, a similar shift has not been made by their SmallCap and AIM-listed peers, according to the Executive Director Total Remuneration Survey - a joint project by Manifest and MM&K, the independent remuneration consultancy - published on 15 June 2007.From the 431 SmallCap and AIM companies covered by the survey, only 40 chief executives received more than £100,000 last year by exercising share options or from the vesting of other share scheme awards. Three-quarters of these directors received nothing from long-term incentives.In comparison, the shift towards performance-related compensation has led to a wide range of outcomes in terms of payouts received by FTSE 100 CEOs. The year's highest paid was Bart Becht, chief executive of cleaning product manufacturer Reckitt Benckiser. Becht collected £22m in 2006, of which £18m - that is 21 times his salary - came from gains on options exercised during the year and the vesting of other share schemes.One in ten FTSE 100 chief executives received more than five times their salary from options and long-term incentive plan payouts.Pay increases for chief executives of large companies (those with a market capitalisation of over £1bn) continue to outstrip average UK earnings: median total remuneration at large companies is now £2.2m p.a. - 240% higher than in 1998. Over the same period, average UK earnings have risen by 42%, retail prices by 21% and the FTSE 100 has grown by only 12%.However, large companies' total remuneration growth rate of 6% for 2006 does represent a drop from the corresponding figure of 9% for the previous year. Furthermore, it is well below the long-term trend of 19% yearly growth since 1998. In large companies the bonus maximum opportunity is much higher and bonus payments average 67% of salary (compared to 26% for smaller companies).The difference in long-term incentive payouts is even more striking - median payout in larger companies is £117,000 p.a. and nothing in smaller companies.Further information is available on the [Manifest](http://www.manifest.co.uk/reports/remuneration/exec_rem_survey.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.4 Canadian regulators release point of sale disclosure framework for funds** On 15 June 2007, the Joint Forum of Canadian securities regulators released for public comment a "Proposed Framework 81-406; Point of sale disclosure for mutual funds and segregated funds." A key element of the Proposed Framework is a two-page document called "Fund Facts", which highlights critical information, including performance, risk and cost. This information will be presented to investors when they need it most - before they make a decision to buy a fund.Copies of the Proposed Framework and accompanying backgrounder are available from the websites of [CCIR](http://www.ccir-ccrra.org/%22%20%5Ct%20%22_new), [CSA](http://www.csa-acvm.ca/%22%20%5Ct%20%22_new) or the [Joint Forum](http://www.jointforum.ca/%22%20%5Ct%20%22_new).Comments should be submitted to the Joint Forum Project Office at the address below by October 15, 2007. Joint Forum Project OfficeJoint Forum of Financial Market Regulators5160 Yonge St,Box 85, 17th FloorNorth York, ONM2N 6L9etailed Contents**1.5 Assessment of the risks arising from commodities business and from firms carrying out commodities business** On 15 June 2007, the Committee of European Banking Supervisors (CEBS) published a consultation paper on the risks arising from commodities business and from firms carrying out commodities business. The report responds to the second part of a Call for Advice issued by the European Commission in August 2006 in which CEBS was invited to assess the prudential risks arising from the conduct of commodities business. The Call for Advice is part of a larger review of the current provisions concerning commodities business and the prudential treatment of firms carrying out commodities business set out in the Directive 2004/39/EC on Markets in Financial Instruments (MiFID) and the Capital Requirements Directive (CRD, Directive 2006/48/EC and Directive 2006/49/EC). The report is based on information provided by CEBS members and observers on the structure and regulatory coverage of their commodities markets as well as on information directly provided by market participants on their business, their risk structure and mitigants, their perception of the current regulatory framework and their concerns regarding any amendments to this framework. The report concludes that at the market level the risks arising from commodities business and the risks in other financial markets (e.g. equity, FX, interest-rate) are generally the same and that these risks exist basically across all types of products (underlyings). In nearly all markets the majority of transactions are carried out OTC. Therefore, in the absence of the use of risk mitigation significant counterparty credit risk (CCR) arises. Other relevant risks identified are market risk, operational risk, legal risk and liquidity risk. Systemic risk crystallizes through contagion which is transmitted via market participants' direct and indirect interdependencies. While the perceived interconnections may give rise to systemic risk concerns, their extent may depend on the size of the respective markets for commodities or exotic derivatives relative to the wider financial market or the related industry. Systemic risk concerns may vary widely across the different markets/underlyings and no generalization can be made. The report also touches on the specifics of the commodities markets/business and their possible relevance to the prudential treatment of the variety of firms that are active in the commodities sector The consultation paper is available on the [CEBS](http://www.c-ebs.org/Consultation_papers/consultationpapers.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.6 Business-community partnerships now a core part of business strategy** Australia's largest companies are increasing and deepening their involvement in the community as corporate community investment (CCI) is becoming a core part of business activity and strategy, according to a report released on 13 June 2007.The report, by the Australian Centre for Corporate and Public Affairs (ACCPA) in conjunction with the Business Council of Australia (BCA), was commissioned by the Prime Minister's Community Business Partnership.The Corporate Community Investment in Australia report demonstrates that while individual businesses are at many different stages in the development of CCI activities, companies on the whole are pursuing a more strategic, business-focused approach to community engagement than ever before.The report has found: * most companies now see CCI as an 'integral component to strategy and the corporate business model', with a quarter of firms now requiring a business case with which to focus their investment and engagement in the community;
* volunteering is now a major driver of CCI activity as companies seek to directly involve their employees - who are increasingly focused on the reputation and values of companies - in their CCI strategies and programs;
* more boards and CEOs are now involved in setting overall strategic directions for their companies' CCI activities;
* companies are becoming more discerning in their CCI engagement, focusing on more rigorous identification and selection of potential community partners, NGOs and activities;
* partnerships with community groups and NGOs are being established with clear, contractual agreements that specify mutual objectives and ensure clarity in roles and responsibilities; and
* almost half of all companies now set aside a specific budget for CCI, although many companies still report difficulties around measurement of CCI outcomes.

The 2007 report follows a similar study released by ACCPA and the BCA in 2000 which found more traditional forms of business-community engagement, such as corporate philanthropy and ad hoc grant making, were being superseded by more strategic approaches.The 2007 report deliberately describes business engagement in the community as 'corporate community investment' to reflect the increasing business focus and strategy now being developed around CCI. The report concludes that the move toward a greater business and strategic focus on CCI among companies will continue, as firms continue to expand their CCI management resources and increasingly embed CCI into their corporate strategies. At the same time, the report calls for greater formal recognition of CCI, particularly in business schools and management education, to reflect its increasing status and importance as a core business activity.The report is available on the [BCA](http://www.bca.com.au/DisplayFile.aspx?FileID=157" \t "_new) website.etailed Contents**1.7 Corporate governance reporting by Australian listed companies** The latest review by the Australian Securities Exchange (ASX) of reporting against the ASX Corporate Governance Council's Principles and Recommendations, published on 13 June 2007, shows that listed entities have continued to improve their corporate governance reporting. The overall reporting level for listed companies - the aggregate of adoption of recommended practices and of 'if not, why not' reporting - was higher in 2006 (90%) than in either of the two previous years ASX has conducted the review (2005 - 88% and 2004 - 84%). According to the ASX in a statement accompanying publication of the review: "Good corporate governance is a culture of transparency and is not restricted to simply adopting the Recommendations. Good corporate governance also exists where entities adopt 'if not why not' reporting; that is, where entities identify the Recommendations they have not followed, explain why they have not followed them, and detail how their practices accord with the spirit of the relevant Principle. The corporate governance arrangements of many entities differ from the Recommendations but equally amount to good practice. Entities are able to adopt and explain the governance practices they consider appropriate to their circumstances." The key findings from the review, which combined the results of listed companies and listed trusts for the first time, were as follows: **(a) Overall reporting levels - listed companies** * The overall reporting level for listed companies for all Recommendations, being the aggregate of adoption of recommended practices and of 'if not, why not' reporting, has increased to 90% in 2006 from 88% in 2005 and 84% in 2004 - an increase of more than 7% since the first review.
* 17 out of 28 Recommendations had reporting levels of over 90% - up from 14 in 2005 and 8 in 2004.
* An additional 6 out of 28 Recommendations had reporting levels of over 80%.

**(b) Overall reporting levels - listed trusts** * The overall reporting level for listed trusts was slightly lower than for listed companies with an overall reporting level for all Recommendations of 85%. In 2005 it was 86%.
* 13 out of 28 Recommendations had reporting levels of over 90% - up from 10 out of 28 in 2005.
* An additional 8 out of 28 Recommendations had reporting levels over 80%.

**(c) Top-500 listed entities - listed companies and listed trusts** * The overall reporting level for all Recommendations was over 94%.

**(d) Adoption reporting levels** * The adoption rate for all Recommendations, excluding 'if not, why not' reporting, in 2006 was 75% for listed companies and 72% for listed trusts, up from 74% and 70% respectively in 2005.
* The average adoption rate for all Recommendations among top-500 listed entities (companies and trusts) was 88%, up from 86% in 2005.

The results indicate that listed entities' understanding of the nature of this type of reporting continues to improve. The level of this type of reporting is high for: * Recommendation 2.1 - A majority of the board should be independent directors - 44% for listed companies, 26% for listed trusts.
* Recommendation 2.2 - The chairperson should be an independent director - 35% for listed companies and 30% for listed trusts.
* Recommendation 2.4 - The board should establish a nomination committee - 52% for listed companies and 56% for listed trusts.
* Recommendation 4.3 - Audit committee structure - 39% for listed companies and 13% for listed trusts.
* Recommendation 9.2 - The board should establish a remuneration committee - 35% for listed companies and 58% for listed trusts.

The results emerge from ASX's review of the annual reports and relevant website sections of 1,294 listed companies and 77 listed trusts - 1,371 listed entities in total - that reported with a 30 June 2006 balance date. This number represents approximately 71% of all listed entities at that date. The review is available on the [ASX](http://www.asx.com.au/about/pdf/mr20070613_corporate_governance_disclosure_analysis.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.8 CESR reviews the supervisory functioning of the prospectus directive and regulation** On 13 June 2007, the Committee of European Securities Regulators (CESR) published a report entitled: "CESR's report on the supervisory functioning of the Prospectus Directive and Regulation" (Ref. CESR/07-225).The objective of this report is to assess whether the new prospectus regime is achieving its objectives of protecting investors and lowering the cost of capital, and, in particular, whether it is contributing to the development of the single market for securities. In general, most market participants seem to be satisfied with the new European legislation. They consider the Prospectus Directive and Regulation to be a step in the right direction in achieving a single market. Among the positive aspects of the new legislative framework, and despite the existence of a few obstacles in its practical functioning, respondents have highlighted the value of the passport mechanism as a useful tool in the development of a single market. Nevertheless, they have also identified certain provisions in the Prospectus Directive and Regulation that are causing some practical difficulties and they request CESR to advise the European Commission to work on the necessary amendments.In particular, respondents identified a number of areas where divergent practices of the different competent authorities posed some difficulties, for example, in relation to the use of certain definitions (i.e. that of a public offer, transferable securities and qualified investors), or the use of exemptions which determine whether the obligation to produce a prospectus exists amongst others.Further information is available on the [CESR](http://cesr.eu/%22%20%5Ct%20%22_new) website.etailed Contents**1.9 Report on superannuation balances** On 12 June 2007, a report was released by the Association of Superannuation Funds of Australia (AFSA) giving a picture of the level and diversity of superannuation account balances in Australia. Using newly available unit records from the Australian Bureau of Statistics 2003-04 Survey of Income and Housing, ASFA compiled the report - 'Are Retirement Savings on Track?' - on Australians' superannuation balances. The average balances achieved in 2004 were: * $56,400 for men; and $23,900 for women.

The average retirement payouts in 2004 were: * $110,000 for men, and $37,000 for women.

ASFA estimates that the average retirement payouts in 2006 are likely to have been: * $130,000 for men, and $45,000 for women.

Based on these figures, relatively few retirees (less than 20%) have or are likely to have lump sum super benefits that are above the soon-to-be-former tax free threshold ($135,590). The Westpac-ASFA Retirement Standard has found that to achieve a modest standard of living in retirement a single person would need to spend $18,375 a year. For a comfortable standard of living they would require $35,668 a year. Retirement savings of over $100,000 are needed to achieve a modest lifestyle and over $260,000 is required for the comfortable lifestyle (assuming access to a full or part Age Pension). Other findings in 'Are Retirement Savings on Track' included: * 10% of individuals with super hold 60% of its assets.
* 70% of men and 90% of women currently have balances of less than $100,000
* 24.3% of the group surveyed reported having no super at all - such as low paid/casual workers, social security recipients, and those who have cashed out their super already.

ASFA will also be releasing a report on the adequacy of the Age Pension later this year. Further information is available on the [AFSA](http://www.superannuation.asn.au/Reports/default.aspx%22%20%5Ct%20%22_new) website. etailed Contents**1.10 EU directive on shareholders' rights adopted** On 12 June 2007, the European Commission (Europa) announced that it welcomed the European Council's formal adoption of the Directive on the exercise of shareholders' rights, which means that the Directive is now officially part of EU law. The formal adoption follows agreement at first reading by the Council and the European Parliament in February 2007. Member States now have two years to implement the Directive in their national laws.The Directive introduces minimum standards to ensure that shareholders of companies whose shares are traded on a regulated market have timely access to relevant information ahead of the general meeting (GM) and simple means to vote at a distance. It also abolishes share blocking and introduces minimum standards for the right to ask questions, put items on the GM agenda and table resolutions. The Directive allows Member States to take additional measures to facilitate further the exercise of the rights referred to in the Directive.The Directive features the following key provisions:* Minimum notice period of 21 days for most GMs, which can be reduced to 14 days where shareholders can vote by electronic means and the general meeting agrees to the shortened convocation period;
* Internet publication of the convocation and of the documents to be submitted to the GM at least 21 days before the GM;
* Abolition of share blocking and introduction of a record date in all Member States which may not be more than 30 days before the GM;
* Abolition of obstacles on electronic participation to the GM, including electronic voting;
* Right to ask questions and obligation on the part of the company to answer questions;
* Abolition of existing constraints on the eligibility of people to act as proxy holder and of excessive formal requirements for the appointment of the proxy holder;
* Disclosure of the voting results on the issuer's internet site.

The Commission proposed the Directive in January 2006 (IP/06/10). The Council of Ministers and the European Parliament reached agreement on the content of the future Directive in a single reading in February 2007 (IP/07/193). In May 2007 the Commission also published a consultation paper regarding a possible Commission recommendation on shareholders' rights that could complement the rules of the Directive.More information on the Directive and the consultation is available on the [Europa](http://ec.europa.eu/internal_market/company/shareholders/indexa_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.11 FSA publishes feedback on private equity risks** On 11 June 2007, the UK Financial Services Authority (FSA) published its feedback to Discussion Paper 06/6 "Private Equity: A discussion of risk and regulatory engagement", which examined the impact that growth and development in the private equity market has on the FSA's regulation of the UK's wholesale markets. The FSA views private equity as an important and growing part of a dynamic and efficient capital market. In DP06/6 the FSA identified the risks it perceived were posed to its statutory objectives by the growth in private equity and outlined the measures taken to mitigate these risks. The feedback received confirmed that it had correctly identified and prioritized those risks and that the proposed regulatory approach to dealing with them was appropriate and effective. The most significant risks that the FSA continues to focus on in relation to private equity are those posed by market abuse and conflicts of interest. These will remain key areas of regulatory focus and the alternative investments supervision team will be conducting further work in relation to conflicts of interest in private equity firms.In order to strengthen its oversight of the potential impact of the private equity market the FSA will improve its data collection on this market through: * Conducting a bi-annual survey on banks' exposures to leveraged buyouts; and
* Enhancing regulatory reporting requirements for private equity firms to incorporate information on committed capital in addition to the existing requirement to report drawn down capital.

Additionally, reflecting the increasing complexity of financing and risk distribution typically associated with leveraged buyout transactions, the FSA will be engaging in a targeted fact-finding exercise to understand the issues and risks inherent in dealing with financial distress and default in a heavily traded corporate name. Also, the International Organization of Securities Commissions (IOSCO) has commissioned a taskforce to assess the impact of recent developments in the private equity market and identify issues which can be addressed within its remit. The FSA will be chairing the work of this taskforce.The feedback statement is available on the [FSA](http://www.fsa.gov.uk/pages/library/policy/dp/2007/fs07_03.shtml%22%20%5Ct%20%22_new) website.etailed Contents**1.12 Corporate finance in the euro area** On 11 June 2007, the European Central Bank (ECB) published the ECB's structural issues report, which this year deals with "Corporate finance in the euro area".The aim of this year's report of this year is to analyze the main features of the functioning of the market for corporate finance in the euro area, including the specifics of the national markets and the conditions applicable to the borrowers. Given the great interest in the issue of small and medium-sized enterprises (SMEs) access to finance, the report also analyses how financing patterns differ across large, medium and small enterprises. Finally, the report discusses the recent trends observed in the corporate finance landscape of the euro area over the past few years and how they have influenced the availability of external finance for firms. The report is available on the [ECB](http://www.ecb.int/home/html/index.en.html%22%20%5Ct%20%22_new) website.etailed Contents**1.13 Financial reporting by unlisted public companies - discussion paper** On 6 June 2007, the Parliamentary Secretary to the Australian Treasurer, the Honourable Chris Pearce MP, released a discussion paper on financial reporting by unlisted public companies. The discussion paper analyses the current financial reporting requirements of unlisted public companies under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The paper aims to promote public debate on the appropriate financial reporting requirements for these companies. The discussion paper is available on the [Treasury](http://www.treasury.gov.au/documents/1269/PDF/Discussion_paper_Financial_Reporting_by_Unlisted_Public_Companies.pdf%22%20%5Ct%20%22_new) website.Interested parties are invited to provide written comments on the discussion paper. Submission closing date: 3 August 2007 Address written comments to:The General ManagerCorporations and Financial Services DivisionThe TreasuryLangton CrescentPARKES ACT 2611 Email: UPCcomments@treasury.gov.auPhone: 02 6263 3971Fax: 02 6263 2770etailed Contents**1.14 APRA releases Basel II market disclosure proposals** On 6 June 2007, the Australian Prudential Regulation Authority (APRA) released a discussion paper and a draft prudential standard setting out its proposed approach to market disclosure under the new Basel II capital adequacy regime, known as the Basel II Framework. The approach applies to all locally incorporated authorised deposit-taking institutions (ADIs) in Australia.The proposals aim to enhance transparency and market discipline in Australian financial markets through high quality and timely market disclosure on the risk management practices and capital adequacy of ADIs.Under APRA's proposed approach, all locally incorporated ADIs, including foreign owned bank subsidiaries, will be required to disclose publicly some basic quantitative information on their capital adequacy and credit risk exposures. This information is already provided to APRA on a quarterly basis. APRA is proposing that these disclosures be made in at least one location, generally on an ADI's website.Australian-owned ADIs that have APRA's approval to use the more advanced Basel II approaches will be required to disclose publicly more detailed qualitative and quantitative information on their risk management practices and capital adequacy.APRA's market disclosure proposals form part of the Basel II capital adequacy regime for ADIs that will come into force on 1 January 2008. The full suite of Basel II prudential standards is expected to be finalised in late 2007.The discussion paper and the draft prudential standard are available on the [APRA](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.15 OECD examines the role of hedge funds and private equity firms in corporate governance** On 5 June 2007, the OECD announced that OECD countries have agreed that the corporate governance practices of private equity firms and hedge funds are best addressed within the framework of the existing OECD Principles of Corporate Governance. They consequently rejected the idea of a separate OECD code on the role of hedge funds and private equity firms in corporate governance. The agreement came at a recent meeting of corporate governance experts and policy makers.The OECD believes it is essential to take into account existing voluntary codes and industry guidelines when addressing issues that have attracted public concern, such as conflicts of interest, the efficiency of the market for takeovers, transparency around major shareholdings and the robustness of voting systems.The Steering Group has based its conclusions on a new OECD report "The Implications of "Activist" Hedge Funds and Private Equity Firms in Corporate Governance". The report states that "activist" hedge funds and private equity firms can play a positive role in corporate governance of publicly held companies. They often act as informed owners and take a more active role in monitoring the performance of companies and their management than other institutional investors.The report is available on the [OECD](http://www.oecd.org/dataoecd/47/27/38672168.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.16 Study on proportionality between capital and control in EU listed companies** On 4 June 2007, the European Commission (Europa) published an external study on the question of proportionality between ownership and control in EU listed companies. The study finds that, on the basis of the academic research available, there is no conclusive evidence of a causal link between deviations from the proportionality principle and either the economic performance of listed companies or their governance. However, there is some evidence that investors perceive these mechanisms negatively and consider more transparency would be helpful in making investment decisions. The study was carried out by Institutional Shareholder Services Europe (ISS Europe), the European Corporate Governance Institute (ECGI) and the law firm Shearman & Sterling LLP.The study will provide input for an impact assessment that the Commission will be carrying out between now and autumn 2007.The study was commissioned in September 2006, following a public consultation carried out between December 2005 and March 2006 on future priorities in company law and corporate governance that confirmed the need for additional information on the factual situation in the EU regarding the issue of proportionality between capital and control. The objective of the study was to identify existing deviations from the proportionate allocation of capital and control across EU listed companies, and to evaluate their economic significance and whether such deviations have an impact on EU financial markets.The objective was to obtain a picture that would be as comprehensive as possible. The scope of the study was therefore defined very broadly. It encompasses the review of such mechanisms as multiple-voting rights, voting caps and non-voting preferential shares, as well as of tools such as shareholders' agreements, cross-shareholdings and company pyramids.The study scrutinizes the regulatory framework in 19 jurisdictions (including 3 from outside the European Union) and examines the situation of 464 listed European companies. The study also consists of a review of the available academic literature and empirical evidence on the proportionality principle as well as a survey of institutional investors which assesses what role the proportionality principle plays in their investment decisions.The study is available on the [Europa](http://ec.europa.eu/internal_market/company/shareholders/indexb_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.17 UK review of issuer liability - final report published** On 4 June 2007, the UK Treasury published Professor Paul Davies' final report on issuer liability to investors in respect of misstatements to the market. The report recommends that the Treasury should use its power in section 90B of the Financial Services and Markets Act 2000 (FSMA) to extend the statutory liability regime in section 90A of FSMA in relation to issuer liability for misstatements to the market. By way of background, section 90A of the FSMA was introduced as 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 then only be liable to investors where a director knew or was reckless as to whether this statement was untrue or misleading or knew that the omission was a dishonest concealment of a material fact. Professor Davies issued a discussion paper in March 2007. The four key recommendations contained in the final report for an extension of the section 90A regime are:* The statutory liability regime should apply to all RIS announcements and not just to periodic financial information.
* The statutory liability regime should extend to disclosures by issuers with securities traded on exchange-regulated markets (including for example AIM and PLUS Markets) and all multi-lateral trading facilities and securities trading platforms, rather than just listed companies.
* The statutory liability regime should apply to dishonest delay in making RIS statements as well as misstatements in RIS announcements.
* Rights should be conferred on sellers as well as buyers but holders should be excluded from the statutory regime.

The report recommends no change in the regime set out in section 90A as regards the following:* Fraud should be maintained as the basis of liability for the statutory liability regime rather than moving to a negligence test.
* Statutory liability should continue to apply to issuers only and should not be imposed on directors or other advisers or third parties in respect of misstatements in RIS announcements.
* The assessment of damages should continue to be left to the courts as it is too difficult to formulate effective statutory rules on this subject.

The final Davies report is available on the [Treasury](http://www.hm-treasury.gov.uk/media/F5E/F3/davies_review_finalreport_040607.pdf%22%20%5Ct%20%22_new) website.etailed Contents**1.18 Review of New Zealand financial reports** On 1 June 2007, the New Zealand Securities Commission announced that it had completed the fourth cycle of its financial reporting surveillance programme.The Commission reviewed financial reports of 40 issuers with balance dates from 30 June 2005 to 31 March 2006. Nine of the issuers were early adopters of New Zealand Equivalents to International Financial Reporting Standards (NZ IFRS). Seventeen issuers had matters that needed to be addressed. Of the seventeen issuers the Commission wrote to, satisfactory agreement was reached on 85% of matters raised. Three significant matters are being followed up separately. The review also identified issues relating to non-disclosure of waivers in annual reports. One matter was referred to NZX and two other matters were referred to NZX Discipline Special Division. The reviews aim to encourage issuers to improve the quality of their financial reports and thus contribute to the integrity of New Zealand's securities markets. The Commission will continue its financial reporting surveillance programme. The report is available from the [New Zealand Securities Commission](http://www.seccom.govt.nz/publications/documents/cycle-4/index.shtml%22%20%5Ct%20%22_new).etailed Contents**1.19 Australian insolvency law reforms**On 31 May 2007, the Parliamentary Secretary to the Australian Treasurer, the Honourable Chris Pearce MP, introduced the [Corporations Amendment (Insolvency) Bill 2007 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96414" \t "default) into Parliament. This Bill will improve the efficiency and the cost effectiveness of insolvency processes, strengthen the rights of employees, and enhance the capacity of creditors to maximise their returns.These reforms were developed on the basis of recommendations from a number of public reviews into the Australian insolvency framework. The Bill has benefited from extensive industry consultation, initially through the Insolvency Law Advisory Group and subsequently through the public release of draft legislation in November 2006. The Insolvency Bill will:* Improve the outcomes for creditors by strengthening the protection of employee entitlements, improving insolvency practitioner disclosures to creditors (including on independence and remuneration), removing unnecessary costs by streamlining procedures and facilitating the liquidation of corporate groups.
* Deter corporate misconduct by extending ASIC's investigative powers in monitoring liquidators and improving court processes in relation to misconduct by company officers. These reforms will complement the $23 million assetless administration fund that has already been implemented by the Government to combat phoenix company activity.
* Improve the regulation of insolvency practitioners by introducing more regular reporting requirements, requiring adequate insurance to be held and providing greater flexibility to the Companies Auditors and Liquidators Disciplinary Board.
* Fine tune the voluntary administration process in light of stakeholder experiences since its introduction in 1993.

The key features of the Bill are as follows:**(a) Improving outcomes for creditors (Schedule 1)****Part 1 - Employee entitlements** * Clarify status and priority of the Superannuation Guarantee Charge in liquidation, receivership and voluntary administration.
* Mandate priority of employee entitlements in a deed of company arrangement.
* Clarify the rights of subrogated creditors.

**Part 2 - Better informing creditor decisions*** Greater disclosure of relationships that may give rise to a conflict.
* Greater disclosure of basis of remuneration proposals put to creditors.

**Part 3 - Streamlining external administration*** Rationalise requirements to publish notices.
* Allow for electronic communication with creditors.
* Remove obstacles to putting a company into creditors voluntary liquidation.

**Part 4 - Pooling*** Facilitate pooling in liquidation

**(b) Deterring corporate misconduct (Schedule 2)*** Grant ASIC a general power to investigate liquidator conduct.
* Remove uncertainty about the orders a court may make to prevent company officers and other persons avoid liabilities.
* Restore longstanding position that penalty privilege does not apply in disqualification proceedings (a key remedy for phoenix companies).

**(c) Improving regulation of insolvency practitioners (Schedule 3)*** Extend the prohibition on offering inducements to insolvency practitioners.
* Update registration requirements by: recognising all forms of external administration; requiring insurance; and requiring annual reporting to ASIC.
* Introduce greater flexibility into Companies Auditors and Liquidators Disciplinary Board processes (allowing pre-hearing conferences, a 90-day delay in orders taking effect, and the publication of reasons for decisions).

**(d) Fine-tuning voluntary administration (Schedule 4)****Part 1 - General*** Clarify the effect of a deed of company arrangement (DOCA) on secured creditors and third party guarantors.
* Clarify the circumstances in which a DOCA may be terminated for breach.
* Require notification to ASIC when a DOCA is finalised.
* Extend the administrators' right of indemnity to all liabilities properly incurred in the conduct of the administration.
* Require administrators to lodge accounts with ASIC (as for other forms of external administration).
* Extend the obligation for administrators to disclose to creditors information that is known to the administrator and which would assist the creditor in making an informed decision about the future of the company.
* Introduce a reduced disclosure regime for debt for equity swaps in administration.
* Extend the timeframe for the first and second meetings of creditors.
* Clarify the processes for moving from liquidation to voluntary administration (stay of liquidation, appointment of administrator).

**Part 2 - Rights to property during administration*** Clarify the effects of a DOCA on property subject to a lien, pledge or retention of title clause.
* Clarify the circumstances in which a charge might be enforced.

**Part 3 - Liquidation following administration*** Clarify the priority of debts incurred during an administration or DOCA.
* Introduce a requirement for an updated 'report as to affairs' where a company moves from administration to liquidation.

etailed Contents**1.20 Regulation and supervision of microinsurance** On 1 June 2007, the International Association of Insurance Supervisors (IAIS) and the Consultative Group for Assisting the Poor (CGAP) released a paper entitled "Issues in regulation and supervision of microinsurance", prepared by the IAIS-CGAP Joint Working Group.Regulators and supervisors in emerging market jurisdictions realise that a more conducive and enabling regulatory environment creates an "inclusive" insurance market that works effectively for the upper as well as the lower income segments, with the latter being the focus of "microinsurance". Microinsurance is insurance that is accessed by the low-income population, provided by a variety of different entities, but run in accordance with generally accepted insurance practices. Importantly, this means that the risk insured under a microinsurance policy is managed based on insurance principles and funded by premiums.The paper outlines salient features of regulation and supervision of microinsurance. It recognises that the IAIS Insurance Core Principles are the foundation of all insurance supervision, including microinsurance.Further information is available on the [IAIS](http://www.iaisweb.org/__temp/1_June_2007__IAIS_and_CGAP_released_a_paper_on_Issues_in_regulation_and_supervision_of_microinsurance.pdf%22%20%5Ct%20%22_new) website. etailed Contents**1.21 Proposed differential reporting for small and medium-sized Australian entities** On 31 May 2007, the Australian Accounting Standards Board (AASB) released invitation to comment ITC 12 'Request for Comment on a Proposed Revised Differential Reporting Regime for Australia and IASB Exposure Draft of a Proposed IFRS for Small and Medium-sized Entities'. The purpose of ITC 12 is to invite comments from Australian constituents on the Board's preliminary views on a revised differential reporting regime for Australia and on the Exposure Draft (ED) issued by the IASB in February 2007. The ITC requests that constituents provide their comments to the AASB by 1 September 2007. This will enable the AASB to consider Australian constituents' comments in the process of formulating its own comments to the IASB, which are due by 1 October 2007. The IASB's ED is developed for smaller entities that are not listed or deposit takers. It proposes simplified recognition and measurement requirements and reduced disclosures compared to full IFRSs. The ED is 380 pages long compared to 2400 pages for full IFRSs. The AASB Chairman, Professor Boymal said that: "If implemented, the proposed revised differential reporting regime would have a significant impact on external financial reporting by many Australian entities, whether they be for-profit entities or not-for-profit entities. Under the proposed revised differential reporting regime, the application of AASB Standards would no longer depend on whether entities are reporting entities, rather the focus of application would be general purpose financial reports. Accordingly, entities that prepare general purpose financial reports would apply either the Australian equivalents to IFRSs or an Australian equivalent to the IFRS for SMEs (SMEs Standard), based on various criteria.Under the proposals, listed for-profit entities and entities that are deposit takers would apply the Australian equivalents to IFRSs. For-profit entities that are not listed or are not deposit takers but satisfy either of the revenue and assets thresholds of $500m and $250m respectively would also apply the Australian equivalents to IFRSs, and those that satisfy neither of the size thresholds would apply a SMEs Standard. Not-for-profit entities, including public sector entities, that satisfy either of the revenue and assets thresholds of $25m and $12.5m respectively would apply the Australian equivalents to IFRSs but those that satisfy neither of the size thresholds would apply a SMEs Standard." Professor Boymal added that: "The ITC also clarifies the meaning of a general purpose financial report. Financial reports on a public register, such as those lodged with the Australian Securities and Investments Commission under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), or otherwise made available to the public at large, such as those tabled in a Parliament, would be regarded as general purpose financial reports. In addition, notwithstanding a company being exempt from lodging under the Corporations Act, if it is required under that Act to prepare a financial report in accordance with Australian Accounting Standards, its financial report would be regarded as a general purpose financial report. According to the AASB, the importance of this ITC and its impact on the Australian external reporting regime cannot be overemphasised. Constituents are strongly encouraged to actively participate in the comment process to both the AASB and the IASB. To be able to respond to the questions in their appropriate context, respondents are advised to read the AASB Basis for Conclusions at the end of the Preface to the ITC". Copies of ITC 12 are available on the [AASB](http://www.aasb.com.au/%22%20%5Ct%20%22_new) website. etailed Contents**1.22 Investors expectations in relation to unlisted managed funds**On 29 May 2007, the Australian Shareholders' Association (ASA) released the consultation draft of its policy statement, 'What Investors Expect - Unlisted Managed Investments'.The ASA will accept comments on the draft policy statement up to 31 July 2007.According to the draft policy statement, investors expect:* clear, accurate and timely information on investments - in product disclosure statements and annual reports;
* annual meetings with those responsible for, and who control investments made by, managed investment funds;
* a role in the appointment or removal of those with such responsibilities and controls whether they be fund managers, and/or trustees and/or responsible entities, and
* those with whom investors deal to avoid and, where they exist, to disclose and act to eliminate conflicts of interest.

The statement is available on the [ASA](http://www.asa.asn.au/%22%20%5Ct%20%22_new) website.etailed Contents**1.23 Risks facing the insurance industry: survey** Excessive legislation is identified as the greatest risk facing the insurance industry by the CSFI's latest survey published on 29 May 2007, in association with PricewaterhouseCoopers LLP. More than 100 respondents to the survey say that excessive regulation is endangering the industry by loading companies with costs, distracting management and creating barriers to competition and innovation. This finding is linked to concern about growing political interference, particularly in markets where governments regulate insurance products and prices. Over-regulation is widespread. With responses from 21 countries, the survey shows it to be a major issue in North America, Europe, South Africa and the Asia Pacific. Sectorally, concern is strongest among life insurance companies, followed by the property & casualty sector. More than 80 per cent of the insurance industry respondents were senior executives or directors. Other high level risks identified by the survey include natural catastrophes and climate change, where insurance losses for the property and casualty sector are rising fast, particularly in heavily populated areas. The main risks facing the life insurance industry include growing human longevity and the soundness of assumptions going into the pricing of life policies. The survey was conducted at a time when the traditional cycle in the property and casualty market is turning down. Respondents say that insurers are striving to maintain revenues by taking on extra risk, cutting prices and loosening the wording of insurance contracts. This raises concerns about the profitability of the industry, and the risk that insurers will be exposed to "long tails" - insurance risks that could take years to materialise. The quality of management in the insurance industry is also a major source of concern. Responses to the survey show widespread doubts about the industry's ability to meet growing challenges from regulation, new competitors, technological change and product innovation. The industry is also seen to be failing to attract new blood because of an image problem. Like regulation, the management issue is geographically widespread. One of the operational challenges facing the industry is the modernisation of back office systems and technology. Much of the industry is technologically obsolete, even paper-based, which ties its hands when competing with new entrants into the business: better equipped banks and Internet-based suppliers. The survey also shows which risks are seen to be receding. Notable is asbestos, once the scourge of the industry, now at the bottom of the list with insurers feeling it is manageable. The problems of under-regulation are also low down the list, though it is felt that several emerging markets need better controls. Although the survey exposes some potentially worrying risks, it also brings better news about the industry's preparedness. Only three per cent of respondents think insurers are "poorly" prepared to meet the risks that lie ahead. Just over 20 per cent answer "well" and the rest give a mixed response. Further information is available on the [PricewaterhouseCoopers](http://www.pwc.com/uk%22%20%5Ct%20%22_new) website. etailed Contents**1.24 PCAOB approves new audit standard for internal control over financial reporting** On 24 May 2007, the US Public Company Accounting Oversight Board (PCAOB) voted to adopt Auditing Standard No 5, "An Audit of Internal Control over Financial Reporting that is Integrated with an Audit of Financial Statements", to replace its previous internal control auditing standard, Auditing Standard No. 2. The Board also adopted the related Rule 3525, "Audit Committee pre-Approval of Non-Audit Services Related to Internal Control over Financial Reporting", and conforming amendments to certain of the Board's other auditing standards.The auditing standard adopted by the Board is principles-based. It is designed to increase the likelihood that material weaknesses in internal control will be found before they result in material misstatement of a company's financial statements, and, at the same time, eliminate procedures that are unnecessary. The final standard also focuses the auditor on the procedures necessary to perform a high quality audit that is tailored to the company's facts and circumstances. The Board worked closely with the Securities and Exchange Commission to coordinate Auditing Standard No. 5 with the guidance to public company management the SEC approved on 23 May 2007 (see item 1.27 of this Bulletin). As part of the Board's commitment to the effective implementation of the new standard, the Board intends in the coming months to adjust its inspection program to assure that it is consistent with the new standard and its principles-based approach. The PCAOB is also continuing to develop for auditors of smaller public companies tailored guidance for applying the new standard as outlined in its four-point plan of May 2006. The Board also is continuing to hold its Forums on Auditing in the Small Business Environment as a way to further monitor implementation issues related to smaller public companies. The adopted standard and related documents are available on the Board's Web site under Rulemaking Docket 21.The Board's new standard is designed to achieve four objectives:1. Focus the internal control audit on the most important matters - The new standard focuses auditors on those areas that present the greatest risk that a company's internal control will fail to prevent or detect a material misstatement in the financial statements. It does so by incorporating certain best practices designed to focus the scope of the audit on identifying material weaknesses in internal control, before they result in material misstatements of financial statements, such as using a top-down approach to planning the audit. It also emphasizes the importance of auditing higher risk areas, such as the financial statement close process and controls designed to prevent fraud by management. At the same time, it provides auditors a range of alternatives for addressing lower risk areas, such as by more clearly demonstrating how to calibrate the nature, timing and extent of testing based on risk, as well as how to incorporate knowledge accumulated in previous years' audits into the auditors' assessment of risk and use the work performed by companies' own personnel, when appropriate.
2. Eliminate procedures that are unnecessary to achieve the intended benefits - The Board examined every area of the internal control audit to determine whether the previous standard encouraged auditors to perform procedures that are not necessary to achieve the intended benefits of the audit. As a result, among other things, the new standard does not include the previous standard's detailed requirements to evaluate management's own evaluation process and clarifies that an internal control audit does not require an opinion on the adequacy of management's process. As another example, the new standard refocuses the multi-location direction on risk rather than coverage by removing the requirement that auditors test a "large portion" of the company's operations or financial position.
3. Make the audit clearly scalable to fit the size and the complexity of any company - In co-ordination with the Board's ongoing project to develop guidance for auditors of smaller, less complex companies, the new standard explains how to tailor internal control audits to fit the size and complexity of the company being audited. The new standard does so by including notes throughout the standard on how to apply the principles in the standard to smaller, less complex companies, and by including a discussion of the relevant attributes of smaller, less complex companies as well as less complex units of larger companies. The upcoming guidance for auditors of smaller companies will develop these themes even further.
4. 4. Simplify the text of the standard - The Board's new standard is shorter and easier to read.

etailed Contents**1.25 Simpler Regulatory System Bill introduced into Parliament** On 24 May 2007, the Honourable Chris Pearce MP, Parliamentary Secretary to the Australian Treasurer, introduced into the House of Representatives the [Corporations Legislation Amendment (Simpler Regulatory System) Bill 2007 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=96354" \t "_default). The Bill implements the bulk of the proposals in the Proposals Paper released by Mr Pearce in November last year, covering a range of regulatory areas such as financial services, financial reporting, takeovers, auditor independence, corporate governance and fundraising. It also contains some additional initiatives that were developed during the consultation process.The Bill also includes the Government's response to a number of recommendations of the Rethinking Regulation report of the Banks Regulation Taskforce of January 2006, including initiatives relating to: the use of the internet for financial reporting; financial reporting thresholds for proprietary companies; reporting requirements for executive remuneration; and fundraising requirements for employee share schemes.The Simpler Regulatory System Bill was passed by Parliament on 21 June 2007.The key objectives of the Simpler Regulatory System package are outlined below.**(a) Improving access to financial advice*** Increasing access to affordable financial advice by reducing the costs associated with providing financial advice, particularly for relatively small-scale investments.
* Enabling financial service providers to communicate more effectively by reducing the volume of documentation that must be provided to some classes of investors, without compromising investor protection.

**(b) Enhancing investor participation*** Encouraging greater employee ownership of companies by removing restrictions that apply to unlisted companies wishing to establish an employee share scheme.
* Providing opportunities for suitable investors to engage in more sophisticated financial investments.

**(c) Greater business efficiency*** Improving the efficiency with which companies can operate by removing the requirement to seek member approvals for relatively small transactions between public companies and related parties, and removing compliance burdens that have little benefit to securities holders in takeover situations.
* Refining auditor independence requirements by reducing the compliance burden without weakening the robust framework established by the Corporate Law Economic Reform Program.
* Facilitating improved access to capital by reducing compliance costs associated with corporate fundraising activities.

**(d) Reducing compliance costs*** Reducing reporting costs for about 1,600 proprietary companies by raising the thresholds at which audited financial reports are required to be prepared.
* Reducing costs associated with the distribution of annual reports by better enabling companies to distribute them to shareholders through the Internet.
* Reducing transaction costs of ongoing lodgement of annual review fees by enabling companies to make a single up front payment to cover the fees that would be incurred over 10 years. For example, instead of $212 per year for 10 years ($2,120), proprietary companies would only be required to pay a one-off fee of $1,600.

**(e) Streamlining regulatory processes*** Introducing improved mechanisms for ASIC to perform its regulatory functions, including more effective notification processes and greater use of electronic registration facilities.
* Streamlining requirements by incorporating accounting standards relating to executive and director remuneration into the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).

Further information on the Simpler Regulatory System Bill is available on the [Treasury](http://www.treasury.gov.au/contentitem.asp?NavId=017&ContentID=1261" \t "_new) website.etailed Contents**1.26 SEC proposes modernization of smaller company capital raising and disclosure requirements** On 23 May 2007, the US Securities and Exchange Commission (SEC) proposed a series of six measures to modernize and improve its capital raising and reporting requirements for smaller companies. Many of the proposals address key recommendations made by the SEC's Advisory Committee on Smaller Public Companies in its final report. They include:* A new system of securities regulation for smaller public companies that would make scaled regulation available to a much larger group of smaller public companies;
* Modified eligibility requirements so companies with a public float below US$75 million can take advantage of the benefits of shelf registration;
* A new exemption from Securities Act registration requirements for sales of securities to a newly defined category of "qualified purchasers" in which limited advertising would be permitted;
* Shortened holding periods under Securities Act Rule 144 for restricted securities to reduce the cost of capital and to increase access to capital;
* New exemptions for compensatory employee stock options so Exchange Act registration requirements would not be triggered solely by a company's compensation decisions; and
* Electronic filing of the form filed by companies making private or limited offerings to ease burdens for filers and make the information filed more readily available.

Further information is available on the [SEC](http://www.sec.gov/news/press/2007/2007-102.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.27 SEC approves new guidance for compliance with section 404 of Sarbanes-Oxley** On 23 May 2007, the US Securities and Exchange Commission (SEC) unanimously approved interpretive guidance to help public companies strengthen their internal control over financial reporting while reducing unnecessary costs, particularly at smaller companies. The new guidance will enhance compliance under section 404 of the Sarbanes-Oxley Act of 2002 by focusing company management on the internal controls that best protect against the risk of a material financial misstatement.The Commission also approved rule amendments providing that a company that performs an evaluation of internal control in accordance with the interpretive guidance satisfies the annual evaluation required by Exchange Act Rules 13a-15 and 15d-15. The Commission also amended its rules to define the term "material weakness" as "a deficiency, or combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis." The Commission also voted to revise the requirements regarding the auditor's attestation report on the effectiveness of internal control over financial reporting to more clearly convey that the auditor is not evaluating management's evaluation process but is opining directly on internal control over financial reporting. Further information is available on the [SEC](http://www.sec.gov/news/press/2007/2007-101.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.28 Non-financial information: survey**A global survey of directors and senior executives, backed up by an Australian poll of leading Chief Financial Officers (CFOs), has highlighted the growing importance of quality non-financial information, such as operational performance and customer satisfaction in predicting the overall health of organisations. The second global Deloitte survey, "In the Dark II: What many boards and executives still don't know about the health of their businesses", highlights the change that is being forced at the top by the growing influence of the internet on customer behaviour as well the increased regulatory and shareholder scrutiny of non-financial risks.The survey highlights how some of the globe's leading boards and their senior management are increasingly linking strong financial performance to a good understanding of the forward looking picture provided by a range of non-financial drivers. The survey also finds that for many organisations their ability to track these indicators is poor. 78 per cent of the global CEOs surveyed said financial indicators alone do not adequately capture their company's strengths and weaknesses. Globally 87 per cent of CEOs and senior executives described their ability to track financial performance as excellent or good, yet only 29 per cent described their non-financial record as excellent or good. The results of the Deloitte poll of 21 CFOs from some of Australia's leading companies held in May 2007, supports these findings. All the Australian CFOs surveyed stated that non-financial metrics are important in determining a company's overall health, yet almost half said their non-financial information was average to poor and none has excellent information.Of the Australian CFOs polled, 30.5 per cent said that customer satisfaction was the most important non-financial measure they tracked. It was also identified as an area where better quality information was required. Employee commitment was also cited by the Australian CFOs as a critical risk area, with better quality information also required. Other information gaps identified by the Australian CFOs included customer satisfaction and measuring an organisation's greenhouse footprint. As the research highlighted, CEOs are under increasing pressure to measure these indicators, with 83 per cent of respondents saying that the market itself is increasingly emphasising non-financial performance measures.In addition, over a third of respondents (37 per cent) said that a company's performance is determined more by intangible assets and capabilities than by hard assets. Globally, key impediments to the use of non-financial performance metrics include underdeveloped tools, organisational scepticism, unclear accountability, time constraints, and the concern that such metrics may reveal too much information to competitors. One critical concern is that reliable non-financial performance metrics are difficult to establish.In Australia 60 per cent of CFOs cited underdeveloped tools as the reason why non-financial information is not being produced. The global research highlighted that consistently tracking issues such as employee engagement, innovation, or customer satisfaction is viewed as more complex, whereas financial metrics are more familiar and quantifiable to many.The report is available on the [Deloitte](http://www.deloitte.com/dtt/article/0%2C1002%2Ccid%253D158267%2C00.html%22%20%5Ct%20%22_new) website. etailed Contents**1.29 CEO turnover remains high at world's largest companies** According to a study published on 22 May 2007, Global CEO departures have levelled off at a high plateau, and less than half of CEOs leaving office in 2006 departed under normal circumstances, according to the sixth annual survey of CEO turnover at the world's 2,500 largest publicly traded corporations published by management consulting firm Booz Allen Hamilton. The study also found that corporate boards are quicker than ever to replace underperforming CEOs, as they focus more on grooming in-house leaders and turn to outsider and interim CEOs less often as outsider results continue to disappoint.Among the findings:* From 1995 to 2006, annual CEO turnover has grown 59%; in that same period, performance-related turnover increased by 318%. In 1995, one in eight departing CEOs was forced from office - in 2006, nearly one in three left involuntarily.
* The CEO turnover wave has crested in every region of the world. Globally, 357 CEOs (14.3%) at the 2,500 largest public companies left office in 2006, a 1.2 percentage point decrease from 2005.
	+ While merger-related departures increased in the past year, both regular and forced succession rates decreased slightly -- from 7.9 to 6.6 percent and 4.8 to 4.6 percent, respectively - though those rates are still significantly higher than the levels of the early 1990s and 2000s.
	+ In 2006, turnover in North America, Japan and the Asia-Pacific region declined from the 2005 level. Although Europe experienced a slight increase over 2005, CEO turnover remained well below its 2004 peak.
* Performance-related turnover fell slightly in 2006, but remained high - 32% of departing CEOs were forced to resign because of either poor performance or disagreements with the board.
* CEO departures due to M&As and buyouts increased in 2006, and the exiting CEOs delivered superior performance for investors.
	+ 22% of all CEO departures in 2006 resulted from mergers or buyouts, compared to 18% in 2005, with North America and Europe experiencing their highest levels of M&A activity.
	+ In 2006, CEOs whose companies were acquired delivered investor returns that were 8.3% per year better than a broad stock market average, compared to 5.3% for those who retired normally.
	+ Exiting via a merger can be an attractive strategy for outsider CEOs following a successful turnaround, taking advantage of their strong upfront restructuring skills. Globally, 17% of CEOs who rose from within the company saw their tenures end in a merger, but 27% of CEOs hired from the outside departed this way.
	+ All outsider CEOs studied who sold a company they led also sold any additional companies where they became CEO.

Booz Allen examined nine years of CEO succession data, and identified two fundamental shifts in the ways corporate boards address CEO selection and oversight: They are becoming less tolerant of poor performance, and they are increasingly splitting the roles of CEO and chairman and recruiting chairmen who have not previously served as a company's CEO. **Additional study findings*** **Boardroom infighting is taking a higher toll on CEOs.** The number of CEOs leaving because of conflicts with the board increased from 2% in 1995 to 11% between 2004 and 2006. In Europe, boardroom power struggles drove 22% of CEO departures in 2006.
* **Prior success. Prior success is no key to CEO survival.** In North America, several CEOs who created above-average returns for investors were forced out in 2006 because of concerns about their ability to deliver future returns.
* **CEOs are staying in office longer.** Average CEO tenure increased to 7.8 years globally in 2006, with CEOs in North America averaging 9.8 years on the job. Asia-Pacific reached its longest-ever average tenure of 9.5 years; only Europe experienced a decline to 5.7 years. The age of departing CEOs dropped to a record low of 54.5 in Europe, suggesting that CEOs in that region are still under tremendous pressure.
* **The hiring of outsider CEOs has peaked.** Globally, the proportion of departing outsider CEOs grew from 14% in 1995 to 30% in 2003, declining to 18% in 2006. The study also found that selection of an outsider produces a big downtick in stock price, while selection of an insider triggers an uptick.
* **CEOs who deliver below-average investor returns don't remain in office long.** In 2006, a CEO who delivered above-average returns was almost twice as likely as one delivering sub-par returns to remain CEO for more than seven years. In 1995, however, underperforming CEOs stayed in office as long as high performers.
* **A merger-related CEO change brings a big boost to stock price, but CEO succession has a limited impact on stock price outside mergers**. The study found that annualized returns to investors for merger-related successions are 117% greater than average in the 30 days before a change in CEO is announced, although some of this increase reflects the merger premium. By contrast, announcing a chief executive change in North America in a non-merger situation produced a slight positive effect (3.8% better than the average return) when a company has been performing poorly for two years and a negative effect (10.2% worse than average) when the company has been doing well.
* **Independent chairmen are best**. Globally, investors enjoyed the highest returns relative to a broad market average when the chairman was independent of the CEO, compared to when the CEO also held the title of chairman, or when the chairman was the prior CEO. In 2006, all underperforming CEOs in North America with long tenures had either held the additional title of chairman or served under a chairman who was the former CEO.
* **CEOs who had formerly served as chief deliver worse returns to investors**. Outsider CEOs who had previously served as the CEO of a publicly traded company delivered slightly worse returns to investors in eight of the nine years studied, than CEOs who rose from within the company.

**Methodology**Booz Allen studied the 357 CEOs of the world's largest 2,500 publicly traded corporations defined by market capitalization who left office in 2006, and evaluated both the performance of their companies and the events surrounding their departures. To provide historical context, Booz Allen evaluated and compared this data to information on CEO departures for 1995, 1998, 2000, 2001, 2002, 2003, 2004 and 2005. For the purposes of the study, Booz Allen classified CEO departures as either:* Merger-driven, in which a CEO leaves after his or her company is acquired by or combined with another.
* Performance-related, in which the CEO was forced to resign, either because of poor performance or disagreements with the board.
* Regular transition, which includes all planned and long-scheduled retirements, as well as health-related departures or death in office.

etailed Contents**1.30 Recommendations to address potential financial system risks relating to hedge funds** On 19 May 2007, the Financial Stability Forum (FSF) issued a report recommending action by financial authorities, counterparties, investors and hedge fund managers to strengthen protection against potential systemic risks relating to hedge funds and other highly leveraged institutions (HLIs).Activity by hedge funds has expanded rapidly since the FSF's 2000 report on HLIs.Their activities have generally been a spur to continuing financial innovation and, by absorbing risk, have provided greater depth and liquidity to financial markets. Over the same period, a small number of core intermediaries have come to play an increasingly important role in some key areas of wholesale financial markets. The relationships between these core intermediaries and hedge funds, through prime broking and counterparty relationships have thus become more central to the robustness of the financial system.Since the Long-Term Capital Management crisis, risk management practices and capacity at core intermediaries have been substantially enhanced. Risk management capacity at the largest hedge funds also has improved. But, while risk management techniques and capacity have been improving, products and markets have become more complex, posing heightened risk measurement, valuation and operational challenges for all market participants.There recently have been some signs of erosion of counterparty standards that reflect the strength of competition for hedge fund business and which complement other signs of complacency about risk taking in financial markets. This heightens the importance of strengthening market discipline, buttressed by supervisors and regulators setting expectations regarding stronger counterparty risk management practices.Effective market discipline requires that counterparties and investors obtain relevant information from hedge funds and act upon this information. Through such market discipline, counterparties contain leverage and its adverse effects on market dynamics. And rapidly changing products, rising trading volumes and closer market integration underscore the importance of continuing attention to infrastructure improvements. The FSF welcomes recent and ongoing public policy and private initiatives to address these issues.Given the importance of strengthening protection against systemic risks, the FSF makes the following five recommendations to support and where relevant build upon ongoing supervisory and private sector work:1. Supervisors should act so that core intermediaries continue to strengthen their counterparty risk management practices.
2. Supervisors should work with core intermediaries to further improve their robustness to the potential erosion of market liquidity.
3. Supervisors should explore and evaluate the extent to which developing more systematic and consistent data on core intermediaries' consolidated counterparty exposures to hedge funds would be an effective complement to existing supervisory efforts.
4. Counterparties and investors should act to strengthen the effectiveness of market discipline, including by obtaining accurate and timely portfolio valuations and risk information.
5. The global hedge fund industry should review and enhance existing sound practice benchmarks for hedge fund managers in the light of expectations for improved practices set out by the official and private sectors.

The FSF underscores the importance of ongoing cooperation among financial authorities in taking forward these recommendations and in spreading good practices. It also notes the importance of authorities' market surveillance activities and of their continuing dialogue with a range of market participants and actors to keep abreast of innovation and to assess the adequacy of practices and policy approaches in addressing risks to financial stability.The FSF will monitor work on these recommendations, as well as other areas relevant to the potential systemic risks associated with hedge funds. It will report to the G7 Finance Ministers and Central Bank Governors on the progress made, new developments and any judgments that the FSF makes about the need for further updates of its overall assessment and recommendations.The report published on 19 May 2007 follows a request by the G7 Finance Ministers and Central Bank Governors at their meeting in Essen in February for the FSF to update its 2000 report on HLIs. The present report provides a re-assessment of the financial stability issues and systemic risks posed by hedge funds. It does not address the investor protection issues associated with institutional or retail investments in hedge funds.The FSF's original report on HLIs in 2000 set out a range of recommendations to address the systemic risks posed by highly leveraged institutions. The FSF published subsequent assessments of the progress made in implementing these recommendations in 2001 and 2002. These reports are available on the [FSF](http://www.fsforum.org/publications/publication_21_25.html%22%20%5Ct%20%22_new) website. etailed Contents**1.31 Long-term incentive remuneration in the US and Europe** According to Hay Group's 2006 Top Executive Compensation study released on 16 May 2007, 63% of US companies surveyed are providing time vested restricted share plans to eligible employees, while less than 5% of European companies grant restricted shares as part of their equity plans. While 95% of US companies surveyed provide some form of LTI vehicle for executives, 66% use more than one plan. Recent changes to the legal, accounting, and regulatory environment paired with shareholder pressure have forced US-based companies to alter the balance of their long-term incentives to reflect performance-based plans.Stock options continue to be the most prevalent vehicle utilized in terms of U.S. long-term incentives, followed by restricted stock plans. Across all industries, the study finds that the "size"-or scope and complexity-of an executive job has a greater impact on base pay than either the industry sector or job title. While different industries focus on different performance measures for their annual incentive plans in the US, most industries consistently hold their executives accountable for a combination of financial performance and achievement of individual goals.The finance-oriented industries surveyed-insurance and diversified financial services organizations-have the highest incentives as a percentage of base salary, while the retail industry has the lowest.Long-term incentive plans are prevalent in the majority of U.S. and European companies. However, the most prevalent vehicle-the stock option-is often designed much differently in Europe. While US stock option plans are typically issued without any additional performance measures, in many countries in Europe most stock option plans feature performance conditions for vesting.Long-term incentive awards are substantially higher in the U.S. than in Europe, but base salaries in the US are 20% lower than the European average. Another significant difference between the pay practices in the US and Europe is in the number of vehicles companies are using. Only 17% of European companies operate more than one type of plan for their top executives, compared to 66% of US companies.Further information is available on the [Hay Group](http://www.haygroup.com/ww/Media/index.asp%22%20%5Ct%20%22_new) website.etailed Contents**1.32 Results of 2006 AGM survey**Blake Dawson Waldron has conducted a survey of 76 AGMs of Australian listed companies held since October 2006. The final report, '2006 AGMs: Review and Results', was published in May 2007 in conjunction with the Business Council of Australia and Chartered Secretaries Australia. This report contains the survey results on a number of areas, including calls for questions by companies before the AGM, remuneration related resolutions, director and auditor participation, the involvement of special interest groups and voting. It also includes qualitative feedback (obtained from a series of discussion forums held in Melbourne, Sydney and Perth) on the possible reasons for trends which have emerged since BDW's 2005 AGM review. On the whole, the practice of AGMs did not change dramatically from 2005 to 2006. As outline below, however, the survey does indicate some developments: * In 2006, compared to 2005, separate presentations by companies on the remuneration report were slightly less common. Possible reasons for this decline are:
	+ the remuneration report is so detailed that there is no need to give a separate presentation;
	+ there was less uncertainty in 2006 on how best to deal with the remuneration report vote - it is just another compliance requirement;
	+ the market is buoyant and companies are generally performing well.
* There was a slightly higher non-binding vote against the remuneration report. 6 out of 76 companies (representing 8% of the companies surveyed) had more than 25% of the proxy votes cast against adoption of the remuneration report (compared with only 1 company out of 61 companies surveyed in 2005). The remuneration report was more likely to trigger a negative vote than resolutions seeking to increase fees for NEDs and approving equity awards to executive directors. This increase might be attributable to the influence of proxy advisory firms who recommended a "no" vote to their clients.
* Shareholders did not increase their engagement with the auditor. This suggests that the CLERP 9 reform which gave shareholders the right to question the auditor before the meeting may not have had the desired effect. Possible reasons for this lack of shareholder engagement are:
	+ AIFRS makes the accounts so complicated that shareholders find it difficult to understand them and ask a question; and
	+ the market is currently buoyant, and shareholders are more likely to engage on auditing matters if the company is experiencing financial difficulties or a qualified audit report has been given.
* Special interest groups showed their members that they are actively seeking to further their interests by being more vocal at AGMs in 2006.
* Voting was predominantly conducted on a show of hands. There was very limited uptake of electronic polling, mainly due to cost concerns.

The report is available from [Blake Dawson Waldron](http://www.bdw.com/publications/agmreport/agmreport052007.pdf%22%20%5Ct%20%22_new). etailed Contents |

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

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| **2.1 Time-critical superannuation advice**On 18 June 2007, the Australian Securities and Investments Commission (ASIC) issued a Class Order, [CO 07/447] "Temporary extension of time for SOA delivery", to help retail investors get financial advice in the lead-up to the new superannuation arrangements that start on 1 July this year.ASIC is aware that many investors are consulting licensed advisers about decisions they may want to make before 30 June. Industry associations have informed ASIC that the number of investors seeking this kind of advice is so large that, in some cases, advisers may be unable to provide advice in these time-critical situations unless the normal period for providing a Statement of Advice (SOA) is changed.ASIC supports the view of industry associations that it is important that, as far as possible, those making superannuation decisions in this period have access to advice from licensed professionals.So ASIC has changed the time by which a written SOA must be given in these circumstances from five days to 30 days.ASIC stresses that, apart from the time allowed providing an SOA, all the rules about giving advice remain unchanged. Crucially, this includes the adviser's obligations to give quality advice that takes into account a client's needs and circumstances. Investors' rights to take action for losses resulting from non-complying advice are also unchanged.The ASIC class order also requires advisers giving advice in these circumstances to give written disclosure to the client, pointing out that the client may not receive a written statement of advice in time to help with other decisions they may need to make, such as exercising cooling off rights.The relief provided by the class order is effective until 30 June. The class order is available on the [ASIC](http://www.asic.gov.au/ASIC/asic.nsf/byHeadline/IR%2007-24%20ASIC%20helps%20time-critical%20superannuation%20advice?opendocument" \t "_new) website.etailed Contents**2.2 Interim relief for general insurers and actuaries until 31 August 2007** On 18 June 2007, the Australian Securities and Investments Commission (ASIC) announced the extension of existing transitional relief for general insurers and actuaries.In both cases, the extension of relief is until 31 August 2007.**(a) General insurance transitional disclosure relief**Corporations Regulations 7.9.15D-7.9.15F modify the application of financial services disclosure provisions to general insurance products. These regulations have a transition period which expires on 20 June 2007. During the transition period, general insurers can either comply with the modified disclosure requirements, or continue to comply with the provisions as they stood before the modifications. ASIC's relief, provided under ASIC Class Order [CO 07/409] "General Insurance Disclosure: Extension of Transitional Period", extends the transition period in the regulations until 31 August 2007.On 12 February 2007, the Government announced amendments to the [Insurance Contracts Act 1984 No. 80 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6416" \t "default), which will, amongst other things, affect the disclosure that must be provided by insurers within insurance contracts. On 26 March 2007, the Government announced proposed new Corporations Amendment Regulations to simplify the financial services regime. Amongst other things, these new regulations will modify financial services disclosure provisions, including in relation to dollar disclosure provisions for general insurers. Both of these sets of legislative changes will require insurers to make changes to their disclosure documentation.ASIC's [CO 07/409] will extend the period of time before general insurers have to comply with the disclosure obligations in Corporations Regulations 7.9.15D-7.9.15F. This will enable general insurers to update their disclosure documents at one time, following the commencement of new requirements in the [Insurance Contracts Act 1984 No. 80 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6416" \t "default) and proposed new Corporations Amendment Regulations announced by the Parliamentary Secretary to the Treasurer on 26 March 2007.**(b) Licensing relief for actuaries**ASIC has also issued an extension of the licensing relief that actuaries have from the requirement to hold an Australian Financial Services Licence (AFSL). ASIC's current relief would otherwise have ceased on 30 June 2007. The extension of the relief is provided under ASIC Class Order [CO 07/410] "Actuaries: Further Extended Transitional Relief" and means that actuaries who can rely on the Class Order will be exempt from holding an AFSL until 31 August 2007.The short extension has been given by ASIC so that actuaries can continue to have the benefit of the current relief until the commencement of a regulation later this year that should exclude actuaries from the licensing requirements under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) when providing the usual professional services of an actuary. Further information is provided in ASIC Information Release [IR 05-37] ASIC further extends interim relief for actuaries, Information Release [IR 06-19] ASIC further extends interim relief for actuaries and general insurers, Information Release [IR 03-43] ASIC provides temporary relief during period of consultation, and [IR 06-46] ASIC further extends interim relief for actuaries, which are available on the [ASIC](http://www.asic.gov.au/%22%20%5Ct%20%22_new) website. etailed Contents**2.3 Enforceable undertaking templates** On 12 June 2007, the Australian Securities and Investments Commission (ASIC) released four template designed to assist those parties considering offering an enforceable undertaking.Enforceable undertakings are one of a number of remedies available to ASIC for breaches of the legislation it is responsible for enforcing. They are generally accepted by ASIC as an alternative to civil or administrative action but are not appropriate in place of criminal proceedings or in matters involving deliberate fraud or misconduct.The four templates cover: * a standard template applicable to all enforceable undertakings;
* sample terms for compliance program assessment;
* sample terms for compensation; and
* sample terms for corrective advertising on the Internet.

ASIC announced the forthcoming release of these templates as a supplement to "Enforceable Undertakings: An ASIC Guide", when it released the guide on 13 March 2007. The templates are available from the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Enforceable%2Bundertakings%2Btemplates?openDocument" \t "_new) website, and will be expanded upon and updated as necessary. The Guide is also available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/EU_guide.pdf/%24file/EU_guide.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.4 New online help for people making a complaint** On 12 June 2007, the Australian Securities and Investments Commission (ASIC) announced improvements to its online services that will make it easier for consumers and investors to make a complaint about a licensed financial services business. ASIC maintains a public register, available on the ASIC website of all businesses licensed to conduct financial services in Australia including banks, credit unions, insurance companies, stockbrokers and financial planners. Information contained on the register will include details of the external dispute resolution (EDR) scheme(s) each licensee belongs to. The seven ASIC-approved EDR schemes covering different sectors of the financial services industry are: * the Banking and Financial Services Ombudsman;
* the Credit Ombudsman Service;
* the Credit Union Dispute Resolution Centre;
* the Financial Co-operative Dispute Resolution Scheme;
* the Financial Industry Complaints Service;
* Insurance Brokers Disputes; and
* the Insurance Ombudsman Service.

In addition, the Superannuation Complaints Tribunal (SCT) is a statutory EDR scheme that deals with complaints about superannuation providers.Between them, the EDR schemes deal with over 100,000 complaints and enquiries from consumers and investors annually. In addition, all seven EDR schemes participate in a common call centre for initial enquiries and complaints from consumers and investors. Anyone phoning the call centre on 1300 78 08 08 will be told how to progress their complaint, or transferred directly to the appropriate EDR scheme.Dealing with a licensed financial business affords consumers and investors certain legal protections. Whilst these protections are limited, and do not guarantee investment performance, dealing with an unlicensed entity provides no legal protection whatsoever. All consumers and investors have the right to make a complaint about an unsatisfactory financial product or service. ASIC produces a free consumer guide, "You Can Complain", about how to make an effective complaint. For further information about how to complain is available on the [ASIC's consumer website](http://www.fido.gov.au/%22%20%5Ct%20%22_new). etailed Contents**2.5 Reissued policy on how to deliver product disclosure about super investment strategies** On 8 June 2007, the Australian Securities and Investments Commission (ASIC) reissued its Policy Statement 184 "Superannuation: Delivery of product disclosure strategies" (PS 184) which deals with how superannuation trustees (trustees) can comply with section 1012IA 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) and deliver product disclosure information about investment strategies to members. PS 184 was originally issued in August 2006.ASIC has reissued PS 184 to take into account practical concerns raised by industry about when s1012IA applies and how trustees can comply with the policy with as much flexibility as possible. After extensive and ongoing consultation with industry ASIC considers that the extra compliance option and clarifications in the reissued policy will make it easier for trustees to comply with s1012IA and provide disclosure about accessible financial products included in investment strategies offered to members.The main refinement to PS 184 allows a trustee to include information about an investment strategy with a specifically identified financial product to be contained in the same Product Disclosure Statement (PDS) for the superannuation product itself. This means that trustees now have three options for providing disclosure about investment strategies with specifically identified financial products (accessible financial products) to members by:* preparing the information themselves in an accessible product PDS for one or more accessible financial products (Option 1), or
* preparing the information themselves in an integrated PDS that combines information about the superannuation product with information about one or more accessible financial products in the one PDS (Option 2); or
* giving a member an accessible product PDS prepared by the issuer of the particular accessible financial product (Option 3).

ASIC has also adjusted the transition period to comply with s1012IA. All new trustees will need to comply with the new transition period rules from 1 July 2007. However, all current trustees will need to comply when they next issue a new complete PDS after 1 July 2007 for the superannuation product or 1 July 2008, whichever is the earlier. The amended transition period will allow trustees to comply with s1012IA and take into account the compliance options offered.etailed Contents**2.6 ASIC consults on policy on licensing relief for trustees of wholesale equity schemes** On 31 May 2007, the Australian Securities and Investments Commission (ASIC) released a consultation paper outlining its proposed policy on licensing relief for trustees of wholesale equity schemes.A wholesale equity scheme refers to an unregistered managed investment scheme that primarily invests in the securities of unlisted companies and whose members are all wholesale clients. The manager of this kind of venture capital arrangement will typically establish the wholesale equity scheme by way of multiple trusts with separate corporate trustees that are related bodies corporate of the manager. The [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) is likely to require these trustees to hold an Australian financial services (AFS) licence for providing dealing and custodial and depository services. To facilitate consultation, ASIC has given interim conditional licensing relief to trustees in Class Order [CO 07/74] until 31 December 2008 if the manager, as an AFS licensee, accepts responsibility for financial services provided by the trustee as if the trustee were its representative by applying for a variation of its licence reflecting the relief. The licensing relief is intended to remove impediments to business in the venture capital industry by removing unnecessary regulatory burdens. ASIC has given interim relief to enable ASIC to further consider the appropriateness of the AFS licensing requirements to trustees of wholesale equity schemes, and discuss ongoing relief with industry. ASIC invites comments on the proposals in the consultation paper by 15 August 2007. Publication of the final policy is expected by June 2008. The consultation paper and interim class order are available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/co07-74.pdf/%24file/co07-74.pdf%22%20%5Ct%20%22_new) website.etailed Contents**2.7 Further updated fees and costs disclosure guide** On 28 May 2007, the Australian Securities and Investments Commission (ASIC) issued a further updated guide for product issuers to help them comply with the Corporations Amendment Regulations 2005 (No. 1) (the enhanced fee disclosure regulations).The revised "Enhanced fee disclosure regulations: Questions and Answers - an ASIC Guide" answers commonly asked questions about compliance with the regulations. It also incorporates some questions and answers released during 2005.ASIC will continue to update this guide from time to time in response to new commonly asked questions or based on its regulatory experience. For example, ASIC is aware that further guidance may be needed on: * disclosure of downstream management costs or performance fees; and
* how to apply exclusions to the definition of management costs such as operational or transactional costs, and costs that an investor would incur if they invested directly in the asset.

**Background**The enhanced fee disclosure regulations include measures on the disclosure of transactions and fees and costs in product disclosure statements (PDSs). These provisions require PDSs for certain investment-linked financial products to include: * a standardised fee template (with accompanying explanation);
* an example of annual fees and costs for a balanced or similar fund; and
* a boxed consumer advisory warning.

The regulations applied to PDSs for superannuation products from 1 July 2005 and for other financial products, including managed investment products, from 1 July 2006. The regulations also mandate certain transactional disclosures in periodic statements of product issuers of superannuation products (from 1 July 2006) and of managed investment products (from 1 July 2007).On 26 March 2007, Treasury released for comment draft Corporations Amendment Regulations that proposed extending the enhanced fee disclosure regime to investment life insurance policies. A date for the commencement of the regulations is yet to be announced.This updated guide amends and deletes some questions in Section A. The new questions answered in this update of the guide relevant to all issuers are as follows: * A11 What is meant by "components" in clause 204(6) of Part 2 of Schedule 10?
* A12 Where fees or costs are reduced, waived or a rebate is offered, what figure should be included in the calculation of managements costs?
* A13 Can contingent fees or costs be excluded from the calculation of management costs?

The new questions answered in this update of the guide relevant to issuers of managed investment products are as follows: * D1 How should issuers of managed investment products comply with the example of annual fees and costs?
* D2 How should fees and costs information be disclosed for a stapled security?
* D3 How should contributory mortgage issuers disclose transaction-specific fee information?
* D4 How should start-up and initial one-off fees or costs be disclosed?

The Guide 'Enhanced fee disclosure regulations: Questions and Answers - an ASIC Guide' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Enhanced_fee_disclosure_regulations_guide.pdf/%24file/Enhanced_fee_disclosure_regulations_guide.pdf%22%20%5Ct%20%22_new) website. etailed Contents**2.8 Technical updates to financial services related policy statements and class orders** On 28 May 2007, the Australian Securities and Investments Commission (ASIC) released technical updates to three ASIC policy statements, a guidance paper, and a number of class orders relating to financial services providers to ensure users of its policy publications are working with the most current information.The updated policy statements are:* [PS 168] Disclosure: Product disclosure statements (and other disclosure obligations)
* [PS 175] Licensing: Financial product advisers - Conduct and disclosure
* [PS 182] Dollar disclosure.

The updated guidance paper is titled Licensing: The Scope of the Licensing Regime: Financial Product Advice and Dealing - an ASIC Guide ('Advice and Deal Guide'). The policy statements and guides have been updated to take account of the regulations made on 15 December 2005 amending the financial services regime. These regulations implement the Federal Government's Refinements to Financial Services Regulation (FSR) proposal paper issued on 2 May 2005. The amendments are of a minor and technical nature and do not raise new policy issues.ASIC will continue to monitor the currency of its publications in light of legislative changes and developments to ASIC policy, and will update them as required. For example, further updating may be necessary to reflect the implementation of the Government's current Corporate and Financial Services Regulatory Review.Copies of the policy statements and guidance papers are available on the [ASIC](http://www.asic.gov.au/fsrpolicy%22%20%5Ct%20%22_new) website or by calling the ASIC Infoline on 1300 300 630.etailed Contents**2.9 Update on ASIC'S review of financial adviser training standards** On 22 May 2007, the Australian Securities and Investments Commission (ASIC) announced that it is conducting a review of its policy on retail financial adviser training standards (Policy Statement 146 Licensing: training of financial product advisers). ASIC has begun to meet with key stakeholders, and will continue to do so to help identify the key issues and options for the review.The review was first foreshadowed in the Parliamentary Secretary's Corporate and Financial Services Regulation Review - Proposals Paper released in November 2006. ASIC will release a public consultation paper in July to seek broad input on the review.ASIC considers that, generally speaking, minimum training standards are appropriate for people providing financial product advice to retail clients. The minimum standards in PS 146 have been in place for a number of years, and advisers and licensees have expended considerable time and money obtaining the relevant training. ASIC is not planning to fundamentally revisit the current training standards.ASIC anticipates that the review will focus on: * the appropriateness of current training standards towards the perimeter of the financial advice regime, and in particular, the appropriateness of the current standards for providers of general advice and providers of advice on general insurance products;
* the description of the knowledge and skills categories in Appendix A of the policy (e.g. whether the categories should be broken down into a larger number of narrower categories);
* the administration and ease-of-use of ASIC's training register (including how courses are placed onto the register); and
* recognition of prior study and training.

Initial meetings with stakeholders suggest that there may be industry concerns about the quality of some courses on the training register and how up to date they are. ASIC would welcome any further information stakeholders are able to provide on this topic. Copies of the Licensing: training of financial product advisers is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps146.pdf/%24file/ps146.pdf%22%20%5Ct%20%22_new) website by calling the ASIC Infoline by calling 1300 300 630 Copies of the Parliamentary Secretary's Corporate and Financial Services Regulation Review - Proposals Paper (November 2006) can be obtained from [The Treasury](http://www.treasury.gov.au/home.asp?ContentID=521" \t "_new) website. etailed Contents |

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| **3.1 Continued improvement in corporate governance reporting**The latest review by the Australian Securities Exchange (ASX) of reporting against the ASX Corporate Governance Council's Principles and Recommendations shows that listed entities have continued to improve their corporate governance reporting. More details of the review are provided in Item 1.7 of this Bulletin.The overall reporting level for listed companies - the aggregate of adoption of recommended practices and of 'if not, why not' reporting - was higher in 2006 (90%) than in either of the two previous years ASX has conducted the review (2005 - 88% and 2004 - 84%).The full review is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.2 ASX welcomes Government commitment to emissions trading scheme**ASX welcomes the Federal Government's commitment to introduce an Emissions Trading Scheme (ETS). The introduction of an ETS will provide business with certainty regarding the cost of emitting greenhouse gases. It will also enable industry to reduce emission levels at the lowest cost to the Australian economy.Key to the success of the proposed ETS will be the introduction of a futures market for emission permits and any fungible carbon-related products. A futures market will generate the short and long-term price signals and risk mitigation required to underpin investment certainty.The ASX is appointing its own working group to facilitate industry input into the design of an appropriate futures market and to provide advice to the Federal Government on the design aspects of an ETS required to facilitate an efficient secondary market for emission permits.Further information is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents**3.3 Changes to supervisory investigation powers and processes** ASX announced on 1 June 2007 a number of changes to ASX's supervisory investigation powers and process.The objective of the changes is to improve the efficiency and effectiveness of ASX supervision for the benefit of all market stakeholders.The changes relate to the:* Publication of Disciplinary Tribunal determinations;
* Introduction of Breach Notices;
* Increase in the maximum dollar penalty that can be determined by Disciplinary Tribunals; and
* Time allowed to pay fines imposed by the Disciplinary Tribunals.

The changes follow a period of public consultation about the proposal paper "Supervisory Powers and Processes", released for comment in December 2006.Further information is available on the [ASX](http://www.asx.com.au/%22%20%5Ct%20%22_new) website.etailed Contents |

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| **4.1 Becker Group Limited - Final decision**On 20 June 2007, the Takeovers Panel advised that it has made a declaration of unacceptable circumstances and final orders in relation to an application by Dolphete Pty Limited, concerning the affairs of Becker Group Limited. **(a) Background**Becker Group is the subject of an off market takeover bid by Prime Media Broadcasting Services Pty Limited (Prime), a wholly owned subsidiary of Prime Television Ltd, at $0.47 per share (initially $0.40 per share, increased on 25 May 2007 to $0.43, and on 13 June 2007 to $0.47) (Prime Offer). At the same time as entering an Implementation Agreement in relation to the Prime Offer, Becker Group entered into an asset sale deed (Asset Sale Deed) with Becker Film Group Pty Limited (BFG), a company associated with two major shareholders and directors of Becker Group, Mr Richard Becker and Mr Russell Becker. Under the Asset Sale Deed, Becker Group agreed to sell Becker Group's film, exhibition, production and distribution businesses (Film Business) to BFG for $15.5 million (subject to adjustment) (Asset Sale Proposal). Messrs Richard and Russell Becker are directors of Becker Group and indirectly control 42.6% of Becker Group's shares. At the time of the Panel's decision Prime and interests associated with Paul Ramsay Holdings Pty Ltd controlled 24.11% of Becker Group.The Asset Sale Proposal is subject to shareholder approval under ASX listing rule 10.1 and chapter 2E of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). At the time of the application:* the Asset Sale Proposal was conditional on the Prime Offer reaching 50% voting power and being declared unconditional (which would be achieved if Messrs Richard and Russell Becker accepted the Prime Offer);
* the Prime Offer was conditional on Prime gaining voting power of 80% (which would be impossible if Messrs Richard and Russell Becker did not accept the Prime Offer);
* the Prime Offer was conditional on Becker Group not disposing of any major assets, but included an exclusion which would allow the Asset Sale Proposal to proceed (thus a proposal from any other person to acquire the Film Business would trigger one of the then terms of the Prime Offer);
* Prime had indicated its intention to vote in favour of the Asset Sale Proposal (which would have, for practical purposes, assured passage of the Asset Sale Proposal);
* Messrs Richard and Russell Becker had stated that if the Asset Sale Proposal was approved they intended to accept (in the absence of a superior offer) the Prime Offer (which would materially affect control of Becker Group and the ability of any other bidder to gain control of Becker Group);
* Becker Group had undertaken no market testing or enquiries as to the value of the Film Business or Becker Group itself; and
* Prime had been allowed to undertake detailed due diligence of Becker Group.

The Prime Offer and the Asset Sale Proposal are the result of negotiations between Prime, Mr Richard Becker and Mr Russell Becker, and Becker Group, which commenced in June 2006 and which led to a formal proposal to Becker Group in December 2006. Prime and Becker Group announced the Prime Offer and the Asset Sale Proposal together on 30 March 2007.Becker Group advised the Panel that it undertook no market testing of the price of the Film Business or Becker Group itself because Becker Group considered the prices proposed for the Film Business and Becker Group itself were attractive and Becker Group was concerned not to lose the opportunity for its shareholders to consider the Prime Offer. **(b) Application**In its application, Dolphete submitted that the Prime Offer and the Asset Sale Proposal were interdependent and that Prime, Paul Ramsay Holdings Pty Ltd and Messrs Richard and Russell Becker were acting in concert. Dolphete submitted that the arrangements surrounding the Prime Offer and the Asset Sale Proposal meant that, in effect:* BFG would be able to acquire the Film Business of Becker Group without being required to obtain the approval of a majority of disinterested shareholders;
* Prime, by giving an additional benefit to BFG, would be able to obtain control of Becker Group by BFG accepting, even if no other shareholders accepted the Prime Offer;
* acquisition of the Film Business or of Becker Group would not take place in an efficient competitive and informed market; and
* the holders of Becker Group shares would not have a reasonable and equal opportunity to participate in the benefits accruing under the Prime Offer.

Dolphete also submitted that Becker Group had agreed no-talk and no-shop conditions under the Implementation Agreement which were anti-competitive and adversely affected the efficient competitive and informed market for Becker Group shares, especially where there had been no market testing of either the price of the Film Business or Becker Group itself.**(c) Decision**The Panel considered that Prime voting for the Asset Sale Proposal, and its effect on the approval of the Asset Sale Proposal:* was a benefit to Richard and Russell Becker, in which no other shareholders of Becker Group would have an opportunity to participate; and
* was likely to have an effect on:
	+ the control or potential control of Becker Group, or the acquisition, or proposed acquisition of a substantial interest in Becker Group, since Richard and Russell Becker had said that they would accept the Prime Offer if the Asset Sale Proposal is approved; and
	+ the efficient, competitive and informed market for control of the shares in Becker Group, since it is likely to affect the success of potential bids to acquire the whole of Becker Group.

The Panel also considered there were material information deficiencies requiring correction in the Notice of Meeting, Becker Group target's statement and the two independent expert's reports on the Asset Sale Proposal and Prime Offer respectively.**(d) Subsequent events**During the proceedings, the Panel invited parties to consider alternative commercial solutions to address the circumstances which Dolphete had submitted were unacceptable in the Application and which the Panel indicated raised concerns for it. Since the date of the Application, a range of events have occurred, both as a consequence of, or as a part of, the Panel's proceedings, and as part of commercial transactions concerned with the Prime Offer and competition for Becker Group and the Film Business. The events include the offering by various parties of undertakings to the Panel to mitigate the circumstances which Dolphete had submitted were unacceptable (Proposed Undertakings) and the emergence of persons, other than Prime and BFG, who have expressed interest in making offers for either the Film Business or the whole of Becker Group, and variations of the Prime Offer (New Circumstances). The Panel has considered all of the Proposed Undertakings offered and New Circumstances which have been put before it. The Panel considers that the New Circumstances, and Proposed Undertakings offered, do not change its finding that the Circumstances are unacceptable circumstances or that orders are warranted and do not adequately remedy the effects of the unacceptable circumstances on Becker Group shareholders and the market for control of Becker Group. **Orders**The Panel has made final orders under section 657D:* preventing Prime, or any associate of Prime from exercising any voting rights (directly or by proxy) attached to Becker Group securities held or controlled by them on any resolution to approve the Asset Sale while Prime (or an associate) is making a takeover bid for Becker Group; and
* requiring Becker Group to provide its shareholders with corrective disclosure to address the material information deficiencies set out in the attached declaration and sufficient time to consider the additional disclosure.

The Panel will publish the reasons for its decision in due course.etailed Contents**4.2 Insider participation in control transactions - Panel publishes final Guidance Note and public consultation response paper** On 7 June 2007, the Takeovers Panel released Guidance Note 19 in relation to when the Panel may consider unacceptable circumstances exist where there is insider participation in control transactions.Guidance Note 19 follows a draft Guidance Note and Issues Paper which were published on 21 February 2007. The Panel received fifteen submissions in response to the draft Guidance Note and Issues Paper. The very large majority were supportive of the Panel's proposed Guidance Note and its content. The Panel has also released a Public Consultation Response Statement which sets out the main comments that the Panel has received and the reasons why the Panel has taken up, or not taken up, the comments or suggestions received.The Guidance Note and Response Statement are available on the [Panel](http://www.takeovers.gov.au/display.asp?ContentID=1226" \t "_new) website.etailed Contents  |

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| **5.1 Directors' power to access financial records**Mark Cessario, Corrs Chambers WestgarthMcDougall v On Q Group Ltd [2007] VSC 184, Supreme Court of Victoria, Hargrave J, 5 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsc184.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/june/2007vsc184.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**Mr McDougall was a director of On Q Group Limited ("OQG"). OQG brought proceedings against Mr McDougall seeking to recover money he owed OQG pursuant to a loan agreement. In those proceedings Mr McDougall sought orders, pursuant to section 290 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), requiring OQG to allow him to access its financial records and authorising accounting experts to inspect the financial records on his behalf and make copies of the documents.Hargrave J found that OQG had not established that Mr McDougall sought access to the financial records for a purpose involving a breach of his fiduciary duties or for personal reasons only. As such, OQG had not satisfied its onus to prevent Mr McDougall being granted access to OQG's financial records. His Honour ordered that such access be granted and that the experts nominated by Mr McDougall be allowed to inspect OQG's financial records.**(b) Facts** In August 2005, the board of directors of OQG appointed accountants to conduct a review of related party transactions between OQG, Mr McDougall and companies associated with him. As a result of that review, and the need for OQG to complete its year end accounts, OQG entered into a 'Deed of Rescission, Termination and Release' with Mr McDougall, which declared void certain transactions between OQG and Mr McDougall. A schedule to that Deed also specified that the reconciled balance of Mr McDougall's loan account was $3,724,969.03, but that this amount was "subject to adjustment if the Auditors determine that it is a different amount". OQG and Mr McDougall also executed a loan agreement, pursuant to which it was agreed that OQG had lent Mr McDougall the reconciled balance of his loan account. In October 2005 Mr McDougall sought to exercise his right, under section 290 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), to access OQG's financial records. One of the reasons he sought access to the financial records was so that the correct balance of his loan account could be determined. In an affidavit sworn in the proceedings, Mr McDougall also stated that he sought access to OQG's financial records because he had more general concerns about the way in which the company was accounting for its financial transactions. In cross-examination Mr McDougall referred to $10 million raised in a capital raising that he believed had not been properly accounted for by OQG. OQG did not provide Mr McDougall with all of the financial records that he sought.In these proceedings, OQG sought payment of the outstanding balance due under the loan agreement between it and Mr McDougall.In the proceedings, Mr McDougall sought orders requiring OQG to provide him with its financial records and allowing persons nominated by him to inspect those records. Those orders were sought pursuant to section 290 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) which provides that:* a director has a right to access a company's financial records; and
* a court may authorise a person to inspect a company's financial records on the director's behalf, and may make orders limiting the use to which that person may make of the records inspected.

**(c) Decision** Hargrave J noted that a director's right to access a company's financial records, whilst he or she remains in office, is limited only by the power of the courts to restrain access where the company proves that the director intends to exercise the right of access "to abuse the confidence reposed in him and materially ... injure the company", "to act in breach of his fiduciary duty to the company" or in circumstances where there is "clear proof that a misuse of power is involved (the onus of which lies on those asserting it)."His Honour emphasised that the onus of proof of a possible misuse of documents by a director lies on the company seeking to resist the director exercising the right of access.Hargrave J held that OQG had not satisfied that onus of proof because:* the mere fact that a director requires access to company documents to defend a claim made by the company against the director does not, by itself, establish that the director requires access for an improper private purpose. Further, in the circumstances of the present case, it was in the best interests of both OQG and Mr McDougall that the dispute regarding his indebtedness be resolved on proper grounds as soon as possible; and
* Mr McDougall, although not required to do so, had established other reasons for his request to access the financial records of OQG.

Therefore, his Honour ordered that OQG provide Mr McDougall with unfettered access to all of its financial records.In the proceedings, Mr McDougall swore that he required the assistance of accounting experts to assist him in understanding OQG's financial records. Hargrave J held that OQG had not demonstrated why those experts should not be permitted to inspect and copy specified financial records on Mr McDougall's behalf, and indicated that he would therefore make orders allowing them to inspect and copy such records. His Honour also indicated that he would make orders restricting the use which those experts could make of the records they inspected, after hearing further from the parties on that issue.etailed Contents**5.2 Accessing a credit union's register of members - approved purposes; members' powers to direct their board** (By Matthew Davis, Mallesons Stephen Jaques)Capricornia Credit Union Ltd v Australian Securities and Investments Commission, [2007] FCAFC 79, Federal Court of Australia, Full Court, Dowsett, Edmonds and Besanko JJ, 5 June 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fcafc79.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/june/2007fcafc79.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerned applications by Mackay Permanent Building Society ('Mackay') to ASIC to approve access to Capricornia Credit Union Ltd ('Capricornia') members' register pursuant to section 173(3B) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Mackay's submitted purposes included not only informing the members of a proposed takeover of Capricornia by Mackay, but, more contentiously, also included purposes to convene a meeting of members for them to direct Capricornia's board to act in certain ways, to change the composition of the board to create a board more receptive to Mackay's takeover and to amend the company's constitution so as to confer upon its members the right to direct the board to act. The court's judgment considered these purposes in line with generally accepted directors' duties and powers and concluded that some of the purposes would, if carried out, amount to members unlawfully usurping directors' management roles. The constitutional amendment was the only one of the contentious purposes to survive.**(b) Facts** Mackay made a takeover offer for Capricornia and to facilitate this, wished to communicate directly with Capricornia members. As Capricornia is a credit union, the general [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) section 173 rules relating to access to the members' register apply in a modified form - which applies to building societies, credit societies or credit unions - requiring ASIC consent for access. Accordingly, Mackay made two applications to ASIC for approval pursuant to section 173(3B); a section inserted by regulation 12.8.06 of the [Corporations Regulations 2001 No. 193 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56758" \t "_default).The proposed purposes for which the initial application (19 October 2004) to access the registers was made were, in relation to a merger proposal:'To communicate (in writing, by telephone or by public forum) with the members . of Capricornia . for the sole purpose of providing material and other information:* about the content . of a [merger] proposal ["purpose 1"];
* to assist them consider and understand the proposal ["purpose 2"];
* . convening a meeting of members to . pass, resolutions;(i) giving directions to Capricornia's board in relation to the proposal ["purpose 3"]; and/or(ii) changing the composition of Capricornia's board so that a majority of its directors (at least) are prepared to give effect to the directions of the members (as set out in any resolution passed by members) with regard to the proposal ["purpose 4"]; .'

Capricornia made submissions opposing the application. Nevertheless, in March 2005, ASIC approved purposes 1, 2 & 4, but declined purpose 3.Mackay made its second application (27 April 2005) for one further purpose ["purpose 5"]; to pass resolutions amending Capricornia's constitution so as to expressly confer upon its members the power to give directions or recommendations to Capricornia's board with respect to the proposed merger. Again Capricornia made submissions opposing the application; however, ASIC approved purpose 5.The Administrative Appeals Tribunal (Deputy President Muller) heard Capricornia's review of both ASIC decisions and Mackay's review of ASIC's initial decision, upholding both ASIC decisions. Capricornia appealed to the Federal Court.**(c) Decision** The judgment primarily deals with two issues:1. What is a permissible purpose pursuant to section 173(3B) to access a shareholder register; and
2. In light of the proposed purposes, to what extent general shareholders' meetings can direct directors to act in certain ways, potentially impinging upon directors' duties.

**(i) Specific takeover chapters do not exclude general register access provisions**Capricornia argued that as a scheme of arrangement or takeover was contemplated, only the specific statutory procedures prescribed in connection with such transactions - chapters 5 and 6 - could be used, excluding other general provisions, such as section 173(3B). However, based on the wording of the legislation, the court dismissed this argument. Thus, a takeover context, of itself, will not be a bar to access to a target company members' register.**(ii) Directors' duties: introduction**As some of the proposed purposes (namely 3, 4 & 5) touched on the respective roles of directors and members, the appropriate relationship between members of a corporation and its board was considered. Capricornia attacked purposes 3, 4 and 5 on the grounds that they undermine the duties of directors and effectively remove the management of Capricornia from its directors and place it in the hands of the members.**(iii) Directors' duties: purpose 3 (directions to the board)**The court accepted that the Capricornia board is obliged to perform the functions conferred upon it by its constitution, a factual analysis of which determined that the management of the business is indeed vested with its directors. The court accepted relevant precedent that members generally may not instruct directors as to the performance of their duties. For this reason, the court agreed with the Tribunal's decision that purpose 3 should not have been approved.**(iv) Directors' duties: purpose 4 (change in composition of the board)**Their Honours noted that 'the effect of the proposal is that the board be re-constituted to comprise directors who will act in accordance with members' directions without exercising any personal judgment', rather than 'observing the directors' duties imposed upon them by sections 180 and 181 and the general law.' This amounted to a fatal flaw. Thus the court held that pursuant to section 249Q, no meeting could be convened for the improper purpose of 'constituting a board comprised of directors who will act in breach of [their] duty'.Interestingly, the court may have been willing to allow purpose 4 if purpose 5 (amendments to the constitution) had been already passed as, in that case, the 'directors will be obliged to give effect to members' directions in connection with Mackay's proposal'. However as the amendment had not yet been passed, the issue was irrelevant.Accordingly, ASIC and the Tribunal's approvals for purpose 4 were set aside.**(v) Directors' duties: purpose 5 (amend constitution)** The court recognised that the real intention of this proposal 'is that the members have the authority to give directions . [which] carries implications that the board is to obey them'. The court was concerned that such directions may be contrary to directors' duties. Although, in the absence of a direction, the board could act in accordance with their constitutional and statutory obligations, the court was concerned should there be a clash between their duties and any such direction. Mackay submitted that the effect of the proposed amendment would be 'to reduce the scope of the directors' powers and duties under the constitution so that action taken pursuant to any direction will not involve breach of any statutory or general law obligation'. While the court readily accepted that under the traditional general law, members can so amend their constitution, they were unambiguous that 'there is no statutory authorisation for members to relieve directors from the duties imposed by sections 180 and 181'.The court further noted that the section 199A and 199C indemnity provisions 'proscribe any exemption from, or indemnity against, liability to the corporation arising from any breach of [those duties]'. While 'the exercise of powers and discharge of duties derived from the constitution may be amenable to members' direction, if permitted by that constitution, the exercise of powers and discharge of duties derived from other sources may not be so amenable'. The court also entertained, but dismissed suggestions that the proposed amendment could, per se, be oppressive, although they observed that directions made pursuant to it may be.The court also considered a number of practical issues such an amendment would raise - including how any direction is to be carried into effect and how timely decisions can be reached - concluding that there 'are likely to be considerable difficulties' with the implementation of purpose 5.Nevertheless, the court ultimately concluded that these problems will 'arise from the nature of any direction which might be given pursuant to the amendment rather than from the amendment itself.' Therefore the court found itself 'unable to conclude that the purpose [5] was unlawful or improper' and thus upheld the Tribunal's decision approving purpose 5, although reserving that the validity of any direction would have to be assessed on its individual merits.The judgment also granted leave to Capricornia to further amend its notice of appeal.etailed Contents**5.3 Sealing of confidential documents and application for leave to compromise debt in liquidator's administration** (By Sophie Purser, Blake Dawson Waldron)Re:JN Taylor Holdings Limited (In Liq) [2007] SASC 193, Supreme Court of South Australia, Debelle J, 25 May 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/may/2007sasc193.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2007/may/2007sasc193.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerned an application by a liquidator pursuant to sections 477(2A) and 477(2B) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) for leave to compromise a debt and for leave to enter into an agreement to effect that compromise where the agreement will operate for more than 3 months.In addition, the liquidator also sought orders to protect the confidentiality of the agreement for which he was seeking the court's approval, being orders to:* hear the application in closed court; and
* seal the affidavits filed in support of the application.

Debelle J considered the following issues in reaching a decision:* whether the court has power to close the court;
* if it has, in what circumstances will it do so;
* the power of the court to seal up confidential documents and other material adduced in evidence; and
* whether the court should make order pursuant to sections 477(2A) and 477(2B) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).

Debelle J found in favour of the applicant, approving the entry by the liquidator into the compromise and allowing the hearing of the application in a closed court, with necessary orders made to protect the confidentiality of documents filed in support of the application**(b) Facts** The liquidator of JN Taylor Holdings Limited had applied for leave of the court to compromise a debt and to enter into an agreement to effect that compromise where the agreement will operate for more than 3 months.The compromise in question involved a "substantial sum of money", however the details in the judgment are sparse out of respect for the confidential nature of the transaction. The liquidator had obtained the advice of an experienced Senior Counsel that confirmed that the compromise had provided a "very substantial benefit" to the preference shareholders. The liquidator had already made two payments to preference shareholders which totalled a distribution of 40 cents in the dollar. When the amount of the compromise was added to available funds, the liquidator would have been able to make a further distribution of about 30 cents in the dollar, with payment to be made before 30 June 2007.At the time when the liquidator entered into the agreement, the Committee of Inspection had been reduced to one. The Committee was therefore unable to approve the compromise. By an order dated 23 March 2007, the Committee of Inspection had been increased to 2; however the liquidator had sought the approval of the court on the basis that it was not appropriate for a newly appointed member of the Committee to be burdened with the decision whether to approve the compromise. The liquidator contended that the application should be held in closed court and the documents filed in support of the application should be sealed up and not be available for inspection by any person unless the court made a specific order permitting inspection. The liquidator claimed that if the events leading to the compromise and the nature of the compromise were disclosed, litigation might result in which the compromise could be challenged causing the other party to the contract to terminate the contract.The application was listed for hearing before a Master of the court, who referred the application to a judge.**(c) Decision** **(i) Closing of the court and sealing of confidential documents**Debelle J made an interim order to close the court at the outset. Debelle J then reviewed that order and considered the extent to which the transcript of the hearing should remain confidential in this judgment.Debelle J noted that it is a well settled principle of the common law that the courts must administer justice publicly and in open court. However, Debelle J gave detailed consideration to the exceptions to this rule that are grounded in what Viscount Haldane LC described in Scott v Scott [1913] AC 417 (at 437-438) as the more fundamental principle that the chief object of courts of justice must be to ensure that justice is done and, accordingly, courts will not sit in public if to sit in public would destroy the subject matter of the dispute.Debelle J also considered the statutory requirements of open justice in reaching his decision set out in section 46A of the [Supreme Court Act 1935 No. 2253 (SA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28891" \t "_default) which provides that: "Subject to any provision of an Act or any rule to the contrary, the court's proceedings must be open to the public". Debelle J found that section 69 of the [Evidence Act 1929 No. 1907 (SA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28548" \t "_default) and rules of court qualify the operation of section 49A of the [Supreme Court Act 1935 No. 2253 (SA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28891" \t "_default), but that the power to close the court will be exercised very sparingly.In his reasons for referring the application to a judge, the Master noted that, with one exception, the practice of placing documents and exhibits in sealed envelopes at the request of liquidators is not authorised by any rule of court or by any considered judicial decision. The exception referred to is Rule 11.3 of the Corporations Rules which the Master found had no operation on the application. Debelle J found that the Master had failed to take into account the full extent of the inherent power of the court to control its proceedings and in particular, section 69A of the [Evidence Act 1929 No. 1907 (SA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28548" \t "_default). Debelle J noted that where a court orders that proceedings be heard in closed court, that order would be frustrated if steps were not taken to preserve the confidentiality of confidential documents tendered at those proceedings.Debelle J found that section 69A(2)(b) of the [Evidence Act 1929 No. 1907 (SA)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=28548" \t "_default) will not prevent an order sealing up documents where it is determined that the public disclosure of those documents would defeat the interests of justice. Implicit in a decision to seal documents is that there are special circumstances that give rise to a sufficiently serious threat of prejudice to the proper administration of justice as to warrant the documents being sealed up.In reaching a decision to hear the application in a closed court and permit the confidential documents to be sealed, Debelle J stated that this was a clear case where disclosure of the documents and the circumstances leading to it would defeat the agreement itself to the clear prejudice of the preference shareholders.**(ii) Approval of the compromise**In order to maintain the confidential nature of the transaction, Debelle J provided scant details in respect of the compromise in his decision. Debelle J found that it was appropriate for the court to grant approval to the compromise notwithstanding that the transaction could operate for a period of years. In reaching this decision, Debelle J noted that the ongoing agreement would not create any burden for the company because neither the company nor the liquidator would incur any cost. etailed Contents**5.4 Constitutionality of the Companies Auditors and Liquidators Disciplinary Board** (By Andrew Healer, Freehills)Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board; Gould v Magarey [2007] HCA 23, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 24 May 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/high/2007/may/2007hca23.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2007/may/2007hca23.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 Companies Auditors and Liquidators Disciplinary Board ('the Board') suspended the registration of two liquidators. The liquidators challenged the decision of the Board on the ground that it was an exercise of judicial power contrary to the Constitution. Chapter III of the Constitution requires that the judicial power of the Commonwealth must only be exercised by a properly constituted court. The court held that the Board's decision was valid as, taking into account functional and historical considerations, there had been no exercise of judicial power.**(b) Facts**Richard Albarran and Vanda Russel Gould ('the appellants') were both liquidators registered under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). The respondents are members of the Companies Auditors and Liquidators Disciplinary Board. The Board has functions and powers conferred on it by sections 204 and 261 of the [Australian Securities and Investments Commission Act 2001 No. 51 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56481" \t "default) and the Corporations Act.Section 1292 of the Corporations Act vests power in the Board to suspend or cancel the registration of liquidators in stipulated circumstances. On the application of ASIC, the Board had made orders suspending the registration as liquidators of both appellants for failing to perform their duties adequately and properly. The Full Federal Court jointly heard argument in each proceeding that the power conferred on the Board by section 1292(2) involves the exercise of the judicial power of the Commonwealth. The Full Federal Court rejected the submissions that section 1292(2) is an attempt by Parliament to confer such judicial power on a body other than a court.**(c) Decision**The High Court unanimously rejected the appeal. In determining whether there had been a conferral of judicial power on the Board, their Honours considered the past decisions of the court in Federal Commissioner of Taxation v Munro (1926) 38 CLR 153, where Isaacs J held that judicial power is power incapable of being exercised by another branch of government; and R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361, where Kitto J held that judicial power involves determining a dispute between parties as to the existence of a legal right or obligation and then applying the law to the facts.**(i) No determination of guilt and no punishment**The Board had made no determination as to whether the Appellants had committed an offence under the Corporations Act. Their Honours construed the words "adequately" and "properly" as they appear in section 1292 as not being directed to a legal standard but toward the commercial and practical standard of professional liquidators. This interpretation is supported by the requirement in section 203 of the ASIC Act that the composition of the Board includes members nominated by professional accounting bodies. In a separate judgment concurring with the majority's reasoning, Kirby J found that an analysis of corporations law in Australia revealed the desirability of upholding the standards of liquidators for the protection of shareholders. This purpose is best served by the Board, which has experience and insight into the work of liquidation, as opposed to a generalist court.**(ii) Historical considerations**The Appellants relied on precedent showing the control of liquidators historically undertaken by the Court of Chancery (R v Davison (1954) 90 CLR 353; R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361). However, their Honours rejected this interpretation of the case law. They held that historical considerations did not show that courts had had a general role in exercising functions of a disciplinary nature such as those undertaken by the Board in Australia. They also observed that in England the Board of Trade had been given significant powers to supervise liquidators prior to the adoption of the Australian Constitution.**(iii) Laws of domestic and general application**The Appellants proposed a distinction, for constitutional purposes, between laws of domestic and general application. It was submitted that disciplinary arrangements in domestic areas, such as the determination of a university visitor in England (as in R v Lord President of the Privy Council; Ex parte Page [1993] AC 682) would not engage the judicial power of the Commonwealth, whereas those determinations relying on the application of general law, such as corporations law, would involve the exercise of judicial power.The court rejected this reasoning on the grounds that the proceedings were not of a punitive nature, and it was also unclear if the archaic distinction proposed had any relevance to Australian law.etailed Contents**5.5 ASIC maintains power under section 206F of the Corporations Act to disqualify persons from managing a corporation** (By Christine Huynh, Mallesons Stephen Jaques) Visnic v Australian Securities and Investments Commission [2007] HCA 24, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ, 24 May 2007The full text of the judgment is available at: [http://cclsr.law.unimelb.edu.au/judgments/states/high/2007/may/2007hca24.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2007/may/2007hca24.htm%22%20%5Ct%20%22_new)or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary** In an important decision concerning ASIC's powers, the High Court dismissed a challenge to ASIC's power under section 206F of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) to disqualify persons from managing a corporation. Section 206F allows ASIC to determine whether to disqualify a person from managing a corporation by reference to criteria, which include public interest. The court unanimously held that as considerations of policy are important in a decision made under section 206F, the power given to ASIC is not an exercise of judicial power and therefore does not contravene section 71 of the Constitution (which reserves federal judicial power to Chapter III courts). **(b) Facts**In late January 2006, ASIC disqualified the plaintiff from managing a corporation without leave of ASIC for five years. Under section 206F, ASIC is able to ban a company director if they are the director of two or more failed companies that are wound up and a liquidator had lodged a report under section 533(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) concerning the ability of the corporation to pay its debts. ASIC claimed that the plaintiff, in failing to maintain adequate financial records and ensuring the companies did not trade while insolvent, had failed to exercise his powers and duties as a director of the companies with reasonable care and due diligence. The plaintiff claimed that there was a breach of section 71 of the Constitution which stipulates that the judicial power of the Commonwealth is vested in a Chapter III court and not a legislative or executive officer, body or tribunal. The plaintiff argued that the power to disqualify persons from managing a corporation is only available to a Chapter III court, and ASIC not being one, made section 206F constitutionally invalid. **(c) Decision** **(i) Central issue to be determined**The central issue was whether section 206F purported to confer upon ASIC a function pertaining exclusively to the judicial power of the Commonwealth. If the legislation did, then it would be invalid as ASIC is not a court identified under Chapter III of the Constitution. **(ii) Joint judgment**The plaintiff argued that, given the presence of Part 2D.6 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) which confers disqualification by section 206C, 206D and 206E on a court, parliament could not under section 206F also vest judicial power in an administrative body. This submission was rejected because it conflicted with the decision made in R v Quinn; Ex parte Consolidated Foods Corporation where the court held that section 23(1) of the [Trade Marks Act 1995 No. 119 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6906" \t "default) validly conferred authority on both the court and the Registrar of Trade Marks. Moreover, the criteria stipulated for the exercise of power by ASIC and the courts differ to a significant degree. In a joint judgment, Gleeson CJ, Gummow J, Hayne J, Callinan J and Crennan J accepted the argument that section 206F confers on ASIC a power to be exercised for the purpose of maintaining professional standards in the public interest and that there is therefore nothing inherently judicial in that power. The Court relied on the decision of the High Court in Precision Data Holdings Ltd where the court held that "where as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal, in this case, is entrusted with the exercise of judicial power". The court held that this was sufficiently determinative to find that section 206F empowers ASIC to determine whether a person can manage corporations and to decide that question by reference to criteria including the public interest. **(iii) Kirby J judgment**Kirby J agreed that the legislation was valid but focused on the disciplinary character of the powers conferred on ASIC by section 206F. This was contrasted with the more open ended powers conferred by the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) on the court. Further, ASIC's rights could not be characterised as determining basic legal rights which must be reserved to Chapter III courts. Therefore, the regulation of officers under section 206F was constitutionally valid even though some sections (eg sections 206C, 206D and 206E) only confer powers on Chapter III courts. His Honour held that the functions conferred by section 206F are not of such a kind that they can only be vested in the courts.Interestingly, Kirby J noted that recently the Commonwealth had a clear tendency to approach every appeal to the separation of powers doctrine by using the "double aspect" or "chameleon principle". While he acknowledged that he had in the past accepted the principle, he cautioned against taking the principle too far and destroying the important objectives of the separation of powers doctrine. **(iv) Conclusion** The High Court unanimously dismissed the appeal. etailed Contents**5.6 When can administrators be deprived of their fees and removed as the new liquidators?** (By Peter Sise, Clayton Utz)Malhotra v Tiwari [2007] VSCA 101, Court of Appeal of the Supreme Court of Victoria, Chernov, Nettle and Redlich JJA, 23 May 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/may/2007vsca101.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/may/2007vsca101.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case involved an application to have the administrators of a company deprived of their administrators' fees. It was alleged that the administrators had misconducted themselves and were biased towards certain interested parties. The Court of Appeal found that the administrators were entitled to their fees. To be deprived of their fees, the administrators would have had to misconduct themselves to the extent that they should have been removed as administrators. The Court of Appeal did, however, refuse to allow the administrators to act as liquidators of the company. There were shortcomings with the administrators' actions which may need to be investigated by a liquidator. The same persons, who acted as administrators, could not be allowed to investigate their own actions now as liquidators as it is "axiomatic" that administrators cannot investigate themselves.**(b) Facts** This appeal concerned the administration of a family business that undertook the importing, wholesaling and retailing of Indian groceries (the "Company"). The facts of this case are lengthy and revolve around an ongoing dispute following a divorce. The Court of Appeal remarked that this case was as much a post-nuptial conflict as a commercial contest.The appellant was a former director of the Company. The second respondents were the administrators of the Company ("Administrators"). The first respondents consisted of the appellant's ex-wife and her son from a former marriage to another previous director of the Company ("Tiwaris"). The Tiwaris were directors of the Company. The Administrators of the Company had decided to place the Company into voluntary liquidation and become the liquidators. The appellant was particularly aggrieved by the decision of the Administrators to allow the Tiwaris to continue to manage the Company during the administration and not himself. The appellant was concerned with the propriety of the Tiwaris as managers of the Company.At trial, the appellant argued that the Administrators had:* acted so improperly or incompetently in allowing the Tiwaris to manage the Company;
* acted with such negligence in failing to impose proper controls on the Tiwaris as managers; or
* acted with such bias towards the Tiwaris, that they were not entitled to their administrators' fees and should be removed as liquidators.

The trial judge found that the Administrators were entitled to their fees and should not be removed as liquidators. The appellant appealed against this decision.**(c) Decision** Before the Court of Appeal, the appellant argued that the trial judge erred in his findings that the various alleged acts of misconduct by the Administrators were not made out or were not such as to warrant depriving them of their fees. The appellant argued that the trial judge failed to consider evidence or his decision was against the weight of evidence. **(i) Alleged misconduct and bias of the Administrators** In a unanimous judgment, the Court of Appeal dismissed the appellant's arguments regarding misconduct and bias. Their Honours concluded that the trial judge had taken into account the material which the appellant had submitted and had reached a conclusion that was logically based on that material.The court of Appeal stated that the Administrators would be deprived of all their fees if they had so misconducted themselves that they should have been removed as administrators. Their Honours acknowledged that there were some "significant shortcomings" in the administrators' supervision of the Company, but were not convinced that these were so great that they should have been removed and hence deprived of all their fees. These "shortcomings" were that the Administrators had inaccurately recorded the work they had carried out during the administration and possibly authorised payments which were suspicious and in need of further investigation.The Court of Appeal agreed with the judge that the Administrators were not biased as they were "far more concerned to maintain corporate peace and achieve a deed of company arrangement than to prefer one side over the other". If the Administrators did make a decision which favoured one side over another, this was justified because the Administrators believed that the interests of the Company were more closely aligned with that particular side. **(ii) Removal of the Administrators** The Court of Appeal allowed the appeal in part, ordering that the Administrators be removed and replaced as the liquidators of the Company. Their Honours agreed with the trial judge that further investigation into the Company needed to be carried out by a liquidator. The Court of Appeal thought it was inappropriate for the Administrators to carry out these further investigations, now as the liquidators, given the shortcomings of their administration. The Court of Appeal stressed that they had not come to any conclusion adverse to the Administrators as this would be inappropriate without first allowing the Company to be heard through an independent representative. The Court of Appeal was concerned that the Administrators may have to investigate their own conduct now as the liquidators. In regard to this, their Honours said:"[I]t is axiomatic that the administrators cannot investigate themselves. The consequent possibility of a conflict of interest necessitates that an independent liquidator be appointed in their place." **(iii) Derivative action**The appellant also appealed against the trial judge's decision to refuse him leave to bring a derivative action on behalf of the Company against the Tiwaris. The Court of Appeal refused leave to the appellant saying that ordinarily it is inappropriate to allow derivative proceedings to be brought when a company is in liquidation because it would require the court to permit another to supplant the liquidator as the personification of the company for the purpose of investigating the behaviour of former directors. etailed Contents**5.7 Reinstatement of deregistered companies under section 601AH(2) of the Corporations Act** (by Lisa Thomas, DLA Phillips Fox)Westbury Holdings Kiama Pty Ltd v ASIC [2007] NSWSC 466, Supreme Court of New South Wales, Barrett J, 11 May 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc466.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc466.htm%22%20%5Ct%20%22_new) or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerned an interlocutory application for the setting aside of an earlier Court order reinstating the registration of a company, Churnwood Holdings Pty Limited (in liquidation) ("Churnwood").It was argued by Miltonbrook Pty Limited, Miltonbrook Land Pty Limited and Embrook Pty Limited ("the Applicants") that not all of the relevant facts were presented to the Court when the reinstatement order was made, and further, that the Applicants had a right to be heard. However, the Applicants' solicitor was in attendance when the orders were made, but neglected to make an oral submission at the time. It was found that the Australian Securities and Investments Commission ("ASIC") had properly reinstated Churnwood under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default), and Barrett J considered whether there was any utility in the reinstatement orders being set aside.The Application was dismissed by his Honour, finding that any order setting aside reinstatement would be futile as it would not create a statutory obligation for the removal or alteration of the entry made by ASIC. **(b) Facts** **(i) Contextual background**On 11 January 1996, Churnwood became a party to two deeds and in each case, the other parties named in the deeds were Miltonbrook Pty Limited and Embrook Pty Limited. Each of Miltonbrook Pty Limited and Embrook Pty Limited granted to Churnwood or its nominee, an option to buy particular property ("the options"). Churnwood commenced winding up and on 30 July 2004 (before deregistration) a director of Churnwood caused Churnwood to nominate Westbury Holdings Kiama Pty Ltd ("Westbury") to exercise each option. Following completion of voluntary winding up, ASIC deregistered Churnwood on 29 January 2005 pursuant to section 509(5) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). On 13 October 2006, the options were then exercised and documents executed by the then non-existent Churnwood. On 6 December 2006, Westbury's solicitor's issued a draft statement of claim to the solicitors of Miltonbrook Pty Limited and Embrook Pty Limited, in which Westbury and Churnwood were named as plaintiffs. The draft included claims for declaratory relief to the effect that the options had been lawfully exercised by Churnwood, as well as seeking consequential relief through specific performance (the day after ASIC re-registered Churnwood (15 March 2007), Westbury and Churnwood filed a statement of claim as foreshadowed by this draft statement).**(ii) Application and order to reinstate registration of Churnwood, and application to set order aside** Proceedings were then brought by Westbury before the court on 12 February 2007, which were stood over until 26 February 2007, seeking an order to terminate the winding up of Churnwood. An additional plaintiff, Mr Fitzgerald, who was the former Liquidator of the company, was added to the proceedings at that stage. The proceedings were again stood over until 5 March 2007. On 5 March 2007, Counsel for the Plaintiffs appeared, and there were no other appearances, despite counsel for the Applicants being present at the proceeding. The evidence principally consisted of an affidavit in support of the reinstatement of Churnwood by a Mr Terry Gallager, who was the sole director and shareholder of Churnwood, as well as director of Westbury. The evidence given by Mr Gallager supporting Westbury's application for reinstatement was as follows: " A dispute has arisen between Miltonbrook Pty Limited, Embrook Holdings Pty Limited and Westbury Holdings Kiama Pty Limited in respect of the proper or due exercise of the options by Westbury Holdings".At the conclusion of the 5 March 2007 hearing, the following three orders were then made by the court:* an order under section 601AH(2) directing ASIC to reinstate the registration of Churnwood;
* an order that Mr Fitzgerald resume office as liquidator upon reinstatement; and
* an order that after the reinstatement and Mr Fitzgerald resumed office as liquidator, the winding up of Churnwood be terminated.

On 14 March 2007, ASIC reinstated the registration of Churnwood and recorded that the company ceased to be in liquidation. However, on the same day, the Applicants by interlocutory process sought an order to set aside and discharge the order made on 5 March 2007. The Applicants argued that the order made by the court directing ASIC to reinstate the registration of Churnwood, should be set aside by reason of the following:* when the application was made by the Plaintiffs, material facts were not disclosed to the court;
* Westbury was not a "person aggrieved" by the deregistration of Churnwood (as required under section 601AH(2)(a)(i));
* the Applicants were persons who were likely to be affected by the order and should have been given an opportunity to be heard; and
* it would not have been just to reinstate Churnwood, particularly for the purpose of pursuing its proposed litigation against the Applicants.

**(c) Decision** **(i) The question of whether Westbury was a "person aggrieved"**Section 601AH(2) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) allows a court to make an order that ASIC reinstate the registration of a company if:(a) an application for reinstatement is made to the court by:i. a person aggrieved by the deregistration; orii. a former liquidator of the company; and(b) the court is satisfied that it is just that the company's registration be reinstated.Barrett J found that as Mr Fitzgerald (former liquidator of Churnwood) had joined proceedings as an additional plaintiff by the time the order directing reinstatement was made on 5 March 2007, section 601AH(2)(a) was satisfied. Therefore, the issue whether or not Westbury was a "person aggrieved" was redundant, because Mr Fitzgerald was a "person aggrieved" under section 601AH(2)(a)(ii). **(ii) The issue of material facts not being disclosed to the court and consequently, the Applicants being denied an opportunity to be heard**It was found by his Honour that information given in Mr Gallager's affidavit in support of Westbury's application to the court for re-instatement of Churnwood, was an "incomplete description of the position". His Honour said that the court was not told of the threatened litigation (Westbury and Churnwood's draft statement of claim) which to his Honour's mind gave the Applicants an interest in the matter far more serious than suggested by Mr Gallager's reference to "disputes" in his affidavit.As well as considering relevant case law, Barrett J considered whether the order should be set aside on the basis of rule 36.15 of the Uniform Civil Procedure Rules 2005, which states that a judgment be set aside by the court if the judgment was given or entered into or was made irregularly, illegally or against good faith.His Honour concluded that the Applicants (or at least Miltonbrook Pty Limited and Embrook Pty Limited, who were named in the draft statement of claim), were entitled to an opportunity to be heard regarding Westbury's application for an order re-instating Churnwood under section 601AH(2) of the Act. His Honour came to this conclusion on the basis that "they were persons with a clear and direct interest in the matter and therefore beneficiaries, in the particular context, of the audi alteram partem rule. Denial of an opportunity to be heard would be irregular in the sense relevant to the operation of rule 36.15(1)".However, the Applicants' solicitor had knowledge of the plaintiff's court application for reinstatement of Churnwood (although by chance) and attended the proceedings in court on 5 March 2007. The Applicants' solicitor made no oral application that day for the Applicants to intervene or to be heard in order to bring to the court's attention to their interest in the matter. For this reason, his Honour found that the Applicants had an opportunity to be heard, even though the opportunity was not actively presented by the Plaintiffs.Barrett J also found that by reason of the plaintiff's deficient disclosure in their ex parte application for reinstatement of Churnwood, there may be grounds for setting aside the orders of 5 March 2007, pursuant to rule 36.15(1). However, his Honour found that even if the orders were to be set aside under rule 36.15(1), it must be considered whether there would be any utility in doing so. **(iii) No utility in setting aside the order**Barrett J found that setting aside of the court's order which gave ASIC statutory authority to reinstate the registration of Churnwood, would not change the fact that ASIC had reinstated the registration of Churnwood. In support of this finding, his Honour cited the principle established in Commissioner for Railways (NSW) v Cavanough (1935) 53 CLR 220 at p 225: "Acts done according to the exigency of a judicial order afterwards reversed are protected: they are 'acts done in the execution of justice, which are compulsive". Further, his Honour stated that ASIC's reinstatement of the registration of Churnwood validly and regularly complied with ASIC's obligations under the court order of 5 March 2007 and section 601AH(2) of the Act. The existence of Churnwood was found to in no way depend on the continued force of the court's order, and could only be brought to an end by a new intervention by statute.Barrett J further considered whether section 1322(4)(b) of the Act could apply, which allows the court to make an order directing ASIC to rectify any register kept by ASIC. His Honour stated that this section does not allow the court to order anything above the steps required to ensure that a register of ASIC is kept in accordance with the statutory provisions applicable to it. As it was found that ASIC's entry was made regularly and validly in accordance with the court's order, his Honour decided that there was nothing in need of rectification and therefore, section 1322(4)(b) could not apply. For these reasons, Barrett J concluded that an order setting aside the orders made on 5 March 2007, would have no meaningful effect and therefore dismissed the interlocutory process filed by the Applications on 14 March 2007 to set aside the orders made on 5 March 2007.etailed Contents**5.8 Specific performance of deed of retirement ordered by court** (By Rebecca Kovacs, DLA Phillips Fox)Silver v Dome Resources NL [2007] NSWSC 455, New South Wales Supreme Court, Hamilton J, 9 May 2007The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc455.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswsc455.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**This case concerned whether a former director of a company ('Mr Silver') could obtain payment of benefits under a retirement deed executed by a company ('Dome') and guaranteed by its holding company ('DRD'). Hamilton J held that:* the board of directors of Dome had the requisite powers to execute the retirement deed; and
* Mr Silver was entitled to orders for specific performance to enforce the payment of the benefits under the deed.

**(b) Facts** Mr Silver had a long and complicated relationship with Dome which originally began when he agreed to act as a consultant to the company in 1993. At this time Mr Silver was a director of a Goldspark Pty Limited ('Goldspark') and it was through this company that he provided consultant services to Dome. Mr Silver issued invoices to Dome on behalf of Goldspark and then accessed those funds to receive payment for his services. In 1998 Mr Silver was appointed a director of Dome. Some time after this appointment, the Executive Chairman of Dome told Mr Silver that he was intending to propose that the board approve an agreement where all executive directors receive a retirement benefit. Mr Silver was then told by another director that all directors fees paid to him as well as all payments made to Goldspark for his services for the three years prior to his retirement would be taken into account in calculating his retirement benefit. A retirement deed was approved and executed by the board on 31 May 1999. It provided that upon the retirement of Mr Silver, Dome would pay Goldspark Mr Silver's total 'emoluments' for the period of three years prior to his retirement. Mr Silver stated that he only remained a director of Dome in reliance on his understanding of his retirement entitlements under the deed. This understanding was based on his previous discussions with the directors of Dome. In November 1999 Mr Silver and his business partner sold Goldspark and created a new company called Fair Choice through which he continued his consultancy services on the same basis as he had done previously with Goldspark.Shortly after this time, Mr Silver agreed to become a non executive director of Dome on the basis that his retirement deed would be altered so that he would still receive his retirement benefit when he retired as a non executive director and that the money would be paid to Fair Choice (rather than Goldspark). The board passed a resolution approving a retirement variation deed which provided for these amendments on 9 May 2000. The retirement variation deed was executed by Dome and by its holding company (DRD) who agreed to guarantee Dome's obligations. On 25 August 2000 Mr Silver resigned as a director of Dome. Despite initial statements from both Dome and DRD indicating that they would be willing to pay out the benefit to Fair Choice under the varied retirement deed, both companies subsequently refused to make any payments.**(c) Decision** **(i) Execution of retirement variation deed was authorised** Hamilton J rejected Dome's argument that it was not authorised to execute the retirement deed and the retirement variation deed. He held that there was a resolution passed by the board authorising the execution of the deed as this was clearly recorded in a minute of the directors' meeting which took place on 9 May 2000. Dome also argued on the basis of Ormiston J's decision in Sali v SPC Ltd (1991) 9 ACLC 1511 that boards of directors do not usually have the power to enter into any agreements for the provision of retirement benefits to members of the board. Hamilton J rejected this proposition on the basis that Dome's constitution provided the directors with the requisite power to fix remuneration for executive directors, including if thought fit, retirement benefits.**(ii) The retirement variation deed was not prohibited by law**Section 200B 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) states that a company cannot give a person a benefit in connection with the person's retirement from a board without member approval. Dome argued that this provision rendered both the payment of the agreed benefit and the agreement to make the payment contained in the retirement variation deed illegal.Hamilton J held that section 200B of the Act only prohibits payment of the benefit without member's approval, and is not a prohibition on the contract being entered into by the parties. His Honour held that in this case member approval was not required as the payment was for past services that Mr Silver rendered to Dome and therefore the statutory exception outlined in section 200G(1)(b) applied. **(iii) Available remedies**As the promise of payment contained in the retirement variation deed was made to Mr Silver, but the benefit was actually to be paid to Fair Choice, neither party could receive judgment at law for the promised amount. Mr Silver was not entitled to payment under the deed and Fair Choice was not a party to the contract.Hamilton J did however conclude that Mr Silver, as a party to the contract, was entitled to specific performance of Dome's promise of payment to Fair Choice, even though Fair Choice was not a party to the contract. Hamilton J rejected Dome's argument that the deed could not be specifically enforced as there was a lack of consideration. He maintained that Mr Silver's continued service to Dome was valuable consideration for Dome's promises made in the varied retirement deed. Finally, having found that Dome's payment obligations were valid and enforceable, his Honour declined to determine the claim that the defendants were estopped from denying the validity of those obligations, and formed the view that it would be difficult for the plaintiffs to obtain meaningful relief under the [Trade Practices Act 1974 No. 51(Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "_default).etailed Contents**5.9 Liability of former members for calls where the former members' name remains erroneously on the register of members** (By Rebecca Young, Blake Dawson Waldron)Stylis v United Medical Protection Ltd [2007] NSWCA 109, New South Wales Court of Appeal, McColl J, Basten JA and Young CJ in Eq, 8 May 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswca109.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/may/2007nswca109.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 decision involved the interpretation of a clause in a company constitution which limited the evidential matters which had to be proven before a member could be liable for a call. The Constitution provided that any person on the register of members could be potentially liable. The lower courts found Dr Stylis liable for a call even though he had ceased to be a member of the company and incorrectly remained on the register. The Court of Appeal found that the clause did not absolve the company from having to prove that a person was actually a member at the time of the call. Dr Stylis could not be liable for a call made when he was no longer a member of the company. This result was mandated by the context and purpose of the relevant provision, as well as a desire to retain consistency with other law in relation to the conclusiveness of registers of members.**(b) Facts** Doctor Stylis was a member of United Medical Protection Ltd (UMP), a medical professional indemnity insurance provider. He defaulted on payment of his subscription to UMP. The UMP Constitution provides that if a member defaults on a subscription payment and this default continues for one month after the payment becomes due, the member ceases to be a member unless the Board authorises otherwise (clause 20). The Board took no steps to prevent Dr Stylis' membership from cessation. The Magistrate found that Dr Stylis' default in payment had not been intentional and it could be inferred that both parties understood that Dr Stylis' membership was continuing through much of the year 2000. Accordingly, no steps were taken to remove Dr Stylis' name from the register of members. Nonetheless, Dr Stylis' membership of UMP ceased as of 16 May 2000. On 17 November 2000, the UMP Board resolved to make a call for money on ordinary members. Clause 28 of the Constitution provides that, in the event of a call being made upon members:"It shall be sufficient to prove that the name of the Ordinary member sued is entered in the Register of Ordinary Members of the Company, that the resolution requiring payment of a call is duly recorded in the minute book of the Board, and that notice requiring payment of such call was given to the Ordinary member sued, and it shall not be necessary to prove the appointment of the Directors or any other matters whatsoever but proof of the matters aforesaid shall be conclusive evidence of the debt".UMP brought proceedings against Dr Stylis to recover the amount of the call, relying on clause 28. Dr Stylis' name was still on the register of members, a resolution requiring payment of the call was recorded and notice requiring payment was given to Dr Stylis. UMP claimed this was all that was required before Dr Stylis was liable for the call. UMP succeeded before the Magistrate and Harrison AsJ of the New South Wales Supreme Court. Both courts found that, although the operation of clause 20 meant that Dr Stylis' membership ceased on 16 May 2000, he could still be liable for the call because the conclusive evidential requirements set out in clause 28 were satisfied.Dr Stylis appealed to the New South Wales Court of Appeal.**(c) Decision** All three judges of the Court of Appeal overturned the lower Court decision. For a variety of reasons, clause 28 could not be interpreted to allow a call to be made on someone who had ceased to be an ordinary member.**(i) The contextual approach**Clause 28 had to be read in the context of the entire Constitution. McColl JA concluded that a variety of provisions discussing the liabilities and benefits of membership indicated that, prima facie, the Constitution only burdens members with responsibility for debts and liabilities incurred while they are members.Basten JA noted that clause 28 should be interpreted in light of clause 27. Clause 27 is the clause which actually empowers the Board to make exceptional calls on ordinary members. Basten JA considered that clause 28 is effectively a procedural provision, whereas clause 27 is the provision conferring the power to make the call. In the event of inconsistency, clause 27 prevails. Accordingly, the power to make a call was constrained to operate in respect of ordinary members. The requirement in clause 28 that a person's name be entered on the register of members is therefore implicitly limited by the fact that a person on the register must actually be a member.**(ii) The purposive approach**McColl JA noted that the purpose of clause 28 is evidential. It is a provision to aid proof of UMP's entitlement to recover calls. Its purpose is not to enable UMP to impose liability for a call upon a person who is not a member. Even considering its purpose, clause 28 did not remove the necessity of demonstrating that a person whose name was entered on the register of members was a member. This interpretation gave the Constitution reasonable business efficacy, while avoiding unjust consequences (such as any person whose name was incorrectly on the register being potentially liable for a call).Basten JA considered the intention of the call made by UMP. The amount of the call was equal to the subscription paid by each ordinary member in the 2000 calendar year. The terms of this resolution indicated that it was not a call intended to apply to former members.**(iii) The consistency approach**McColl JA also referred to the fact that the requirement to keep a register of members is derived from sections 168 and 169 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Ordinarily, a register is proof of the matters shown in the register (section 176). Where there is an issue as to the accuracy of a register, other evidence can be taken into account in conjunction with what appears on the register (Sung Li Holdings Ltd v Medicom Finance Pty Ltd (1995) 13 ACLC 955). McColl JA thought it would be incongruous to accept a construction of clause 28 which would be contrary to the scheme for keeping and proving the contents of registers which has developed under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). Consistency with other law requires that it be possible to prove, for the purpose of clause 28, that the register was incorrect.**(iv) Other observations**Other concerns and observations made by the judges included:* Both Young CJ in Eq and McColl JA commented on the lack of argument that clause 28 was subject to an implied term that the register must be duly kept according to law and that UMP's register was not properly kept.
* Basten JA and Young CJ in Eq considered whether leave should be granted by the Court where the monetary value was so small (approximately $27,000). Young CJ described it as a delicate balancing act between the usual practice that the Court is reticent to grant leave to appeal for sums less than $100,000 and the proposition that the Court will give leave in the interests of justice where the decision below is clearly wrong. On the balance, the Court decided it would grant leave to appeal.

Dr Stylis, therefore, was not liable for a call after he had ceased to become a member, despite the fact that his name was still on the register of members. While clause 28 could limit the evidential matters which UMP had to prove before they could sue a member for a call, this was limited by the fact that calls could only be made against members.etailed Contents**5.10 A 'person aggrieved' under section 601AH(2) of the Corporations Act** (By Kathryn Finlayson, Minter Ellison)Brereton v Australian Securities and Investments Commission [2007] FCA 651, Federal Court of Australia, Finkelstein J, 4 May 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/may/2007fca651.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/may/2007fca651.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 person will be a 'person aggrieved' for the purposes of an application for reinstatement of a company's registration under section 601AH(2) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) if they:* are, at least arguably, a creditor of the deregistered company; or
* have a claim against the deregistered company.

**(b) Facts** Mr Brereton was the only director of FTV Tweed Finance Pty Ltd. The company did not pay its review fees within 12 months of the date for payment and was deregistered. Mr Brereton made an application for the reinstatement of FTV Tweed Finance Pty Ltd's registration under section 601AH(2) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).As an application under section 601AH(2) can only be made by a 'person aggrieved', Justice Finkelstein was required to determine whether Mr Brereton had standing to make the application.Mr Brereton claimed that he was a 'person aggrieved' on four bases: * he was a director of the company at the time it was deregistered;
* he was a creditor of the company;
* he had a claim against the company; and
* his company was the beneficial owner of all the shares in FTV Tweed Finance Pty Ltd.

**(c) Decision** Justice Finkelstein held that Mr Brereton was a 'person aggrieved' on two bases:* he was a creditor of the company. Although his claim to be a creditor was disputed, Justice Finkelstein held that it was sufficient for Mr Brereton to show that he was 'at least arguably' a creditor of the company in order to establish standing; and
* he had a claim in restitution against the company. The payment of the review fees was a 'necessary intervention' by Mr Brereton who was obliged to take reasonable steps to overcome the consequences of his failure to ensure that FTV Tweed Finance Pty Ltd paid its review fees. Although the fact that Mr Brereton paid the review fees to obtain the reinstatement was a factor against his claim, it was not fatal. His Honour also held that it did not matter that the facts that established the claim arose after the application for reinstatement was made.

Accordingly, Justice Finkelstein ordered that the Australian Securities and Investments Commission reinstate FTV Tweed Finance Pty Ltd.His Honour did not decide Mr Brereton's claim that he was a 'person aggrieved' by virtue of his position as a director of FTV Tweed Finance Pty Ltd at the time it was deregistered.His Honour dismissed Mr Brereton's claim that he was a 'person aggrieved' on the basis that his company was the beneficial owner of all the shares in FTV Tweed Finance Pty Ltd. His Honour noted that, if this was able to be proven, it may give Mr Brereton's company standing but not Mr Brereton as an individual.etailed Contents**5.11 Oppression action by a shareholder/creditor** (By Stephen Magee, Clayton Utz)Gamlestaden Fastigheter AB v Baltic Partners Ltd (Jersey) [2007] UKPC 26, The Lords of the Judicial Committee of the Privy Council, Lord Scott of Foscote, Lord Phillips of Worth Maltravers, Lord Rodger of Earlsferry, Lord Brown of Eaton-under-Heywood, Lord Mance, 25 April 2007The full text of this judgment is available at:[http://www.bailii.org/uk/cases/UKPC/2007/26.html](http://www.bailii.org/uk/cases/UKPC/2007/26.html%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**A shareholder in a joint venture company had lent money to the company. The Privy Council held that the shareholder could bring an oppression action to recover damages on behalf of the company, even if the company was insolvent and the damages would benefit the shareholder in its capacity as creditor rather than as shareholder.**(b) Facts** Gamlestaden Fastigheter AB became a shareholder in a joint venture company with other persons, with the object of investing in commercial property. The business was conducted through a partnership. The JV company was one of the three members of the partnership. Gamlestaden's parent company made a large loan to the JV company for one of the property acquisitions.In 1993, unknown to Gamlestaden, the directors of the JV company allegedly authorised the withdrawal of money from the partnership by the other two partners. Gamlestaden began an oppression action against the JV company, under articles 141 and 143 of the Companies (Jersey) Law 1991. It claimed two types of relief:* an order that the directors of the JV company pay damages to the company for breach of duty; or
* an order allowing Gamlestaden to take derivative proceedings against the directors in the name of the JV company.

By now, the JV company was insolvent. This meant that any award of damages would only benefit its creditors, rather than its shareholders. This meant that, should damages be awarded, Gamlestaden stood to benefit more as a creditor than as a shareholder.The JV company argued that an oppression action cannot be taken by a shareholder unless the relief sought would be of some benefit to the shareholder in his capacity as a shareholder. **(c) Decision** The Privy Council held that, in the case of a joint venture company, a shareholder's remedies for oppression were not limited to those which would benefit them as a shareholder:"If the company is a joint venture company and the joint venturers have arranged that one, or more, or all of them, shall provide working capital to the company by means of loans, it would ... be inconsistent with the purpose of these statutory provisions to limit the availability of the remedies they offer to cases where the value of the share or shares held by the applicant member would be enhanced by the grant of the relief sought. If the relief sought would, if granted, be of real, as opposed to merely nominal, value to an applicant joint venturer, such as Gamlestaden, in facilitating recovery of some part of its investment in the joint venture company, that should, in their Lordships' opinion, suffice to provide the requisite locus standi for the application to be made."The Privy Council added that the benefit of the action had to accrue to the shareholder, rather than an unrelated third party. In this case, the loan had been provided by Gamlestaden's parent, rather than Gamlestaden itself. However, the Privy Council regarded this as a difference of form rather than of substance in the context of the joint venture as a whole.In the course of its reasons, the Privy Council discussed two procedural matters:* Statute of Limitations - in obiter, it suggested that, where negligence is alleged against directors, the limitation period runs from the date of the negligence (rather than the date it comes to the knowledge of shareholders), since the injured party is the company and the company, through the directors, would have knowledge of the alleged negligence from the time it occurred;
* the court's general power to make orders on an oppression action allows it to make orders for the payment of damages to the company.

etailed Contents**5.12 'Break fees' and 'no-shop' conditions in a scheme of arrangement** (By Rory Maguire, Freehills)APN News & Media Limited, in the matter of APN News & Media Limited [2007] FCA 770, Federal Court of Australia, Lindgren J, 20 April 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca770.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/april/2007fca770.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**Justice Lindgren examined an application under section 411(1) of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) that a meeting be held to consider a proposed scheme of arrangement. Under the proposed scheme, the plaintiff agreed to certain lock-up devices including "no-shop" and "break fee" provisions.Despite the amount of the break fee, his Honour found that neither of these provisions were in breach of any rules or would influence shareholder voting and made an order that a meeting be convened.**(b) Facts**The plaintiff, APN News & Media Limited, made an application to the Court that an order be made under section 411(1) convening a shareholders meeting for the consideration of a proposed scheme of arrangement.Equity funding for the scheme was to be obtained from a consortium of investors and was conditional on a share sale to that consortium. Under this agreement, the plaintiff consented to both no-shop and break fee provisions. While the no-shop provisions were deemed to generally satisfy any concerns of the court (as previously outlined by Justice Santow in Re Arthur Yates & Co Ltd (2001) 36 ACSR 758), the break fee amount raised concerns regarding its possible influence on voting.The Takeovers Panel's Guidance Note 7 stipulates that a break fee should not exceed 1% of the equity value of the target and this rule has been accepted by the courts in relation to schemes. In this instance, a break fee of $27.5 million was payable by the plaintiff to the consortium if the scheme did not proceed, which represented around 0.88% (depending upon which value was chosen for the denominator). The court considered whether the break fee might:* coerce shareholders into agreeing to the scheme; or
* deter companies from making a competing offer, on the basis that any competing offeror must be prepared to both cover the break fee and offer a higher price per share, in turn leading shareholders to consider that they have no alternative but to accept the scheme.

The scheme also provided for a deemed warranty that shares are free from encumbrances and that shareholders are entitled to transfer them.**(c) Decision**Justice Lindgren ruled that the break fee amount did not breach any of the Takeover Panel's rules as it was below the 1% threshold. However, his Honour recommended that future applications under section 411(1) be supported by evidence that no-shop and break fee provisions:* are commercially negotiated;
* do not operate against the interests of the offeree shareholders; and
* include calculation details.

In addition, the deemed warranty was held to be no more than a device ensuring that scheme participants whose shares were subject to an encumbrance are not unfairly advantaged.It was held that the court was therefore likely to approve the scheme and an order was made that the plaintiff convenes a meeting of shareholders to vote on the proposal.etailed Contents**5.13 Where and when can a statutory demand be served?** (Peter Sise, Clayton Utz)Scope Data Systems Pty Ltd v David Goman as Representative of the Partnership BDO Nelson Parkhill [2007] NSWSC 278, New South Wales Supreme Court, Justice White, 18 April 2007The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswsc278.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/april/2007nswsc278.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 statutory demand was posted to the registered office of a debtor company (which was at its accountant's office). The demand was diverted to the accountant's PO Box due to an arrangement between the accountant and Australia Post. Under this arrangement, an employee of the company's accountant would retrieve the mail from the PO Box and deliver it to the company's registered office.There was a dispute as to when service of the statutory demand had occurred. Justice White reached the following conclusions. * A statutory demand is served when it is delivered to the registered office of the company, not when it arrives at the company's PO Box.
* If a company diverts its mail from its registered office to a second address, the company does not prove that the document arrived at its registered office at a different time to when it would have arrived in the ordinary course of post by showing that it arrived at the second address at a different time to when it would have arrived at its registered office in the ordinary course of post.
* If someone other than the company diverts mail to a second address, the company can prove that the document was delivered to its registered office at a different time to which it would have arrived in the ordinary course of post by showing that it was delivered to the second address at a different time.

Justice White doubted that the second of these propositions was correct as it is inconsistent with several authorities. His Honour, however, felt bound to follow it because it was stated by the NSW Court of Appeal in Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259. Justice White noted that the Court of Appeal was apparently not referred to several authorities, which were inconsistent with the conclusion, when deciding Falgat Constructions. Hence, outside of NSW, the second proposition might be not be accepted and the third proposition may apply even when the debtor diverts its own mail. **(b) Facts** David Goman (the "Creditor") sent a statutory demand to the address of the registered office of Scope Data Systems Pty Ltd (the "Debtor") on Monday, 25 September 2006. The Debtor's registered office was at the street address of the office of its accountant. The accountant had an arrangement with its local post office that any mail addressed to its street address would be placed in its PO Box. This meant that no mail addressed to the registered office would actually arrive there as it would be diverted to the PO Box by the post office. On the morning of each business day, an employee of the accountant would check the PO Box. The accountant retrieved the Creditor's statutory demand from the PO Box on the morning of Tuesday 3 October 2006 and took it to the Debtor's registered office. Monday, 2 October was a public holiday and the statutory demand was not in the PO Box on the morning of Friday, 29 September. The Debtor responded to the statutory demand by filing an originating process and accompanying affidavit on 23 October 2006 seeking to have the statutory demand set aside. The Debtor then served the Creditor on 24 October. Section 459G(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") requires an application to set the statutory demand aside to be filed and served within 21 days of the statutory demand being served on the debtor. If the statutory demand had been validly served on 3 October 2006, the application to set aside the statutory demand was filed and served (just) in time. If the statutory demand had been served prior to 3 October, the Debtor was out of time. **(c) Decision** **(i) The relevant legislation**Section 109X(1)(a) of the Corporations Act states that a document may be served on a company by "leaving it at, or posting it to, the company's registered office". Section 29(1) of the [Acts Interpretation Act 1901 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6818" \t "_default) states that when an Act authorizes a document to be served by post, service is taken to have occurred at the time the letter would have been delivered in the "ordinary course of post" unless the contrary is proven. Sub-section 29(2) states that section 29 does not affect the operation of section 160 of the [Evidence Act 1995 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "default). Section 160(1) of the [Evidence Act 1995 No. 2 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6191" \t "default) and the [Evidence Act 1995 No. 25 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4459" \t "default) both state:"It is presumed (unless evidence sufficient to raise doubt about the presumption is adduced) that a postal article sent by prepaid post addressed to a person at a specified address in Australia or in an external Territory was received at that address on the fourth working day after having been posted." (underlining added)In light of these provisions, Justice White thought the position was as follows:* If the evidence establishes the time when delivery occurred, then that is the time at which service is taken to have occurred.
* If the evidence does not establish the time delivery occurred, then, unless the contrary is proved, delivery is deemed to have occurred in the "ordinary course of post". What the "ordinary course of post" is must be proved by evidence.
* If there is insufficient evidence of when delivery would have occurred in the "ordinary course of post", the presumption in section 160 of the Commonwealth Evidence Act (applicable to federal courts) and section 160 of the New South Wales Evidence Act (applicable to New South Wales courts), dictates that delivery would have occurred on the fourth working day after posting. This presumption may be displaced if there is "evidence sufficient to raise doubt about the presumption".
* If the evidence shows that the article was not delivered in the ordinary course of post, the presumption under section 160 of the applicable Evidence Act may assist in proof of when the document was delivered.

**(ii) Where the statutory demand must be delivered**The statutory demand had to be delivered to the registered office of the Debtor. Delivery to the PO Box could not be equated with delivery to the Debtor's registered office.**(iii) When was the statutory demand delivered?**Justice White referred to the case of Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd [2006] NSWCA 259 ("Falgat"). In Falgat, it was held that a party does not prove that delivery occurred at its registered office at a different time to which it would have occurred in the ordinary course of post by showing that it reached a second address, to which it diverted its mail, at a different time to which it would supposedly reached its registered office in the ordinary course of post. His Honour thought that Falgat should be confined to the situation where the recipient had chosen itself to divert its mail to another address. Justice White thought that Falgat Constructions should be so confined because the NSW Court of Appeal had not been referred to some relevant authorities which pointed to a contrary conclusion. The Debtor in the present scenario had its mail diverted by its accountants rather than itself. Justice White concluded that service did not occur until the statutory demand was taken to the registered office of the debtor after being retrieved from the PO Box. This occurred on 3 October. Hence the application by the Debtor was made in time.**(iv) Genuine offsetting claim**The Debtor submitted that it had an off setting claim under section 459H of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) which should reduce the amount claimed in the statutory demand. The offsetting claim was a claim against the Creditor for the Debtor's legal costs in a proceeding. Justice White referred to Macleay Nominees Pty Ltd v Belle Property East Pty Ltd [2001] NSWSC 743 which stated that a genuine offsetting claim is a claim made in good faith. Good faith requires the claim to be:"arguable on the basis of facts asserted with sufficient particularity to enable the Court to determine that the claim is not fanciful." In the case of a claim for unliquidated damages for economic loss, the debtor must adduce some evidence to show the basis on which the loss arises and calculated. Justice White also referred to Elm Financial Services Pty Ltd v McDougall [2004] NSWSC 560 which stated that an off setting claim does not need to be particularised to the last dollar or cent. Justice White accepted that the Debtor's off setting claim was genuine. His Honour stated that it is not a high hurdle to show that an off setting claim is genuine.etailed Contents**5.14 Under what circumstances will different members rights result in separate classes for the purposes of section 411 of the Corporations Act?** (By Justin Fox and Tony Mohorovic, Corrs Chambers Westgarth)In the Application of United Medical Protection Limited [2007] Federal Court of Australia, FCA 631, Finklestein J, 19 March 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/march/2007fca631.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/march/2007fca631.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)**(a) Summary**This was an application to convene meetings of members to consider a scheme of arrangement proposed to be entered into by United Medical Protection Limited and The Medical Defence Association of Victoria Limited. The companies proposed to merge by way of scheme of arrangement into a newly incorporated company. Two issues arose in respect of determining the classes of members for the purposes of voting on the scheme.The first issue concerned the possibility that some members would be required to pay higher insurance premiums if the scheme was approved. His Honour Justice Finkelstein was originally concerned that this may require the formation of two separate classes for the purposes of section 411.The second issue related to differences in rights attaching to different categories of members of both companies. There were differences in the rights of members in both companies in relation to obligations to guarantee the debts of the company, liability to meet calls for contribution for funds and voting rights. His Honour was concerned that these differences may require the formation of further classes for the purposes of section 411.On both issues his Honour held that there was only one class of member for the purposes of voting on the scheme. He found that rights of the members in each category were not so dissimilar as to make it impossible for them to consult together with a view to their common interest.**(b) Facts** The application concerned two companies limited by guarantee being United Medical Protection Limited (United) and The Medical Defence Association of Victoria Limited (MDAV). Through their subsidiaries, United and MDAV provided insurance services to their members who were mostly medical practitioners.United and MDAV wished to merge through schemes of arrangement under the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default). A new company was to be incorporated. Current members of United and MDAV would become members of the new company. United and MDAV would become subsidiaries of the new company.Two issues arose in respect of determining classes for the purposes of voting on the scheme under section 411 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).First, it was noted that if the schemes were adopted, some members and not others might be required to pay a higher premium for insurance. The question which arose was whether these members should vote in a separate class.Second, a question arose as to whether different categories of members should vote in different classes.United had two categories of members: ordinary members and affiliate members. An ordinary member was required to guarantee the obligations of United (to a nominal amount), was liable to make calls for contributions of funds up to an amount equal to the member's annual fee and was able to speak and vote at all meetings. In contrast, an affiliate member was not required to guarantee the obligations of United, was not liable to meet any calls for contribution of funds and had no right to vote.MDAV had three categories of members: medical practitioners, companies that employ medical practitioners and students enrolled in a faculty of medicine.The medical practitioners had similar rights to those of ordinary members of United. The companies and students had similar rights to affiliate members of United.The issue was whether these different categories of member should constitute different classes for the purposes of section 411 of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default).**(c) Decision** Finkelstein J held that the fact that some members would pay higher premiums was not sufficient to form a separate class. The question to ask is whether the members 'rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest' citing the leading case of Sovereign Life Assurance Co v Dodd [1892] 2 QB 573.His Honour found that although members might have different considerations which may influence them to vote differently on the proposed schemes, it does not necessarily follow that those members should be separated into different classes. To support this principle his Honour cited In the Matter of Chevron (Sydney) Ltd [1963] VR 249, Re Landmark Corporation Ltd (in liq) [1968] 1 NSWR 759 and Re Jax Marine Pty Ltd [1967] 1 NSWR 145.His Honour further held (on a tentative basis) that the different classes of members in each of the scheme companies did not form a separate class. He stated that the question to be answered is whether the rights of the members who are to be bound by the schemes are so dissimilar as to make it impossible for them to consult together with a view to their common interest, on this occasion citing Re Hawk Insurance Co Ltd.His Honour further noted that an overzealous subdivision may give a small group a right of veto that would defeat the basic object of the provisions dealing with schemes of arrangement which is to enable large groups to achieve a compromise or effect an arrangement, citing Nordic Bank Plc v International Harvester Australia Ltd [1983] 2 VR 298. On that test the court found that all categories of members should form the one class, notwithstanding the different rights attaching to each class of membership.etailed Contents**5.15 Delaware's highest court rejects extension of directors' fiduciary duty to creditors** North American Catholic Educational Programming Foundation, Inc. v Gheewalla, Supreme Court of the State of Delaware, 18 May 2007(By Jonathan Redwood, Barrister, Victorian Bar - List A)The full text of this judgment is available at:[http://courts.delaware.gov/opinions/(nbvy0wjdzka5xj55yeyw1n55)/download.aspx?ID=92000](http://courts.delaware.gov/opinions/%28nbvy0wjdzka5xj55yeyw1n55%29/download.aspx?ID=92000" \t "_new)**(a) Introduction**In a decision issued on 18 May 2007, the Delaware Supreme Court in North American Catholic Educational Programming Foundation, Inc. v Gheewalla held that creditors of a Delaware corporation may not assert direct claims for breach of a fiduciary duty owed by the corporation's directors to them when the corporation is insolvent or in the "zone of insolvency." While creditors of a corporation may bring derivative actions on behalf of a corporation when a corporation is insolvent for breach of fiduciary duties owed by the directors to the corporation, the Delaware Supreme Court emphatically rejected any expansion of directors' fiduciary duties to creditors. The Court reaffirmed one of the most basic principles of Delaware corporate law that directors owe their fiduciary obligations to the corporation and its shareholders and not its creditors. Endorsing a contractual theory of creditor protection, the Court concluded that creditors are afforded adequate protection through a combination of contractual arrangements (for example, restrictive indenture covenants and taking security interests), fraudulent transfer law, bankruptcy law and general commercial principles of good faith and fair dealing. Accordingly, there was no sound policy justification for departing from entrenched legal principle and extending directors' fiduciary duties to creditors. The decision may be contrasted with the more ambiguous position under Anglo-Australian law where courts have suggested that directors of a company may have a duty to take into account the interests of its creditors in appropriate circumstances.**(b) Background**The claim against the directors of Clearwire Holdings Inc. was brought by one of its creditors, the North American Catholic Educational Programming Foundation (NACEPF). The directors were all employed by Goldman Sachs and served on the Clearwire board of directors at the direction and under the control of Goldman Sachs. NACEPF alleged, among other things, that the directors knew but did not tell them that Goldman Sachs did not intend to carry out the business plan that was the stated rationale for NACEPF entering into a master agreement to create a national system of wireless connections to the internet. NACEPF contended that Clearwire was either insolvent or in the "zone of insolvency" at this time and the directors accordingly had a fiduciary duty to consider the interests of creditors, especially a substantial creditor such as NACEPF. This threw up for decisive legal resolution the question of whether Delaware law should recognize a new direct right for creditors to challenge directors' exercise of business judgments as breaches of fiduciary duties owed to creditors when a company is insolvent or in the zone of insolvency. The Delaware courts had never authoritatively decided this question, although there had been suggestions in previous decisions of Delaware courts and decisions from other US-jurisdictions that such a duty may exist in certain circumstances. The notion of a shifting duty to creditors when a corporation is insolvent or in the zone of insolvency had also found some support in the academic literature which pointed to a variety of theories for such an extension of fiduciary duty law. The most commonly-offered rationale for creating a fiduciary duty to creditors upon a corporation's insolvency is the "trust-fund" doctrine. According to this theory, when a corporation becomes insolvent, its property is deemed the res of a trust, its directors are deemed trustees of the trust, and its creditors are deemed beneficiaries of the trust. Another theory for the shifting fiduciary to creditors is that during insolvency or on the cusp of insolvency, creditors' rights begin to resemble and converge with the rights of shareholders while the corporation is insolvent such that an exclusive focus on maximizing the corporation's value to equity holders creates a disproportionate and inequitable risk of loss to debt holders. **(c) Decision of Delaware Supreme Court**The Delaware Supreme Court agreed with the Court of Chancery below that in view of the existing legal protections afforded to creditors through fraudulent transfer law, bankruptcy law, general commercial law and the ability of creditors to negotiate agreements with strong contractual covenants and security interests, the imposition of an additional layer of protection for direct breach of a fiduciary duty owed to creditors was unnecessary and outweighed by the costs to economic efficiency that recognition of such a duty would likely impose on corporate decision-making. The Court also considered itself compelled towards this conclusion by the need to provide directors "with clear signal beacons and brightly lined channel markers as they navigate with due care, good faith, a loyalty on behalf of a Delaware corporation and its shareholders" (quoting from Malone v. Brincat, 722 A. 2d 5, 10 (1998)). Recognizing that directors of an insolvent corporation owe direct fiduciary duties to creditors would, reasoned the Court, create uncertainty for directors who have a duty to exercise their business judgment in the best interests of the insolvent corporation. Accordingly, the Court laid down a bright-line rule that when a solvent corporation is navigating in the zone of insolvency, the focus of Delaware directors does not shift or change. Directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation and for the benefit of its shareholder owners. The Court also rejected previous dicta of an earlier decision of the Court of Chancery (Production Resources Group LLC v. NCT Group, Inc., 863 A. 2d 772 (2004)) that there might exist circumstances in which directors of an actually insolvent corporation display such a marked degree of animus towards a particular creditor with a proven entitlement to payment that they give rise to a direct claim for breach of fiduciary duty to that creditor. The Court noted that while there may a basis for a direct claim arising out of contract or tort in that circumstance, the Court's holding is intended to completely preclude a direct claim arising out of a purported breach of fiduciary duty owed to the creditor by the directors of an insolvent corporation. The Court said that directors of insolvent corporations must retain the freedom to engage in "vigorous, good faith negotiations with individual creditors for the benefit of the corporation." Derivative actions by creditors, however, were on a different footing. When a corporation is insolvent, its creditors take the place of the shareholders as the principal constituency and residual beneficiaries injured by any fiduciary breaches that diminish the value of the corporation. Equitable considerations, therefore, give creditors standing to bring derivative actions on behalf of the corporation for breach of fiduciary duties to the corporation when the corporation is insolvent.**(d) Observations**One of the hallmarks of Delaware corporate law jurisprudence is the recognition that pragmatic conduct-regulating legal norms to be applied by directors and the business community require "precise conceptual line-drawing." The clear guidance provided to directors in Clearwire is consistent with this theme. The decision is also based on a sound policy premise that the fiduciary duties of directors are directed towards the legal responsibility of directors to manage the business of a corporation for benefit of its shareholder owners. As the court was at pains to emphasize, this does not leave creditors unfairly exposed and unprotected. Bankruptcy law, contractual provisions and general principles of commercial law, all combine to give creditors a broad spectrum of protections from decisions of directors that harm their interests. Finally, as a practical matter, the decision is likely to be of significance for directors of distressed and highly-leveraged companies when considering private equity and other bids. The decision makes it clear that in these circumstances the fiduciary duty of the director remains to act in the interests of the corporation and for the benefit of the shareholder owners.Australian and English courts, by contrast, have been prepared to recognize that directors of a company may have a limited duty to take into account the interests of creditors in certain circumstances. In Clearwire the court emphasized that other protections afforded to creditors made it unnecessary to recognize a duty to take into account the interests of creditors, especially the protections afforded by fraudulent transfer law under section 548 of the Bankruptcy Code. Broadly speaking, under that provision transfers made by companies may be set aside in a bankruptcy if they were made at a time when (A) the company was insolvent at the time of the transfer (or made insolvent as a result of the transfer) or the property remaining in the hands of the company after the transfer was unreasonably small for the conduct of its business and (B) the transfer was made for less than reasonably equivalent value. American courts interpret this provision expansively. There is no direct equivalent to section 548 of the Bankruptcy Code under Australian law. Unfair preference provisions, which apply separately under section 547 of the Bankruptcy Code in the US, serve related objectives but are conceptually different, and section 121 of the [Bankruptcy Act 1966 No. 33 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "default) concerning voidable transfers analogous to fraudulent transfer provisions under US law does not apply to companies. However, since 1993 transactions of a company may be set aside by a court if they are "uncommercial transactions" entered into when the company was insolvent (or which themselves cause the company to become insolvent) and they occurred within two years of insolvency (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)). "Uncommercial transactions" has been interpreted broadly and purposively by Australian courts thus far and arguably captures many of the types of transactions that would run afoul of section 548 of the Bankruptcy Code. Indeed, it may even operate more broadly. Moreover, the provision is also an additional source of personal liability under the insolvent trading provisions, which expose directors to personal liability for incurring a debt at a time when there were reasonable grounds for the director suspecting that the company was insolvent or would become insolvent by incurring the debt. The duty of directors to prevent insolvent trading has no counterpart under US law. Arguably, therefore, the protections afforded to creditors under Australian law are as strong, or stronger, than the protections under US law that the Delaware Supreme Court concluded militated against any extension of directors' fiduciary duties to creditors. Many of the Australian decisions recognizing a limited duty to creditors were decided before the introduction of the insolvent trading and uncommercial transaction provisions of the [Corporations Act 2001 No. 50 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "_default) and Australian courts may be influenced by the reasoning of the Delaware Supreme Court when considering this issue again.etailed Contents |

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