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|  | |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  | | --- | --- | | **Bulletin No. 137**  Editor: [Professor Ian Ramsay](mailto:i.ramsay@unimelb.edu.au" \t "_new), Director, Centre for Corporate Law and Securities Regulation  Published by SAI Global on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/" \t "_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/" \t "_new), the [Australian Securities Exchange](http://www.asx.com.au/" \t "_new) and the leading law firms: [Blake Dawson](http://www.blakedawson.com/" \t "_new), [Clayton Utz](http://www.claytonutz.com/" \t "_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/" \t "_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/" \t "_new), [Freehills](http://www.freehills.com/" \t "_new), [Mallesons Stephen Jaques](http://www.mallesons.com/" \t "_new).   1. 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[Previous editions of the Corporate Law Bulletin](http://my.lawlex.com.au/default.asp?goto=previous_news&indexid=7" \t "_new) | [bout SAI Global](http://www.saiglobal.com/) | | |  | | --- | | COPYRIGHT WARNING Use of this product must be in accordance with our licence agreement and the relevant licence fee paid by your organisation. We will vigorously pursue legal action against organisations found to be in breach of these requirements, in particular where email content has been forwarded, copied or pasted in any way without prior authorisation. If you are uncertain about your organisation's licensing arrangements, please contact SAI Global on 1300 555 595. | | |  |  |  |  |  |  | | --- | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | |  |  | | --- | --- | | **Detailed Contents** |  | | |  | | | [1. 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Recent Corporate Law and Corporate Governance Developments** |  |  | | |  | | |  | | --- | | **1.1 Shareholder claims against insolvent companies - Implications of the Sons of Gwalia decision**   On 29 January 2009, the Corporations and Markets Advisory Committee (CAMAC) released its report 'Claims by shareholders against insolvent companies: implications of the Sons of Gwalia decision'.   The report responds to a request for advice on the effect of the High Court decision in *Sons of Gwalia Ltd v Margaretic [2007]* HCA 1 (Sons of Gwalia).  While recognising that the decision has significant implications, including for providers of corporate debt finance as well as the conduct of external administrations, CAMAC has not recommended action to overturn its effect.   The High Court held, in effect, that a claim by a shareholder for loss to the value of shares caused by failure of the company to inform the market would rank equally with the claims of other unsecured creditors in an external administration. It was not a claim in the shareholder's 'capacity as a member of the company', which would be postponed behind claims by unsecured creditors.   While clarifying the law, it brought into focus the largely unanticipated conflict between the provision to shareholders of statutory remedies for corporate misconduct and the traditional notion of shareholder interests being postponed behind those of conventional unsecured creditors in a liquidation.   The views of respondents to CAMAC's earlier discussion paper were polarised on the question whether the current position should be maintained or changed.  The Committee as a whole is not persuaded of the need for change in the legal position. Any move to curtail the rights of recourse of aggrieved shareholders where a company is financially distressed could be seen as undermining legislative initiatives to provide shareholders with direct rights of action in respect of corporate misconduct.    In effect, the facilitation of private remedies has added to the enforcement armoury, encouraging self‑help by affected parties to complement the role of the regulators in relation to corporate disclosures. Shareholders and creditors share an interest in the promotion of an efficient and informed market.   The Committee acknowledges the possible consequences of Sons of Gwalia for companies seeking funds in the unsecured debt market and in the rehabilitation of financially distressed companies. The High Court decision has provided a measure of certainty and it is likely that changes have already occurred as the market has adapted to the legal environment.   The Committee recognises that shareholder claims may add to the complexity of corporate external administrations. It has proposed measures to assist with those claims:   * a standardised proof of debt form for claims by aggrieved shareholders, which administrators may choose to use in making a 'just estimate' of the value of those claims; * a rebuttable presumption that a determination in one proceeding of a question of fact common to other aggrieved shareholder claims applies in any subsequent proceedings; and * giving the court a general power to make orders in a liquidation, which would cover creditors' meetings and the determination of shareholder claims.   The Committee also provided advice on the following options if, notwithstanding its view, some change to the present position were considered necessary:   * postpone all, or some, claims by aggrieved shareholders behind claims by conventional unsecured creditors; * maintain those claims as creditor claims but subject them to a monetary cap; and * prohibit claims by aggrieved shareholders altogether.   CAMAC considered possible measures to assist aggrieved shareholders if their current rights, as recognised in Sons of Gwalia, were postponed. It did not favour the introduction, by legislation, of a fraud on the market principle (which would overcome the need to prove reliance on a corporate misrepresentation) in the context of claims by aggrieved shareholders against insolvent companies.  The report also recommended:   * abrogation of the rule in Houldsworth's case, which in some cases prohibits claims by shareholders who have purchased shares from the company, rather than from a third party; and * that shareholders making claims as members of a company in liquidation, for unpaid dividends for example, should not, on that basis, receive information or be able to vote as creditors.   The report is available on the [CAMAC](http://www.camac.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.2 EU Commission adopts measures to strengthen financial markets supervisory committees**   On 26 January 2009, the European Commission adopted a set of decisions to strengthen the supervisory framework for EU financial markets, in order to improve supervisory cooperation and convergence between Member States and to reinforce financial stability. Under the new rules, the three committees that supervise, respectively, the securities, banking and insurance sectors will benefit from a clearer operational framework and more efficient decision-making processes. In addition, the Commission proposes that these committees, as well as key bodies involved in the standard-setting process for financial reporting and auditing at both EU and international level, should be provided with financial support from the EU budget so that they can achieve their objectives as rapidly and efficiently as possible.    The proposal for financial support now passes to the Council and the European Parliament for consideration.  The Commission has revised the Decisions establishing the EU Committees of Supervisors (CESR, CEBS and CEIOPS), setting up a clearer framework for the activities of the Committees and reinforcing current financial stability arrangements.   The new Decisions contain a non-exhaustive list of tasks that the Committees are expected to perform and enhance the role of the Committees as regards the safeguarding of financial stability. In order to improve the decision-making process of the Committees, the Decisions introduce qualified majority voting when consensus cannot be reached. Members who do not follow measures adopted by the Committees must be prepared to present the reasons for this choice. The measures adopted by the Committees remain non-binding.   The proposals are available on the [European Commission](http://ec.europa.eu/internal_market/finances/committees/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.3 European financial integration report**   On 19 January 2009, the European Commission released its European Financial Integration Report (EFIR) - an annual analysis of the integration in the EU financial sector and its effects on competition, efficiency, financial stability and competitiveness. EFIR also includes a progress report on EU financial services policy achievements in 2008.   The report is available on the [European Commission](http://ec.europa.eu/internal_market/finances/fim/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.4 Margin lending reforms**  On 18 January 2009, Senator Nick Sherry, Australian Minister for Superannuation and Corporate Law, announced that the Government's Financial Services Working Group has begun consultations with industry on a new, national margin lending regulatory regime, which will include new short form, plain English product disclosure documents.  Last year, the Council of Australian Governments (COAG) agreed to the transfer of margin lending regulation from the states to the Commonwealth. As a result, margin lending will be included in Chapter 7 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) as a financial product by 1 July 2009.  This will mean that all margin lending providers will have to:   * have an Australian Financial Services Licence (AFSL); * comply with general conduct standards, including the requirement to deal with investors efficiently, honestly and fairly; * undertake appropriate disclosure to an investor, including provision of a Product Disclosure Statement (PDS), a Statement of Advice (SOA) and ongoing reporting; * have adequate arrangements for the management of conflicts; * ensure representatives are adequately trained and competent to provide those services; and * be subject to enforcement measures regarding market manipulation, false or misleading statements, inducing investors to deal using misleading information, and engagement in dishonest, misleading or deceptive conduct.   All margin lending providers will also be subject to responsible lending conduct provisions as part of broader consumer credit reforms covering all credit providers.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.5 Basel Committee on Banking Supervision announces enhancements to the Basel II capital framework**  On 16 January 2009, the Basel Committee on Banking Supervision issued a package of consultative documents to strengthen the Basel II capital framework. These enhancements are part of a broader effort the Committee has undertaken to strengthen the regulation and supervision of internationally active banks in light of weaknesses revealed by the financial markets crisis.   The proposed changes to capital requirements cover:   * trading book exposures, including complex and illiquid credit products; * certain complex securitisations in the banking book (e.g. so-called CDOs of ABS); and * exposures to off-balance sheet vehicles (i.e. asset-backed commercial paper conduits).   The Committee is also proposing standards to promote more rigorous supervision and risk management of risk concentrations, off-balance sheet exposures, securitisations and related reputation risks. Through the supervisory review process, the Committee is promoting improvements to valuations of financial instruments, the management of funding liquidity risks and firm-wide stress testing practices.  In addition, the Committee is proposing enhanced disclosure requirements for securitisations and sponsorship of off-balance sheet vehicles, which should provide market participants with a better understanding of an institution's overall risk profile.  The Committee proposes that the capital requirements for the trading book be implemented in December 2010 while the other improvements, including those related to risk management and disclosures, be introduced by the end of 2009.  These proposed changes are part of the Committee's broader work program, as set out in its 20 November 2008 press release, to strengthen in a fundamental way bank capital adequacy, risk management and supervision. In particular, this includes assessing ways to mitigate procyclicality, for example, by promoting capital buffers above the regulatory minimum that can be drawn upon during periods of stress. These efforts are in support of the April 2008 recommendations of the Financial Stability Forum and the G20's November 2008 action plan.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.6 PWG private-sector committees finalise best practices for hedge funds**  On 16 January 2009, the US Department of the Treasury announced that the two private-sector committees established by the President's Working Group on Financial Markets (PWG) have released their finalised sets of best practices for asset managers and hedge fund investors in an effort to increase accountability for participants in this industry.   The PWG originally tasked the committees, selected in September 2007 and comprised of asset managers and investors, with collaborating on industry issues and developing best practices. The committees released their draft best practices in April 2008, and provided a public comment period.  The committees amended the reports in certain respects to further the fundamental goal of the best practices and to clarify parts of the report.   The final best practices for the asset managers call on hedge funds to adopt comprehensive best practices in all aspects of their business, including the critical areas of disclosure, valuation of assets, risk management, business operations, compliance and conflicts of interest.   The final best practices for investors include a Fiduciary's Guide, which provides recommendations to individuals charged with evaluating the appropriateness of hedge funds as a component of an investment portfolio, and an Investor's Guide, which provides recommendations to those charged with executing and administering a hedge fund program if one is added to the investment portfolio.   The committees' work was based on the PWG's Principles and Guidelines Regarding Private Pools of Capital issued in February 2007, which sought to enhance investor protections and systemic risk safeguards. The PWG includes the heads of the US Treasury Department, the Federal Reserve Board, the Securities and Exchange Commission and the Commodity Futures Trading Commission.   The report is available on the [PWG](http://www.amaicmte.org/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.7 Group of Thirty - Financial reform report**  On 15 January 2009, the Group of 30 published a report titled "Financial Reform: A Framework for Financial Stability". The Group of Thirty, established in 1978, is a private, non-profit, international body composed of senior representatives of the private and public sectors and academia. It aims to deepen understanding of international economic and financial issues, to explore the international repercussions of decisions taken in the public and private sectors, and to examine the choices available to market practitioners and policymakers.   The report addresses flaws in the global financial system and provides 18 specific recommendations to: improve supervisory systems by redefining the scope, boundaries, and structure of prudential regulation; enhance the role of the central banks; improve governance practices and risk management; address pro-cyclicality via capital and liquidity standards; enhance accounting practices; strengthen the financial infrastructure; and increase coordination internationally.    The report is available on the [Group of Thirty](http://www.group30.org/pubs/pub_1460.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.8 FSA confirms extension of short selling disclosure regime**  On 14 January 2009, the UK Financial Services Authority (FSA) confirmed that it will extend its disclosure obligation for short selling of stocks in UK financial sector companies until 30 June 2009. The decision follows strong support for the proposals on which the FSA consulted last week.  Disclosure of a net short position in the stock of a UK financial sector company will continue to be required once a position reaches 0.25% of a relevant firm's issued share capital. However, from 16 January 2009, further disclosure is only required if a short position changes by a further 0.1% of issued share capital (i.e. at 0.35%, 0.45% etc).  The FSA plans to issue a further consultation paper with proposals on longer-term options for a short selling regime within a few weeks.    Further information is available on the [FSA](http://www.fsa.gov.uk/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.9 European Commission launches consultation on review of the Prospectus Directive**  On 9 January 2009, the European Commission launched a consultation on its review of the application of the Prospectus Directive, including some proposals to improve and simplify this Directive. The Prospectus Directive aims to ensure that investors are provided with clear and comprehensive information when making investment decisions. The Commission now wishes to assess the potential impact of its proposals and the merit of any alternative approaches.    The Directive introduced a "single passport for issuers", making securities available to investors either through a public offer procedure or by admitting their shares to trading. This means that once approved by the regulatory authority in one Member State, a prospectus then has to be accepted everywhere else in the EU. In order to ensure investor protection, that approval is granted only if the prospectus meets common EU standards for what information must be disclosed and how.   The Commission has identified some elements in the Directive that may create in practice unnecessary burdens and unjustified costs for companies and intermediaries. The consultation paper explains these issues and suggests measures to address the problems identified. The issues include:   * definition of qualified investors; * revision of exempt offers ('retail cascade' issue and employee shares schemes); * revision of annual disclosure obligation; * time limit for exercise of right of withdrawal; and * certain thresholds of the Directive.   The consultation paper also considers issues that have been brought to the Commission's attention but that are not included at this stage in the draft proposals. The Commission would like to receive contributions and suggestions from stakeholders on these issues, including:   * effectiveness of the prospectus summary; * disclosure requirements for offers with Government guarantee schemes; and * disclosure requirements for small quoted companies and for rights issues.   The consultation paper is available on the [European Commission](http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.10 FSA clarifies disclosure requirements for directors**  On 9 January 2009, the UK Financial Services Authority (FSA) clarified its disclosure requirements for directors who grant security over their shareholdings.    The Model Code (an Annex to the Listing Rules), is specific that a director intending to use shares of a company as security requires clearance from the company before doing so but does not mandate disclosure to the market.  The FSA can see no basis on which a director could legitimately avoid seeking clearance where his or her shares are to be used as collateral for a financing transaction.  The FSA expects listed issuers to deal with breaches of the Model Code by their directors.    Grants of security over shareholdings also fall within the Disclosure and Transparency Rules (DTR).  Persons discharging managerial responsibilities ("PDMRs"), such as directors, and their connected persons should therefore disclose such transactions to their companies, which in turn should make disclosure to the market.    However the rules in DTR are derived from the EU Market Abuse Directive which does not define specifically which transactions fall within its disclosure requirements.  As a result, there are different practices in different European markets in respect of the disclosure of granting of security over shares.  The FSA acknowledges that this has led to a degree of uncertainty among market practitioners in London about the exact requirements.  The FSA has therefore concluded that it will not pursue any enforcement action for cases where directors and their firms have not hitherto made the necessary DTR disclosures.  Following this clarification, the FSA expects all outstanding disclosures to be made by 23 January 2009.   The statement is available on the [FSA](http://www.fsa.gov.uk/pages/Doing/UKLA/company/disclosure/index.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.11 Report on reform of US financial regulation**   On 8 January 2009, the US Government Accountability Office (GAO) published a report titled "Financial Regulation: A Framework for Crafting and Assessing Proposals to Modernize the Outdated US Financial Regulatory System".    The report observes that the US and other countries are in the midst of the worst financial crisis in more than 75 years. While much of the attention of policymakers understandably has been focused on taking short-term steps to address the immediate nature of the crisis, these events have served to strikingly demonstrate that the current US financial regulatory system is in need of significant reform. To help policymakers better understand existing problems with the financial regulatory system and craft and evaluate reform proposals, the GAO report (1) describes the origins of the current financial regulatory system, (2) describes various market developments and changes that have created challenges for the current system, and (3) presents an evaluation framework that can be used by Congress and others to shape potential regulatory reform efforts.    According to the report, several key changes in financial markets and products in recent decades have highlighted significant limitations and gaps in the existing US regulatory system.   * Firstly, regulators have struggled, and often failed, to mitigate the systemic risks posed by large and interconnected financial conglomerates and to ensure they adequately manage their risks. The portion of firms operating as conglomerates that cross financial sectors of banking, securities, and insurance increased significantly in recent years, but none of the regulators is tasked with assessing the risks posed across the entire financial system. * Secondly, regulators have had to address problems in financial markets resulting from the activities of large and sometimes less-regulated market participants - such as nonbank mortgage lenders, hedge funds, and credit rating agencies - some of which play significant roles in today's financial markets. * Thirdly, the increasing prevalence of new and more complex investment products has challenged regulators and investors, and consumers have faced difficulty understanding new and increasingly complex retail mortgage and credit products. Regulators failed to adequately oversee the sale of mortgage products that posed risks to consumers and the stability of the financial system. * Fourthly, standard setters for accounting and financial regulators have faced growing challenges in ensuring that accounting and audit standards appropriately respond to financial market developments, and in addressing challenges arising from the global convergence of accounting and auditing standards. * Finally, despite the increasingly global aspects of financial markets, the current fragmented US regulatory structure has complicated some efforts to coordinate internationally with other regulators.   The report is available on the [GAO](http://www.gao.gov/new.items/d09216.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.12 Principles for sound stress testing: Basel Committee issues consultative paper**  On 6 January 2009, the Basel Committee on Banking Supervision (BIS) issued the consultative paper 'Principles for Sound Stress Testing Practices and Supervision'.   The paper presents sound principles for the governance, design and implementation of stress testing programs at banks. It addresses weaknesses in stress testing exposed by the financial crisis. These include the underestimation of the potential severity and duration of stress events and the insufficient identification and aggregation of risks on a firm-wide basis.   The paper sets expectations for the role and responsibilities of supervisors in reviewing firms' stress testing practices and emphasises that a sound stress testing program should:   * be directed by the board and senior management; * provide forward-looking assessments of risk; * complement information from models and historical data; * be an integral part of capital and liquidity planning; * guide the setting of a bank's risk tolerance; and * facilitate the development of risk mitigation or contingency plans across a range of stressed conditions.   The paper is available on the [Bank for International Settlements](http://www.bis.org/publ/bcbs147.pdf?noframes=1" \t "_new) website.    [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.13 Study says improve do not suspend fair value accounting standards**  On 30 December 2008, the US Securities and Exchange Commission (SEC) delivered a report to Congress mandated by the Emergency Economic Stabilization Act of 2008 that recommends against the suspension of fair value accounting standards.   Rather, the report by the SEC's Office of the Chief Accountant and Division of Corporation Finance recommends improvements to existing practice, including reconsidering the accounting for impairments and the development of additional guidance for determining fair value of investments in inactive markets, including situations where market prices are not readily available.   As mandated by the Act, the report addresses the following six key issues:  1. the effects of such accounting standards on a financial institution's balance sheet;  2. the impacts of such accounting on bank failures in 2008;  3. the impact of such standards on the quality of financial information available to investors;  4. the process used by the Financial Accounting Standards Board in developing accounting standards;  5. the advisability and feasibility of modifications to such standards; and  6. alternative accounting standards to those provided in such Statement Number 157.   Among key findings, the report notes that investors generally believe fair value accounting increases financial reporting transparency and facilitates better investment decision-making. The report also observes that fair value accounting did not appear to play a meaningful role in the bank failures that occurred in 2008. Rather, the report indicated that bank failures in the US appeared to be the result of growing probable credit losses, concerns about asset quality, and in certain cases, eroding lender and investor confidence.  The Emergency Economic Stabilization Act of 2008 directed the SEC, in consultation with the Board of Governors of the Federal Reserve System and the Secretary of the Treasury, to study mark-to-market accounting standards as provided by the FASB Statement of Financial Accounting Standards No 157, Fair Value Measurements. The Act, which was signed into law on 3 October, required that the study be completed within 90 days.   While the report does not recommend suspending existing fair value standards, it makes eight recommendations to improve their application, including:  Development of additional guidance and other tools for determining fair value when relevant market information is not available in illiquid or inactive markets, including consideration of the need for guidance to assist companies and auditors in addressing:   * How to determine when markets become inactive and whether a transaction or group of transactions are forced or distressed; * How the impact of a change in credit risk on the value of an asset or liability should be estimated; * When should observable market information be supplemented with and/or reliance placed on unobservable information in the form of management estimates; and * How to confirm that assumptions utilized are those that would be used by market participants and not just a specific entity.   Enhancement of existing disclosure and presentation requirements related  to the effect of fair value in the financial statements.  Educational efforts including those to reinforce the need for management judgment in the determination of fair value estimates.  Examination by the FASB of the impact of liquidity in the measurement of fair value, including whether additional application and/or disclosure guidance is warranted.  Assessment by the FASB of whether the incorporation of credit risk in the measurement of liabilities provides useful information to investors, including whether sufficient transparency is provided currently in practice.  The report also recommends that FASB reassess current impairment accounting models for financial instruments, including consideration of narrowing the number of models under US GAAP. The report finds that under existing accounting requirements, information about impairments is calculated, recognized and reported on basis that often differs by asset type. The report recommends improvements, including: reducing the number of models utilized for determining and reporting impairments, considering whether the utility of information available to investors would be improved by providing additional information about whether current declines in value are consistent with management expectations of the underlying credit quality, and reconsidering current restrictions on the ability to record increases in value (when market prices recover).  The report is available on the [SEC](http://www.sec.gov/news/studies/2008/marktomarket123008.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.14 APRA revises audit requirements for ADIs**   On 23 December 2009, the Australian Prudential Regulation Authority (APRA) released a revised prudential standard on audit requirements for authorised deposit-taking institutions (ADIs).  The revised Prudential Standard APS 310 Audit and Related Matters follows consultation with the audit profession and the industry. Its aim is to ensure that APRA is provided with independent advice from an ADI's auditor in relation to its operations and risk control environment, as well as assurance that data provided to APRA are reliable.  Key requirements of the prudential standard include:   * ADIs must formally appoint an auditor for prudential purposes (which can be the same as the auditor employed for financial statement audits); * the appointed auditor must meet APRA's fit and proper and independence requirements; * the level of assurance required from the audit is dependent upon the nature and source of data collections being audited; and * ADIs will continue to provide a risk management declaration endorsed by the Board of the ADI and the Chief Executive Officer.   The prudential standards will take effect for financial years beginning on or after 1 January 2009.   The Standards and Guidance Notes are available on the [APRA](http://www.apra.gov.au/ADI/Prudential-Standards-and-Guidance-Notes-for-ADIs.cfm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.15 IASB provides update on steps taken in response to the global financial crisis**   On 19 December 2008, the International Accounting Standards Board (IASB), announced the steps it has taken as part of its response to the global financial crisis to address recommendations made by the G20 leaders in November 2008:   * Improved accounting for off balance sheet items; * New disclosure requirements related to impairment; * Acceleration of efforts to address broader issues of impairment on a globally consistent basis: * Ensuring consistent treatment of accounting for particular credit-linked investments between US generally accepted accounting principles (GAAP) and International Financial Reporting Standards (IFRSs); * Ensuring embedded derivatives are assessed and separated if financial assets are reclassified; and * Considering fully other issues related to financial instruments, including the fair value option, raised at the recent series of round tables in London, New York and Tokyo.   These decisions taken by the board follow earlier action detailed below:   * an IASB amendment to permit reclassifications of financial assets under certain circumstances (13 October 2009); * proposals to enhance disclosures of financial instruments (15 October 2009); * publication of guidance for the application of fair value in illiquid markets    (31 October 2009); and * the establishment of a joint Financial Crisis Advisory Group, chaired by Harvey Goldschmid, a former commissioner of the US Securities and Exchange Commission, and Hans Hoogervorst, chairman of the Netherlands Authority for the Financial Markets. This group will meet several times in the first quarter of 2009.   Further information is available on the [IASB](http://www.iasb.org/Home.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.16 CESR to consult on non-equity markets transparency**   On 19 December 2008, the Committee of European Securities Regulators (CESR) published a consultation paper on the transparency of non-equity markets (Ref. CESR/08-1014). Given the recent market crisis, the consultation seeks to gather views that will assist CESR in analysing the role of trade transparency on markets for corporate bonds, structured finance products and credit derivatives. In relation to corporate bonds, the objective of CESR's work is to review whether CESR's conclusions on trade transparency in bond markets, published in August 2007 (Ref. CESR/07-284b), remain appropriate in light of the experiences from the recent market turmoil.    Regarding structured finance products and credit derivatives, the key question CESR seeks to consider is the extent to which post-trade information plays a role to support price formation, reinforce valuation practices and provide supplementary information about the scale of credit risk transfers.    **(a) Transparency of corporate bond markets**    In its advice to the European Commission on trade transparency in the non-equity markets (Ref. CESR/07-284b) in August 2007, CESR noted that it had not seen evidence, at that stage, of a market failure in relation to trade transparency which would have warranted mandatory transparency for bonds. However, CESR concluded that some re-distribution of the existing transparency information could be useful to help retail participants and noted that there were some market led initiatives that, once in place, should be evaluated to establish if these had addressed potential concerns. Given the recent financial crisis, CESR decided however to re-evaluate these conclusions as a matter of urgency and consequently, in its consultation paper notes that it is not of the view that insufficient post-trade transparency was the key reason behind the problems of the corporate bond market, nor does it believe that additional post-trade transparency would be able to solve these problems as a singular measure.   However, CESR believes that there would be value for market participants in receiving access to greater post-trade information. CESR notes that it is willing to explore with market participants whether additional post-trade transparency could play a role in supporting a return to more normal market conditions in the corporate bond markets and be of value thereafter.    CESR is therefore seeking to hear from market participants, as to whether they share this view and whether they consider that an approach which distinguishes between the needs of participants active in the wholesale market from those active in retail market might be appropriate.    Market participants are also asked to provide their views on the sufficiency of trade information available on corporate bond markets, and in particular whether more trade information would be required in order to comply effectively with best execution requirements. Furthermore, in this context, CESR is also seeking to identify the experience of market participants who use the US Trade Reporting and Compliance Engine (TRACE) and to establish what conclusions, if any, can be drawn from this.    CESR has also analysed the existing market-led solutions and noted that they focus on aggregated and delayed data and have a limited coverage in terms of issues and transactions covered as well as institutions providing the data. However, at this stage CESR considers that market-led solutions in this area could still be appropriate provided that they can deliver an adequate level of post-trade transparency in a timely manner and are subject to close external monitoring.    **(b) Transparency of structured finance product and credit derivatives markets**   In order to analyse whether a post-trade transparency regime could be envisaged for structured finance products and credit derivatives, the consultation paper describes the main characteristics of those markets, providing background on the recent turbulence and highlighting the expansion of new financing techniques based on securitisation. CESR is of the opinion that post-trade information plays a role in these markets, although CESR notes that insufficient post-trade transparency may not have been the key reason behind the recent market turmoil and additional post-trade transparency would not be able to solve the different problems experienced in the structured finance market as a single measure on its own. However, the appropriate level of transparency should be calibrated taking into account the relevant instruments, their trading methods as well as market participants active in the markets for these instruments. In light of the above, CESR is particularly interested in receiving the views of market participants on any specific technical, market impact or efficiency reasons that might limit the introduction of a post-trade transparency framework for these instruments.    Consequently, CESR puts forward a number of questions in order to further develop its conclusions on the extent to which post-trade information plays a role to support price formation, reinforce valuation practices and provide supplementary information about the scale of credit risk transfers for Asset Backed Securities, Collateral Debt Obligations, Asset Backed Commercial Papers and Credit Default Swaps in Europe's secondary markets.   CESR invites responses to the consultation paper on the [CESR](http://www.cesr.eu/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.17 FSA to explore more widely the issue of consumer responsibility**  On 19 December 2008, the UK Financial Services Authority (FSA) published a discussion paper on consumer responsibility to explore what steps the regulator or others could take to help consumers understand and protect their own best interests more effectively. The protection of consumers is one of the FSA's four statutory objectives, and the regulator adopts a two-pronged approach to achieving its consumer protection and consumer awareness objectives:   * it sets, monitors and enforces standards for firms; and * provides - or require others to provide - education, information and advice for consumers.   While the FSA has no power to impose responsibilities on consumers, it is required by law to consider the general principle that consumers should take responsibility for their decisions when setting its consumer protection agenda.  To this end, the discussion paper aims to provoke debate and bring greater clarity to the FSA's approach to consumer responsibility.      The discussion paper is available on the [FSA](http://www.fsa.gov.uk/pages/Library/Policy/DP/2008/08_05.shtml" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.18 European Commission launches public consultation on hedge funds**  On 18 December 2008, the European Commission launched a public consultation on policy issues arising from the activities of the hedge fund industry, in view of developing appropriate regulatory initiatives. A significant part of global hedge fund assets are managed and administered in Europe.    This consultation is part of the Commission's comprehensive review of regulatory and supervisory arrangements for all financial market actors in the European Union, which is to be finalised in 2009 upon consideration of the report of the High Level Expert Group chaired by Jacques de Larosière. It also responds to the recent reports by the European Parliament, which raise a number of concerns that have come into sharper international focus as hedge funds have, like many other financial actors, been heavily affected by the current financial crisis.   **Issues addressed by the consultation**  Views and evidence are sought in the following areas, so as to guide on appropriate regulatory initiative:   * **Systemic risks.** The consultation invites views on whether existing systems of macro-prudential oversight are sufficient to allow regulators to monitor and react to risks originating in the hedge fund sector and transmitted to the wider market through counterparties, including prime brokers, and through the impact on asset prices. * **Market integrity and efficiency.** The consultation asks whether and under what circumstances the activities of hedge funds pose a threat to the efficiency and integrity of financial markets. * **Risk management.** The consultation asks whether public authorities should concern themselves more with the way in which hedge funds manage the risks to which they and their investors are exposed, value their asset portfolios and manage any potential conflicts of interest. * **Transparency towards investors and investor protection.** The consultation invites views on whether hedge fund investors are adequately protected and receive the information required for sound investment decisions.   The consultation document is available on the [European Commission](http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/2028&format=HTML&aged=0&language=EN&guiLanguage=en" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.19 COAG decision on directors' liabilities**   On 18 December 2008, Senator Nick Sherry, Australian Minister for Superannuation and Corporate Law, announced that the Council of Australian Governments (COAG) has agreed to progress increased harmonisation of the laws on company director liability.  The Ministerial Council for Corporations (MINCO) will now examine the imposition of personal criminal liability for corporate fault and the contribution this makes to the goal of a seamless national economy, including nationally consistent regulation.   Specifically COAG has referred this issue to MINCO with guidance in the form of the following principles:   * where companies contravene statutory requirements, liability should be imposed in the first instance on the company itself; * personal criminal liability of a corporate officer for the misconduct of the corporation should generally be limited to situations where the officer encourages or assists the commission of the offence (accessorial liability); and * in exceptional circumstances, where there is a public policy need to go beyond the ordinary principles of accessorial liability, a form of deemed liability could be imposed on a corporate officer only using a 'designated officer' approach (for minor offences) or a 'modified accessorial' approach (for more serious offences).   MINCO will report back to COAG with its recommendations for harmonisation and reform by mid-2009.  In addition, Treasury has completed a survey on directors in conjunction with the Australian Institute of Company Directors to assess the impact of corporate laws that impose personal liability on directors.   Nearly 100 directors of S&P/ASX-200 companies participated and full survey results can be found on the [Treasury](http://www.treasury.gov.au" \t "_new) website. The survey results will be assessed as part of the COAG process.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.20 EU legislative initiatives in response to the financial turmoil**  On 15 December 2008, the House of Lords' European Union Committee published a report titled 'EU Legislative Initiatives in Response to the Financial Turmoil'. The report outlines the European Commission's recent regulatory/legislative proposals and proposed changes to supervisory structures in response to the financial crisis. It also sets out the views of the UK government and the FSA on these proposals. The matters dealt with in the report include: reform of the supervisory frameworks; the capital requirements directive; deposit guarantee schemes; and rules on credit ratings agencies.  The report is available on the [House of Lords](http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/3/3.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.21 IFAC paper highlights roles of regulators and profession in standard-setting process**   In December 2008, the International Federation of Accountants (IFAC) published a policy position paper describing and explaining the international standard-setting process, particularly for International Standards on Auditing (ISAs). The paper 'International Standard Setting in the Public Interest', explains how responsibility is shared between public and private sector organizations to produce high quality standards that are in the public interest. The paper identifies the underlying principles of legitimacy, independence, accountability, transparency and performance that are the key to a successful standard-setting process, and it describes how the structures and processes of the independent standard-setting boards in the areas of international auditing, ethics and accounting education are consistent with these principles.    The paper is available on the [IFAC](http://www.ifac.org/Store/Details.tmpl?SID=1229098401517900&Cart=1229099307518379" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1)  **1.22 Asset managers address over-reliance on credit ratings**   In December 2008, the European Fund and Asset Management Association (EFAMA), the European Securitisation Forum (ESF) and the Investment Management Association (IMA) jointly published the "Asset Management Industry Guidelines to Address Over-Reliance upon Ratings", providing guidance for asset managers on the responsible use of ratings for securitisation, structured finance and structured credit products.   The Guidelines have been produced as a response to the call of the Financial Stability Forum (FSF) for investors to address their over-reliance on ratings and to review their standards of due diligence and credit analysis when investing in structured credit products.     The Guidelines are available on the [EFAMA](http://www.investmentuk.org/press/2008/20081211-01.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  |  | | |  | | |  | | --- | | **2.1 ASIC extends ban on covered short selling of financial securities**  On 21 January 2009, the Australian Securities and Investments Commission (ASIC) announced it would keep the ban on covered short selling of financial securities in place until Friday 6 March 2009.  ASIC advised the market on 13 November 2008 that the current ban on covered short selling of financial securities (as defined in ASIC's release of 13 November 2008) would remain in place until at least 27 January 2009.  This approach was consistent with many other jurisdictions, including the UK, where the Financial Services Authority (FSA) planned to lift its short selling ban on certain financial securities on 16 January 2009.  The FSA lifted its ban on 16 January 2009 and ASIC expected to then lift its ban, so as to be in line with the other major markets.  ASIC, however, noted the recent increase in volatility in financial stocks in overseas markets. ASIC is not at this stage in a position to assess if the resumption of short selling in the UK was coincidental or contributed to this volatility and if so, to what extent.  As many factors are at play in these overseas markets, ASIC needs time to examine these latest developments. ASIC will therefore, over the next few weeks, assess the markets more carefully to determine the role of short selling and aggressive or predatory practices and whether there are similar risks for Australia when the ban is lifted.   ASIC believes that in the context of the renewed volatility affecting banking stocks in many markets, including the UK and USA, this cautious approach is warranted. ASIC believes that any possible loss of market efficiency or price discovery as a result of this additional short period of review is therefore justified.  ASIC's decision to extend the ban on covered short selling of financial securities is also in the context of a legislative framework that recognises short selling as a legitimate mechanism of price discovery and liquidity, subject to disclosure and subject to intervention by ASIC in exceptional cases.  ASIC's intention is and remains to keep its intervention to an absolute minimum. ASIC will continue its consultations with relevant stakeholders and other regulators in Australia and overseas.  ASIC will keep the position under review, and might decide it has sufficient information to be able to lift the ban earlier than 6 March, and will make a decision for 6 March closer to that date. Publication of short selling data  ASIC's current reporting and disclosure regime will continue pending the commencement of the Government's permanent measures. Continuing to require disclosure of covered short selling will reduce the potential for abusive behaviour and disorderly markets. Stock lending  ASIC reminds market participants that borrowers must have a presently exercisable and unconditional right to vest securities for delivery at the time of a covered short sale. These arrangements must comply with section 1020B of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). ASIC's Regulatory Guide 196 Short Selling: Overview of s1020B [RG 196] clarifies what constitutes a naked short sale.  **Key details**  1. Covered short selling of financial securities will continue to be banned;  2. Covered short selling of non-financial securities is unaffected and will still be permitted;  3. The daily reporting of gross short sales will continue as will the publication to the market of aggregate short sales by security the day after trading; and  4. ASIC requires strict compliance with the ban on naked short selling as outlined in RG196.  The Guide 196 'Short Selling: Overview of s1020B' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg196.pdf/$file/rg196.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h2)  **2.2 ASIC releases market assessment reports**   On 14 January 2009, the Australian Securities and Investments Commission (ASIC) released the findings of the following four annual market assessments:  1. Chicago Mercantile Exchange, Inc (CME); 2. Board of Trade of the City of Chicago Inc (CBOT);  3. Eurex Frankfurt AG (EFAG); and 4. London Metal Exchange Ltd (LME).  ASIC has concluded that each market has adequate arrangements for the supervision of its market in accordance with the obligations under section 792A(c) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Corporations Act).   A financial market is defined as a facility through which offers to buy and sell financial products are regularly made. Anyone who operates a financial market in Australia must obtain a licence to do so, or otherwise be exempted by the Minister. CME, CBOT, EFAG and LME have all been granted Australian market licences as an overseas authorised market.  As part of the conditions of granting a licence to operate a financial market, the licensee must supervise the market in accordance with Part 7.2 of the Corporations Act.  Under the Corporations Act, ASIC is required to conduct an assessment of the extent to which licensed financial markets are complying with their obligations to supervise their markets. ASIC must do this at least once per year in relation to each licensee. ASIC can also assess how well a licensee is complying with its other obligations under the Corporations Act.  In conducting its assessments of these overseas market operators ASIC sought and received information provided from the relevant home regulatory authorities about the supervisory arrangements of each market operator to help it in compiling each report.  The report 'Chicago Mercantile Exchange, Inc' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep-145-CBOT-Assessment-Report-December-2008.pdf/$file/Rep-145-CBOT-Assessment-Report-December-2008.pdf" \t "_new) website.  The report 'Board of Trade of the City of Chicago Inc (CBOT)' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Rep-145-CBOT-Assessment-Report-December-2008.pdf/$file/Rep-145-CBOT-Assessment-Report-December-2008.pdf" \t "_new) website.    The report 'Eurex Frankfurt AG (EFAG)' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP-146-Eurex-Assessment-Report-December-2008.pdf/$file/REP-146-Eurex-Assessment-Report-December-2008.pdf" \t "_new) website.  The report 'London Metal Exchange Ltd (LME)' is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/REP-147-LME-Assessment-Report-December-2008.pdf/$file/REP-147-LME-Assessment-Report-December-2008.pdf" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h2)  **2.3 ASIC issues consultation paper on share purchase plan threshold**  On 18 December 2008, the Australian Securities and Investments Commission (ASIC) issued Consultation Paper 103, 'Review of share purchase plan threshold'.  This consultation paper invites comment on proposals to increase the monetary limit for share purchase plan disclosure relief from the current $5,000 in any consecutive 12 month period to $15,000 and to make it a condition of the relief that a cleansing notice be lodged with the Australian Securities Exchange.   ASIC also proposes to extend the terms of the relief for the issue of interests in an ASX listed managed investment scheme under an interest purchase plan.  The proposed changes are directed at providing shareholders with expanded investment opportunities and industry with flexible capital raising options, without unduly compromising on investor protection.  Under class order CO 02/831, ASIC grants disclosure relief for the offer of shares by a corporation listed on the ASX to existing shareholders under share purchase plans. This relief is subject to a number of conditions, including that it only extends to issues up to a value of $5,000 in a 12 month period.   The principle underlying ASIC's policy in relation to share purchase plans is to allow share purchase plans where the risk to the shareholder is limited to the amount which may be invested by each investor in a 12 month period. Also, the benefits to investors (such as savings on brokerage) outweigh the disadvantages and risks of not having full prospectus disclosure.  The monetary limit was last reviewed in 2002.  The consultation paper seeks the views of stakeholders, including companies, industry associations, retail investors and their professional advisers.  ASIC invites comments on the proposals by 13 February 2009.  The consultation paper is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Consultation-paper-103-Review-share-purchase-plan-threshold.pdf/$file/Consultation-paper-103-Review-share-purchase-plan-threshold.pdf" \t "_new) website.    [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  |  | | |  | | |  | | --- | | **3.1 New index for listed investment companies**   On 2 January 2009 a new index for Listed Investment Companies commenced.  It is called the ASX LIC Index and its code is XIC.   ASX has established the index in conjunction with the local Listed Investment Company community. The index comprises 44 LICs listed on ASX which invest directly in Australian and international equities.   Standard & Poor's looks after the data analysis of the index.  Both end-of-day values and the historical data are available on the [ASX](http://www.asx.com.au/products/managed_funds/index.htm" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h3)  **3.2 Rule amendment - ACH Clearing Rules: Capital requirements**   Changes to the minimum capital requirements for ACH Clearing Participants were advised to the market in ASX's July 2008 Market Information Document as part of a range of risk-based changes to ASX's central counterparty services. The increases are relevant to those ACH Clearing Participants that are subject to the Risk Based Capital Requirements and remain complementary to the existing Liquid Capital requirements for Clearing Participants under the ACH Rules.   The first change is an increase in minimum core liquid capital to $2,000,000, which took effect on 1 January 2009. A further increase in minimum core liquid capital to $10,000,000 is planned for 1 January 2010.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h3)  **3.3 Rule amendment - ACH Clearing Rules: Participants precluded from acting in the capacity of trustee of any trust**   ACH Clearing Rule 3.2.1(a) was amended on 1 January 2009 to preclude ACH Participants from acting in the capacity of trustee of any trust. This amendment ensures consistency with the corresponding admission requirement of the ASX Market Rules.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h3)  **3.4 Referrals to ASIC**   During the calendar quarter ending 31 December 2008 ASX's supervisory subsidiary ASX Markets Supervision Pty Limited (ASXMS) made these referrals to ASIC:   * 4 potential contraventions for insider trading; * 1 potential contravention for short selling; * 5 potential contraventions of continuous disclosure; and * 4 potential contraventions for market manipulation.   [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h3)  **3.5 ASX review of trading by directors in blackout period**   On 11 December 2008 ASX released its latest review of securities trading by directors during the "blackout" period. The review was based on the disclosure of Directors' Interest Notices by listed entities.   The review was conducted by ASX Markets Supervision (ASXMS) on all Directors' Interest Notices lodged between 1 July and 30 September 2008 (Q3 2008). A similar review was conducted between 1 January and 31 March 2008 (Q1 2008).   The report is available on the [ASX](http://www.asx.com.au" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h3)  **3.6 Settlement**   ASX published a consultation paper, Enhancing Australia's Equity Settlement System, on 9 December 2008.  The paper aims to solicit market feedback on the need for, and impact and preferences of, several potential options to further improve the Australian equity settlement system.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h3)  **3.7 Gross short sale activity report**   In early December ASX included additional information in the daily gross short sale activity report to assist users in interpreting the data. The additions include the total amount of sales (not just short sales) of each stock, gross short sales as a percentage of turnover, and the percentage change in each stock's price.   Additionally, the daily gross short sale report is now published at around 11.00 am to allow ASX to follow up with participants where inaccuracies are identified in the reported figures and to provide time for participants to rectify their submissions prior to publication to the market.    [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  |  | | |  | | |  | | --- | | **4.1 GoldLink Income Plus Limited - Declaration of unacceptable circumstances and orders**  On 28 January 2009, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances and final orders in relation to an application dated 8 January 2009 by Emerald Capital Limited in relation to the affairs of GoldLink IncomePlus Limited (see TP09/02).  The Panel received a review application from Fortina Pty Ltd in relation to this decision.  Emerald made a 45% proportional takeover offer for GoldLink, which closed on 19 January 2009.  In its bidder's statement, Emerald stated that if, as a result of accepting the bid a GoldLink shareholder was left with less than a marketable parcel of shares, the takeover extended to the whole of the shareholder's parcel of shares and the shareholder would be deemed to have accepted for all of their shares.    Bell IXL Investments Limited and its associates had an interest in approximately 18% of GoldLink (22,944,000 shares).  On 21 December 2008 Fortina, a company associated with Bell IXL, established 1,912 trusts.  The trusts each held 12,000 shares (22,944,000 in total).  On 2 January 2009, Fortina lodged acceptances in respect of 12,000 shares for each of the 1,912 Fortina trusts in an attempt to accept Emerald's offer in respect of all 22,944,000 shares.  The Panel considers (among other things) that the actions by Fortina were at odds with the basic principles and policies underlying particular provisions of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) relating to proportional bids, were contrary to the efficient market principle and the equal treatment principle and gave rise to unacceptable circumstances.  The Panel did not consider it against the public interest to make the declaration, and in making the declaration had regard to the matters in section 657A(3).  The Panel has made orders to the effect that Emerald only process acceptances such that 45% of the 22,944,000 shares be accepted.  The reasons for the decision will publish in due course on the [Takeovers Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h4)  **4.2 Bisalloy Steel Group Limited - Declaration of unacceptable circumstances and orders**   On 23 December 2008, the Takeovers Panel announced that it had made a declaration of unacceptable circumstances and final orders  in relation to an application dated 15 December 2008 by Balron Nominees Pty Ltd in relation to the affairs of Bisalloy Steel Group Limited.  Bisalloy is conducting a 4 for 5 renounceable rights issue to raise approximately $20.9 million. The issue price under the rights issue is 25c, which was a discount of 7.4% to the closing price of Bisalloy shares at 1 December 2008. This discount has eroded during the offer period of the rights issue.   The rights issue is fully underwritten by ABN AMRO Morgans Corporate Limited and fully sub-underwritten by Anchorage BSG Pty Limited. Anchorage BSG is a wholly owned subsidiary of the Anchorage Capital Partners 1 Fund, which is managed by Anchorage Capital Partners Pty Ltd. The Chairman of Bisalloy, Mr Phillip Cave, who currently has a 3.6% interest in Bisalloy also has a 40% interest in Anchorage Capital Partners Pty Ltd and a 10% interest in the Anchorage Capital Partners 1 Fund. Mr Cave is also a director of Anchorage Capital Partners Pty Ltd. The rights issue prospectus discloses that if Anchorage BSG's and Mr Cave's interests are taken together, their voting power in Bisalloy could increase to 48% if there is a 100% shortfall under the offer.    Anchorage BSG submitted to the Panel that it was not prepared to sub-underwrite the rights issue on the basis that it would sub-underwrite only 50% of the shortfall and that it was attracted to the sub-underwriting because of the prospect that it would give it some influence in the affairs of Bisalloy.  The Panel considers that the independent directors of Bisalloy did not take all reasonable steps to minimise the potential control impact of the rights issue on the company, in particular, by not offering an opportunity to participate in the sub-underwriting to other major shareholders, Balron and Investors Mutual. This together with the omission of information in the prospectus relating to the intentions of Anchorage BSG gave rise to unacceptable circumstances.  The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in section 657A(3).   The Panel has made orders to the effect that:  1. Other major shareholders of Bisalloy (Balron and Investors Mutual Limited) have the ability to obtain in equal proportion to Anchorage BSG any shares under the sub-underwriting arrangements that would otherwise take Anchorage BSG's and Mr Cave's combined voting power in Bisalloy to over 20%.  2. Anchorage BSG and Balron (if Balron decides to participate in any shortfall) must inform Bisalloy of their intentions in relation to Bisalloy.  3. Bisalloy lodge a supplementary prospectus disclosing, among other things, the intentions of Anchorage BSG and Balron.  The orders do not affect the underwriting arrangements as between Bisalloy and ABN AMRO Morgans or the sub-underwriting arrangements as between ABN AMRO Morgans and Anchorage BSG.   The reasons for the decision will publish in due course on the [Takeovers Panel](http://www.takeovers.gov.au/" \t "_new) website.  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Contributions** |  |  | | |  | | |  | | --- | | If you would like to contribute an article or news item to the Bulletin, please email it to: "[cclsr@law.unimelb.edu.au](mailto:cclsr@law.unimelb.edu.au" \t "_new)".  [etailed Contents](http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No.%20137.htm-%20January%202009.htm%23h1) | | |  |

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