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Recent Corporate Law and Corporate Governance Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%232) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009_files/spacer%281%29.gif | | |  | | --- | | **1.1 IOSCO publishes principles for hedge funds regulation**    On 22 June 2009, the International Organization of Securities Commissions' (IOSCO) Technical Committee published a report titled 'Hedge Funds Oversight: Final Report' which contains six high level principles that will enable securities regulators to address, in a collective and effective way, the regulatory and systemic risks posed by hedge funds in their own jurisdictions while supporting a globally consistent approach.    The report, which was prepared by the Task Force on Unregulated Entities (Task Force), recommends that all securities regulators apply the principles in their regulatory approaches.    The six high level principles are:   1. Hedge funds and/or hedge fund managers/advisers should be subject to mandatory registration;   2. Hedge fund managers/advisers which are required to register should also be  subject to appropriate ongoing regulatory requirements relating to:  a) Organisational and operational standards;  b) Conflicts of interest and other conduct of business rules;  c) Disclosure to investors; and  d) Prudential regulation.    3. Prime brokers and banks which provide funding to hedge funds should be subject to mandatory registration/regulation and supervision. They should have in place appropriate risk management systems and controls to monitor their counterparty credit risk exposures to hedge funds.   4. Hedge fund managers/advisers and prime brokers should provide to the relevant regulator information for systemic risk purposes (including the identification, analysis and mitigation of systemic risks).    5. Regulators should encourage and take account of the development, implementation and convergence of industry good practices, where appropriate.    6. Regulators should have the authority to co-operate and share information, where appropriate, with each other, in order to facilitate efficient and effective oversight of globally active managers/advisers and/or funds and to help identify systemic risks, market integrity and other risks arising from the activities or exposures of hedge funds with a view to mitigating such risks across borders.    The Task Force will continue to work to support the implementation of these standards by its members and to deal with future regulatory issues that may arise in relation to hedge funds. It will act as the contact point with prudential regulators and banking standards setters, as well as other regulatory bodies such as the Joint Forum and the hedge fund industry in relation to the development and implementation of industry standards of best practice.     The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD293.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.2 IOSCO publishes principles for the effective regulation of short selling**   On 19 June 2009, the International Organization of Securities Commissions' (IOSCO) Technical Committee published a final report entitled 'Regulation of Short Selling' which contains high level principles for the effective regulation of short selling. The principles were developed by the Task Force on Short Selling (Task Force) following consultation with regulators and market participants from around the world who were generally supportive of the proposals.    The Technical Committee recommends that effective regulation of short selling comprises the following four principles:  1. Short selling should be subject to appropriate controls to reduce or minimise the potential risks that could affect the orderly and efficient functioning and stability of financial markets. 2. Short selling should be subject to a reporting regime that provides timely information to the market or to market authorities.  3. Short selling should be subject to an effective compliance and enforcement system.  4. Short selling regulation should allow appropriate exceptions for certain types of transactions for efficient market functioning and development.   The Task Force was established by the Technical Committee in November 2008 in response to concerns regarding the impact short selling was having in the extreme market conditions created by the financial crisis. The Task Force's aims were to work to eliminate gaps between the different regulatory approaches to naked short selling whilst minimising any adverse impact on legitimate activities, such as securities lending and hedging, which are critical to capital formation and reducing market volatility.   The report outlines the minimum that regulators should do in order to support each of the four principles.   **The first principle:** appropriate controls to reduce or minimise the potential risks that could affect the orderly and efficient functioning and stability of financial markets. In order to reduce or minimise the potential risks from short selling, regulators should have an effective discipline for the settlement of short selling transactions. As a minimum requirement this should impose strict settlement (such as compulsory buy-in) of failed trades.    **The second principle:** a reporting regime that provides timely information to the market or to market authorities. In order to achieve this enhanced level of transparency regarding short selling activity, jurisdictions should consider some form of reporting of short selling information to the market or to market authorities.    **The third principle:** an effective compliance and enforcement system. This is essential for an effective short selling regulatory regime. The regulators should:   * monitor and inspect settlement failures regularly; * require appropriate parties to maintain books and records of short sales for a sufficient period of time to assist with post-event investigation work; * consider whether they are able to extend the power to require information from parties suspected of breach, beyond the scope of licensed or registered persons if they lack such power; * establish a mechanism to analyse the information obtained from the reporting of short positions and/or flagging of short sales to identify potential market abuses and systemic risk; and * review whether their existing cross-border information sharing arrangements are sufficient to facilitate cross-border investigation.   **The fourth principle:** allow appropriate exceptions for certain types of transactions for efficient market functioning and development. It is necessary that there is flexibility in short selling regulation in order to allow market transactions that are desirable for efficient market functioning and development. Therefore regulatory authorities should at a minimum clearly define the exempted activities and the manner in which these exemptions should be reported.    The report is available on the [IOSCO](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD292.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.3 US President Obama announces plan for major regulatory reform**   On 17 June 2009, President Obama proposed a major regulatory reform plan to modernize and protect the integrity of the US financial system.    The President's plan:   * requires that all financial firms that pose a significant risk to the financial system at large are subjected to strong consolidated supervision and regulation; * increases market discipline and transparency to make US markets strong enough to withstand system-wide stress and the potential failure of one or more large financial institutions; * creates the Consumer Financial Protection Agency to focus exclusively on protecting consumers in credit, savings, and payment markets; * provides the government with enhanced tools needed to manage financial crises so it is not forced to choose between bailouts and financial collapse; and * raises international regulatory standards and improves international coordination.   **(a)   Enhanced supervision and regulation of all financial firms**   **The Financial Services Oversight Council**   * The President's plan will create a Financial Services Oversight Council chaired by Treasury, to help fill gaps in regulation, facilitate coordination of policy and resolution of disputes, and identify emerging risks in firms and market activities. * The Financial Services Oversight Council will replace the President's Working Group on Financial Markets and will have a permanent, fulltime staff at Treasury. The Council will:  - Have broad authority to gather information through the Chair from any financial firm to identify emerging risks to financial stability. - Identify gaps in regulation and prepare an annual report to Congress on market developments and potential emerging risks.  - Recommend firms for identification as Tier 1 Financial Holding Companies (Tier 1 FHCs) that should be under consolidated supervision by the Federal Reserve.  - Provide consultation on material prudential standards for Tier 1 FHCs and systemically important payment, clearing and settlement systems.   - Provide a forum for discussion of cross cutting issues among the principal federal financial regulatory agencies.   - Facilitate information sharing and coordination among the principal federal financial regulatory agencies regarding policy development, rulemakings, examinations, reporting requirements,  and enforcement actions.   **Consolidated supervision and regulation**   * Under the President's plan, all financial firms that are found to pose a threat to the US economy's financial stability based on their size, leverage, and interconnectedness to the financial  system will be subjected strong to consolidated supervision and regulation. * These Tier 1 FHCs will be subject to consolidated supervision and regulation regardless of whether they own insured depository institutions and will be subject to the non-financial  activities restrictions of the BHC Act.   **Expanded authority and accountability for the Federal Reserve Board**   * The Federal Reserve currently holds regulatory responsibilities over bank holding companies and is best suited to take on authority and accountability for consolidated supervision of all Tier 1 FHCs.   **Establish specific criteria to determine which firms are subject to the highest regulatory standards**   * The Administration proposes that Congress should establish criteria that the Federal Reserve must consider for identifying large and interconnected firms as Tier 1 FHCs.   **Higher prudential standards for large, interconnected firms**   * Tier 1 FHCs will be subjected to stricter and more conservative prudential standards than those that apply to other bank holding companies - including higher standards on capital, liquidity and risk management.   **Authority to Federal Reserve Board to assess risk and impose requirements on consolidated activities of large, interconnected financial firms**   * The Federal Reserve will be responsible for and have a right to assess risk and set higher standards at all levels (including regulated and unregulated subsidiaries of a Tier 1 FHC to protect against excessive risk taking at any level.   **Higher capital and management requirements for all financial holding companies**   * All financial holding companies- including Tier 1 FHCs - will be required to be "well capitalized" and "well managed" on a consolidated basis to engage in the broad set of financial activities permitted under the Gramm Leach Bliley Act.   **Fundamental reassessment of design and structure of regulatory capital requirements**   * A working group led by Treasury will conduct a fundamental reassessment  of the design and structure of the existing regulatory capital requirements for banks and bank holding companies (including Tier 1 FHCs).   **Executive compensation standards**   * Regulators will issue standards and guidelines that better align executive  compensation practices with long term shareholder value and that prevent compensation practices from providing incentives that could threaten the safety and soundness of supervised institutions. * The SEC will have authority to require companies to allow shareholders to vote on executive compensation packages to help ensure that compensation packages are closely aligned with the interests of shareholders.   **Strengthen firewalls between banks and their affiliates**   * Firewalls between banks and their affiliates will be strengthened to better protect the federal safety net that supports banks to better prevent spread of the subsidy from the federal safety net to bank affiliates, and to better address conflicts of interest in banking organizations.   **Review of accounting standards for financial firms**   * Accounting standards will be reviewed to determine how financial firms  should be required to employ more forward looking loan loss provisioning practices that incorporate a broader range of available credit information. * Fair value accounting rules also will be reviewed with the goal of identifying changes that could provide market participants with both fair value information and greater transparency regarding the cash flows management expects to receive from investments.   **(b)  Strengthened regulation of core markets and market infrastructure**  **Strengthen supervision of securitization markets**   * Banking regulators will issue regulations that require the originator of a securitized loan, or the sponsor of a securitization to retain 5 percent of the credit risk of securitized exposures. * The SEC will continue its efforts to increase the transparency and standardization of securitization markets, and be given clear authority to require robust reporting by issuers of asset-backed securities. * The SEC will continue its efforts to tighten the regulation of credit rating agencies, including measures to ensure that firms have robust policies and procedures that manage and disclose conflicts of interest and otherwise promote the integrity of the ratings process. * Regulators will reduce their use of credit ratings in regulations and supervisory practices, wherever possible.   **Bring comprehensive regulation to the markets for all over-the-counter derivatives, including credit default swaps**   * Credit default swap markets and all other "over-the - counter" (OTC) derivatives markets will be subject to comprehensive regulation in order to: - prevent activities in those markets from posing risk to the financial system; - promote transparency and efficiency of those markets; - prevent market manipulation, fraud, and other market abuses; and - prevent OTC derivatives from being marketed inappropriately to unsophisticated parties. * These goals will be reached through comprehensive regulation that includes: - requiring transparency for all OTC derivative trades and positions, through recordkeeping and reporting requirements; - empowering market regulators to take vigorous enforcement action against fraud, market manipulation, and other market abuses; - requiring conservative regulation of all OTC derivative dealers and all other major participants in the OTC derivatives markets; - requiring standardized OTC derivatives to be centrally cleared and executed on exchanges and other transparent trading venues; and - requiring higher capital charges for customized OTC derivatives.   **Harmonize futures and securities regulation**   * The CFTC and the SEC will make recommendations to Congress on how to eliminate differences in statutes and regulations with respect to similar types of financial instrument that are not  essential to achieving investor protection, market integrity, or price transparency. * The CFTC and SEC will complete a report by 30 September 2009 with their recommendations. * If the CFTC and SEC cannot reach agreement by the above date, their differences will be sent to the Financial Services Oversight Council, which will be required to make recommendations to resolve the differences within 6 months of its formation.   **(c) Strengthened consumer protection**  **Create a consumer Financial Protection Agency:**As part of the President's plan, the new agency will have broad authority to protect consumers of credit, savings, payment and other consumer financial products and services, and to regulate all providers of such products and services. The Agency will be responsible for:   * promoting concise and clear information for consumers; and protecting consumers from unfair and deceptive practices; * promoting fair, efficient, and innovative financial services markets for consumers; and * improving access to financial services.   **Give Consumer Financial Protection Agency full authority to enforce proper protections:**The Agency will be structured to be independent and accountable; with an empirical approach to regulation and a stable source of funding. CFPA will have authority to:   * write rules across bank and nonbank firms for a level playing field and higher standards; * supervise and examine institutions for compliance; * enforce compliance through orders, fines, and penalties; and * write rules that serve as a floor, not a ceiling with respect to state laws, and states will be empowered to enforce these strong rules.   **Key principles for action**   **Transparency**   * Mandate a new proactive approach to disclosure. * Require that all disclosures and other communications with consumers be reasonable; balanced in their presentation of benefits, and clear and conspicuous in their identification of costs, penalties and risks. * Consumers should have clear disclosure regarding the consequences of their financial decisions.   **Simplicity**   * Define standards for "plain vanilla" products that are simple and have straight forward pricing. * Require all providers and intermediaries to offer these products prominently, alongside whatever other lawful products they choose to offer. * Alternative products will be subject to more scrutiny and violations with respect to alternative products will carry higher penalties. * In some cases, CFPA would have authority to mandate consumers to "opt out" of standard products before they could be offered other alternatives.   **Fairness**   * Ban unfair terms and practices or place tailored restrictions on product terms and provider practices, if the benefits outweigh the costs. * Impose heightened duties of care on financial intermediaries that reflect reasonable consumer expectations. * Help ensure that compensation practices do not create conflicts of interest between intermediaries and consumers.   **Accountability**   * Provide the Agency with accountability as the primary federal financial consumer protection supervisor.   **Access**   * Enforce fair lending laws and the Community Reinvestment Act. * Seek to ensure that underserved consumers and communities have access to prudent financial services, lending, and investment.   **(d)   Providing the Government with tools to effectively manage financial crises**  **Key proposals are:**   * Impose more stringent capital, activities, and liquidity requirements on large, interconnected firms (Tier 1 FHCs). * Require prompt corrective action from large, interconnected firms should their capital levels decline. * Require rapid resolution plans from all large, interconnected firms. * Provide the Government with emergency authority to resolve any large interconnected firm in an orderly manner.   **(e) Improving international regulatory standards and co-operation**  **Key proposals are:**   * Subject foreign financial firms operating Within the US to the same standards as US firms. * Strengthen the international capital framework. * Improve the oversight of global financial markets. * Reform crisis prevention and management authorities and procedures. * Enhance supervision of internationally active financial firms.   [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.4 The use of credit ratings - Joint Forum releases final paper**    On 15 June 2009, the Joint Forum released the final version of its paper entitled 'Stocktaking on the use of credit ratings'.    The paper was developed in response to a request from the Financial Stability Forum (FSF) for the Joint Forum to conduct a stocktaking of the uses of external credit ratings by its member regulatory authorities in the banking, securities and insurance sectors. The Joint Forum prepared and circulated to member authorities a questionnaire on the use of credit ratings in their jurisdictions. The questionnaire was designed to elicit information regarding member authorities' use of credit ratings in legislation (statutes), regulations (rules), and/or supervisory policies (guidance) governing, generated by, or affecting such authorities. The report focuses on the responses concerning the usage of credit ratings. It also describes respondents' assessments regarding the impact of their use of credit ratings.  The paper is available in the [BIS](http://www.bis.org/publ/joint22.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.5 European Commission launches consultation on how to ensure responsible lending and borrowing in the EU**   On 15 June 2009, the European Commission launched a public consultation on "Responsible lending and borrowing in the EU". Responsible lending, where the credit products sold are appropriate for consumers' needs and are tailored to their ability to repay, and responsible borrowing, where consumers provide relevant, complete and accurate information on their financial conditions, are vital components in ensuring a stable and effective credit market.   The consultation covers, amongst other things, the advertising and marketing of credit products, the pre-contractual information provided, ways to assess product suitability and borrower creditworthiness, advice standards, responsible borrowing and issues relating to the framework for credit intermediaries (e.g. disclosures, registration, licensing and supervision).   The consultation paper is available on the [Europa](http://ec.europa.eu/internal_market/finservices-retail/credit/responsible_lending_en.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.6 OECD publishes report on corporate governance and the financial crisis**   The Organisation for Economic Co-Operation and Development (OECD) has published a report titled "Corporate governance and the financial crisis: key findings and main messages". The report examines remuneration, risk management, board practices and the exercise of shareholder rights. The main finding of the report is that in relation to each of these areas, there is, at this stage, no immediate call for a revision of the OECD Principles.  In general, the Principles provide for a good basis to adequately address the key concerns that have been raised. A more urgent challenge is to encourage and support effective implementation of the already agreed standards.   The report is available on the [OECD](http://www.oecd.org/dataoecd/3/10/43056196.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.7 Core principles for effective deposit insurance systems**    The Bank for International Settlements (BIS) has published a paper on the core principles for effective deposit insurance systems. The financial crisis has illustrated the importance of effective deposit insurance to help maintain public confidence. In response, the Basel Committee and IADI collaborated to develop the core principles for effective deposit insurance systems.   These core principles set an important benchmark for countries to use in establishing or reforming deposit insurance systems and address a range of issues including:   * deposit insurance coverage; * funding; * prompt reimbursement; * public awareness; * resolution of failed institutions; and * cooperation with other safety net participants including central banks and supervisors.   The paper is available on the [BIS](http://www.bis.org/publ/bcbs151.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.8 SEC statement on executive compensation**  On 10 June 2009, the US Securities and Exchange Commission (SEC) announced that it is actively considering a package of new proxy disclosure rules that will provide further information on compensation decisions.    The SEC is considering several proposals that would require greater disclosure:   * about how a company - and its board - manages risks; * about a company's overall compensation approach; * about potential conflicts of interest by compensation consultants, including disclosure of relationships between the consultants and the company and their affiliates, so both compensation committees and investors will be better able to assess the advice the consultants provide; and * about director nominees, including their experience and qualifications to serve on the board or on particular board committees - and about why a board has chosen its particular leadership structure.   Further information is available on the [SEC](http://www.sec.gov/news/press/2009/2009-133.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.9 Interim final rule on TARP standards for compensation and corporate governance**   On 10 June 2009, the US Treasury published an interim final rule on compensation and corporate governance standards for companies that have received funds as part of the Troubled Assets Relief Program (TARP). The rule:  **(a) Limits executive compensation for certain executives and highly compensated employees at companies receiving TARP funds:**   * Limits bonus payments to protect taxpayer investments * Curtails the payment of golden parachutes * Imposes a clawback for any bonus based on materially inaccurate performance criteria   **(b) Appoints a special master to review compensation plans at firms receiving exceptional assistance:**   * Responsible for reviewing any compensation for senior executive officers and most highly paid employees at firms receiving exceptional assistance - with authority to disapprove plans where salary or other compensation is inappropriate, unsound or excessive * Must approve the compensation structure for any executive officers and the 100 most highly paid employees at those firms * Possesses authority to negotiate reimbursements on payments made before 17 February 2009 * Makes determinations based on a clear set of principles   **(c) Implements and expands upon key legislative provisions:**   * Extends required risk analysis of compensation to all employees of TARP firms * Requires luxury expenditure policies for all TARP firms * Institutes "Say on Pay" requirement for all TARP firms   **(d) Sets additional compensation and governance standards to improve accountability and disclosure:**   * Prohibits tax gross-ups * Requires additional disclosure of perquisites * Mandates disclosure of compensation consultants   The full text of the rule is available on the [Treasury](http://www.treasury.gov/press/releases/tg165.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.10 Statement by US Treasury Secretary Tim Geithner on executive compensation**  On 10 June 2009, the US Treasury Secretary, Tim Geithner, issued a public statement on executive compensation. In the statement he outlines the following principles:   * compensation plans should properly measure and reward performance * compensation should be structured to account for the time horizon of risks * compensation practices should be aligned with sound risk management * there should be a re-examination of whether golden parachutes and supplemental retirement packages align the interests of executives and shareholders * transparency and accountability should be promoted in the process of setting compensation.   Mr Geithner stated that he will work with Congress to pass legislation in two specific areas. First to support efforts in Congress to pass "say on pay" legislation, giving the SEC authority to require companies to give shareholders a non-binding vote on executive compensation packages.    Second to propose legislation giving the SEC the power to ensure that compensation committees are more independent, adhering to standards similar to those in place for audit committees as part of the Sarbanes-Oxley Act. At the same time, compensation committees would be given the responsibility and the resources to hire their own independent compensation consultants and outside counsel.   'Providing Compensation Committees New Independence' fact sheet is available on the [Treasury](http://www.treasury.gov/press/releases/reports/fact_sheet_indepcompcmte.pdf" \t "_new) website.  'Say on Pay' fact sheet is available on the [Treasury](http://www.treasury.gov/press/releases/reports/fact_sheet_say%20on%20pay.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.11 CESR assesses impact of MiFID on the functioning of equity secondary markets**   On 10 June 2009, the Committee of European Securities Commission Regulators (CESR) published its assessment on the impact of the Markets in Financial Instruments Directive (MiFID) on the functioning of equity secondary markets (Ref. CESR/09-355). Following the first anniversary of the implementation of MiFID in November 2008, CESR launched a review of the impact that the MiFID was having on the functioning of equity secondary markets. The report published focuses on the functioning of MiFID's provisions and those of its Implementing Regulation with regards to market transparency and integrity, regulated markets, Multilateral Trading Facilities (MTF) and systematic internalisers. The publication of CESR's report follows a call for evidence issued in November 2008, which sought stakeholders' views on the workings of MiFID and its impact.    **(a) MiFID's impact on secondary markets**    CESR's assessment showed that the introduction of MiFID significantly changed the secondary markets landscape across Europe, most importantly through the introduction of new MTF platforms. Whilst the market share of regulated markets has decreased since the implementation of MiFID, the vast majority of equity trading is transacted through the existing regulated markets rather than on the new entrants or Over-the-Counter (OTC).  Many factors have influenced the cost of trading since MiFID came into force: The increased competition between trading venues resulted in downward pressures on direct execution costs. At the same time, increase in technology spent to trade in a more fragmented environment and general widening of bid-offer spreads as a result of volatile market conditions, have tended to offset the reduction in trading fees. The findings also indicate concerns by some market participants that fee reductions by trading platforms have not been passed on entirely by trading participants to investors.    **(b) Pre- and post-trade transparency**    After the implementation of MiFID, market participants expressed concerns over a number of pre-trade transparency issues ranging from interpretation issues, to potentially undesirable impacts on innovation and an unlevel playing field between various trade execution venues. CESR is already taking steps to address these concerns. For instance, a process for considering future applications for pre-trade transparency waivers has been implemented and CESR has agreed to undertake a review of all pre-trade transparency waivers starting in the latter half of this year.    As a result of the increased competition in trade publication services introduced by MiFID, trade data is now available from a number of different sources. Some market players were concerned that market data fragmentation was taking place; in particular that there would be a need for better quality of post-trade data and a consolidated set of market data. CESR is aware of these concerns and will conduct further work to better understand and assess issues surrounding the calibration of the deferred publication regime, the cost of accessing post-trade data and the consolidation of data.    **(c) Level playing field**   MiFID is aimed at developing competition and greater efficiency of equity trading while maintaining investor protection. Achieving greater competition is raising concerns about the level playing field among trading platforms, both by regulated markets vis-à-vis MTFs and by regulated markets and MTFs vis-à-vis investment firms' OTC activities. In its report, CESR notes the importance of recognising the challenges arising from this competition so that action can be taken or recommendations made to address issues identified. In addition to publishing this report on the impact of MiFID on equity secondary markets functioning, CESR has already started preparing a similar report on MiFID's impact on non-equity markets.   Further information is available on the [CESR](http://www.cesr.eu/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.12 IMF report on the fiscal implications of the global economic and financial crisis**   On 9 June 2009, the International Monetary Fund (IMF) published a report on the fiscal implications of the global economic and financial crisis. According to the report, the global financial crisis is having major implications for the public finances of most countries. Fiscal revenues are declining through the operation of automatic stabilizers and because of lower asset and commodity prices. Direct fiscal support is being provided to the financial sector, and many countries are undertaking discretionary fiscal stimulus. This is cushioning the global economy from the effects of the crisis. But it implies a fiscal deterioration that is particularly strong for advanced countries, where the increase in both government debt and contingent liabilities is unprecedented in scale and pervasiveness since the end of the Second World War. Moreover, these developments are taking place in the context of severe long-run fiscal challenges, especially for countries facing rapid population aging.  The fiscal balances of G-20 advanced countries are projected to weaken by 8 percentage points of GDP on average, and government debt is projected to rise by 20 percentage points of GDP in 2008-2009, with most of the deterioration occurring in 2009. The fiscal balances of G-20 emerging market economies will deteriorate by 5 percentage points of GDP. For advanced economies, the increase in debt mostly reflects support to the financial sector, fiscal stimulus, and revenue losses caused by the crisis. For emerging economies, a relatively large component of the fiscal weakening reflects declining commodity and asset prices. Collapsing asset prices have also had adverse effects on funded components of pension systems, with potentially significant risks for public accounts over the next few years.  While fiscal balances are expected to improve over the medium term, they will remain weaker than before the crisis. Public debt-to-GDP ratios will continue to increase over the medium term: in 2014 the G-20 advanced country average is projected to exceed the end 2007 average by 36 percentage points of GDP. On current policies, debt ratios will continue to grow over the longer term, reflecting demographic forces. Moreover, for both advanced and emerging economies, the crisis has increased short and medium-term fiscal risks, with key downside risks arising from the need for possible further support to the financial sector, the intensity and the persistence of the output downturn, and the return from the management and sale of assets acquired during the financial support operations.  This somber fiscal outlook raises issues of fiscal solvency, and could eventually trigger adverse market reactions. This must be avoided: market confidence in governments' solvency is a key source of stability and a precondition for economic recovery. Therefore, there is an urgent need for governments to clarify their exit strategy to ensure that solvency is not at risk.   In formulating such a strategy, four components are particularly important:   * fiscal stimulus packages, where these are appropriate, they should not have permanent effects on deficits; * medium-term frameworks, buttressed by clearly identified policies and supportive institutional arrangements, should provide a commitment to fiscal correction, once economic conditions improve; * structural reforms should be implemented to enhance growth; and * countries facing demographic pressures should firmly commit to clear strategies for health and pension reforms. While these prescriptions are not new, the weaker state of public finances has dramatically raised the cost of inaction.   The full report is available on the [IMF](http://www.imf.org/external/pubs/ft/spn/2009/spn0913.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.13 Strengthening EU financial supervision**   On 9 June 2009, the European Council adopted recommendations to strengthen EU financial supervision. The key recommendations are:  Establishment of a European Systemic Risk Board:  The Council agrees that an independent macro-prudential body covering all financial sectors, the European Systemic Risk Board (ESRB), should be established -without legal personality and charged with the following tasks, without prejudice to the role and responsibilities of existing bodies:  (i) Define, have access to and/or collect as appropriate, and analyse all the information relevant for identifying, monitoring and assessing potential threats and risks to financial stability in the EU that arise from macro-economic developments and developments within the financial system as a whole; (ii) Identify and prioritise such risks; (iii) Issue risk warnings, where risks appear to be significant, to policy makers and supervisors; (iv) Where necessary give recommendations or advice on the measures, including where appropriate legislative ones, to be taken in reaction to the risks identified; (v) Carry out the mandatory monitoring of the required follow-up to warnings and recommendations; and  (vi) Liaise effectively with the IMF, the FSB and third country counterparts.  Establishment of a European System of Financial Supervisors:  The Council agrees that the recommendation by the de Larosière Group to establish a European System of Financial Supervisors (ESFS) should be carried out and completed without delay. To this end, the Council invites the European Commission and all other relevant parties to take the appropriate initiatives, which should aim at:   * upgrading the quality of supervision and strengthening national supervisors by setting in motion a process leading to far stronger and consistent powers for supervisory and sanctioning regimes in the Member States, aligning supervisors' competences, mandates and powers to the fullest extent possible; * strengthening oversight of cross-border groups by completing the setting-up of supervisory colleges for all major cross-border financial firms in the EU by the end of 2009; and * moving towards the realisation of a single rulebook, with a core set of EU-wide rules and standards directly applicable to all financial institutions active in the Single Market, so that key differences in national legislations are identified and removed.   The Council recommends that a European System of Financial Supervisors be established as an operational European network with shared and mutually reinforcing responsibilities. At EU level, the current EU Committees of supervisors (CEBS, CEIOPS and CESR) should be transformed into European Supervisory Authorities (ESAs) with a legal personality under Community law: a European Banking Authority (EBA), a European Insurance and Occupational Pensions Authority (EIOPA), and a European Securities and Markets Authority (ESMA). National supervisors should remain responsible for day-to-day supervision of individual firms.  The Council recommends that the ESAs should be entrusted with the following tasks and powers:  (i)  Ensuring that a single set of harmonised rules and consistent supervisory practices is applied by national supervisors by two means:  (a) Developing binding harmonised technical standards in the areas to   be specified in Community legislation. Such standards should apply from a fixed date, provided the Commission endorses them; (b) Drawing up non-binding standards, recommendations and interpretative guidelines, which the competent national authorities would apply in taking individual decisions.   (ii) Ensuring a common supervisory culture and consistent supervisory practices (iii) Collecting micro-prudential information (iv) Ensuring consistent application of EU rules, in cases to be further clearly specified in Community legislation        (v) Using full supervisory powers for some specific pan-European entities (vi) Ensuring a coordinated response in crisis situations  The Council considers that the European Commission should present all necessary proposals by early autumn 2009 at the latest. The draft legislation for the setting up of the ESRB and the ESAs should specify the above-mentioned organisational and structural aspects, and the mechanism through which the ERSB and the ESAs should work in close cooperation. The aim should be to have the new European Financial Supervision system, comprising both macro-prudential and microprudential components, fully in place in the course of 2010.   The Council agrees that the functioning of the ESRB and ESFS should be reviewed no later than three years after their establishment.   Further information is available on the [European Council](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/108389.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.14 CESR launches call for evidence on mutual recognition with non-EU jurisdictions**  On 8 June 2009, the Committee of European Securities Regulators (CESR) published a call for evidence on mutual recognition with non-EU jurisdictions. The globalisation of financial markets challenges securities regulators to seek appropriate mechanisms for dealing with cross-border transactions. In order to support the activities carried out at EU level and to identify the economic advantages and drawbacks in entering into negotiations with third countries a CESR Task Force on mutual recognition has been set up.      The call for evidence is available on the [CESR](http://www.cesr.eu/popup2.php?id=5766" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.15 More robust guidance on boardroom behaviours needed says study**   On 8 June 2009, the Institute of Chartered Secretaries (ICSA) published its report on boardroom behaviours which has been submitted to Sir David Walker as part of his review of corporate governance in UK banks. The report follows a study by ICSA of boardroom behaviours, which took the form of a survey and a number of roundtable meetings with company secretaries. The process distilled the knowledge, skills and experience of the company secretarial community on what constitutes good - and bad - boardroom behaviour. Areas covered in the survey included boardroom culture and behaviour, the Combined Code, directors' skills and resources, disclosure, risk management and the role of shareholders.    In ICSA's view, best practice in boardroom behaviour is characterised, amongst other things, by a clear understanding of the role of the board; the appropriate deployment of knowledge, skills, experience and judgment; independent thinking; the questioning of assumptions and established views, and a supportive decision-making environment. The degree to which these behaviours can be delivered is shaped, inter alia, by the character and personality of the directors and the balance in the relationship between the key players in the boardroom.    General conclusions from ICSA's study are that: risk management is not properly overseen, monitored and reviewed at board level; boards generally are not formulating the appropriate risk tolerances of their companies; remuneration and incentivisation are not aligned with shareholders objectives; and disclosure is inadequate.    Specific conclusions are that:  (i) The absence of guidance on appropriate boardroom behaviours represents a structural weakness in the current system of corporate governance. Had such guidance been available and observed, ICSA argues, the consequences of the current crisis may have been less severe.   (ii) Prevention of a recurrence of the events of the last year is at least partly dependent upon more robust guidance on boardroom behaviours being incorporated in the Combined Code.   (iii) Better articulation of the business case for best practice corporate governance, and more focus on directors' responsibilities and potential liabilities, should incentivise directors to exhibit appropriate boardroom behaviours.  The Combined Code, ICSA recommends, should be amended to incorporate wording relating to appropriate boardroom behaviours and the business case for pursuing best practice corporate governance. It is also suggested that a best practice guidance note on how boards can improve boardroom behaviour should support the Code.   The full report is available on the [ICSA](http://www.icsa.org.uk/assets/files/pdfs/consultations/09.04%20ICSA%20Policy%20Report%206.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.16 Report on ratings users**   On 5 June 2009, the Australian Government released a report on ratings user reforms, compiled by the Australian Treasury and the Australian Securities and Investments Commission (ASIC), following two roundtables held in March with banking and finance industry groups.   The report contains four recommendations, all of which are accepted by the Government. The recommendations are:   * for ASIC to consider possible options for investor education addressing over-reliance on credit ratings; * for ASIC to continue to work with rating agencies on progressing their AFSL applications; * for banks and industry bodies to continue their efforts to encourage more informed investment decisions; and * for the Government to continue to make known the benefits and quality of Australia's prudential regulation system.   In late 2008, the Government announced that ratings agencies would be required to hold an Australian Financial Services Licence (AFSL) by 1 July 2009, and issue annual compliance reports against the International Organisation of Securities Commissions (IOSCO) Code of Conduct. IOSCO directly endorsed this approach in March 2009.   ASIC has written to the Government to update it on the status of the licensing of rating agencies in Australia. As part of that update, ASIC has requested, and the Government has agreed to, a short extension of the licensing timeframe to no later than 1 January, 2010.   ASIC has based its request on significant recent developments particularly in Europe, that may impact on the level of obligations placed on ratings agencies in Australia.  The current AFSL exemption for ratings agencies will continue to apply until the new licensing commencement date.   The report is available on the [Treasury](http://minscl.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/070.htm&pageID=003&min=njs&Year=&DocType" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.17 Reform of the taxation of employee share schemes**  On 5 June 2009, a consultation paper and exposure draft bill on the reform of the taxation of employee share schemes was jointly released by the Australian Treasurer, the Honourable Wayne Swan MP, and the Assistant Treasurer, the Honourable Chris Bowen MP.  Through this paper the Government seeks to provide a point of reference for public submissions on the Government's 2009 Budget commitment to better target the concessions for employee share schemes and reduce the opportunities for tax avoidance.   Given the community concerns with the changes announced on Budget night and the possible unintended adverse impacts on employee share scheme arrangements for ordinary employees, the Government has fast-tracked the consultation process.   As outlined in the consultation paper, the Government proposes that the taxation of discounts on employee share scheme shares and rights on acquisition will remain its starting principle. However, the Government will provide concessional tax treatment for particular schemes. The concessions are in the form of a tax exemption, or a tax deferral in limited circumstances.   To provide certainty to employers and employees currently participating in employee share schemes, the Government proposes that the new arrangements commence on 1 July 2009. In the interim, the existing law will apply to all shares and rights acquired before 1 July 2009.   The consultation paper is available on the [Treasury](http://www.treasury.gov.au/documents/1559/PDF/consultation_paper.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.18 Issues paper: Improving Australia's framework for disclosure of equity derivative products**  On 5 June 2009, the Australian Government released an Issues Paper titled 'Improving Australia's Framework for Disclosure of Equity Derivative Products'.  The paper considers whether Australia's regulatory regime meets the challenges to adequate disclosure posed by innovation in the financial system, and in particular by the increased use of equity derivatives.  The paper is available on the [Treasury](http://www.treasury.gov.au/documents/1556/PDF/Equity_Derivatives_Assessment_IP.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.19 FRC publishes discussion paper on reducing complexity in corporate reporting**    On 4 June 2009, the UK Financial Reporting Council (FRC), the UK's independent regulator responsible for promoting confidence in corporate reporting and governance, published a discussion paper arising from its project on reducing complexity in corporate reporting.   The paper is titled 'Louder than Words: Principles and Actions for Making Corporate Reports Less Complex and More Relevant'. The paper seeks to address growing concerns about the complexity of corporate reporting. The paper recommends an approach to reducing complexity based on eight guiding principles - four for better communication in reports and four for improving the quality and effectiveness of regulations.    The paper also makes five calls for action where the FRC believes further investigation may lead to opportunities for reducing complexity. These are:   * Cash flow and net debt reporting: could this be better aligned with user needs such as by including a net debt reconciliation? * Wholly owned subsidiaries reporting requirements: are there ways to reduce the reporting burden such as by reducing the filing or disclosure requirements? * Cut clutter: could preparers reduce immaterial information (with the support of regulators) that may be undermining the quality of reports? * Disclosures: could the process for creating disclosures be overhauled and guidance provided about when they can be deleted as not relevant? * IFRS: could usability through logical organisation and clearer articulation of the desired outcomes for each standard be improved?   The discussion paper is available on the [FRC](http://www.frc.org.uk/images/uploaded/documents/FRC_DiscussionPaper_020609.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.20 House of Lords banking supervision and regulation report**  On 2 June 2009, a report on UK banking regulation and supervision was published by the UK House of Lords Economic Affairs Committee. The Committee  criticises the banking and financial services tripartite regulatory regime and concludes that failures of regulation and supervision contributed to the financial crisis in the UK.  The Committee criticises the inadequate definition of roles and responsibilities of the Bank of England, The Treasury and the Financial Services Authority (FSA) in the current Memorandum of Understanding on regulation of the financial sector.  The report particularly identifies a failure of macro-prudential supervision - surveillance of the stability of the financial system as a whole - as a contributory cause of the crisis. The Committee believes the FSA focussed on its consumer protection role and failed to take sufficient steps to alleviate risks to the financial system caused by excessive debt and banks' ventures into complex and opaque financial instruments. They also point out that the Bank of England had reduced the number of its staff working on financial stability.  The Committee recommends the Government should revisit the tripartite supervisory system in the UK as a matter of priority with the aim of ensuring a sharper focus on financial stability. In particular, the Committee recommends that the Government should return responsibility for macro-prudential supervision from the FSA to the Bank of England.   The Committee also recommends that in future regulators should focus more closely on the risk models used by banks. The Committee concludes that prior to the financial crisis banks were using short term risk models which relied too heavily on recent financial data. With limited data, towards the end of any period of economic boom risk models paint a rosy picture which can lead to speculative bubbles. The report recommends that regulators should rigorously question the assumptions in banks' risk assessment models, insist that they calibrate their models over long periods and submit risk models to regular stress tests.  Other recommendations in the report include:   * increases in regulatory capital requirements for assets on banks' trading books; * central reporting and clearing of Credit Default Swaps (CDSs); and * greater oversight by the British authorities of UK branches of multinational banks.   The Committee also recommends the development of policies to:   * counter pro-cyclicality in existing regulations; * regulate and supervise liquidity; * improve bank governance; and * remove agency ratings from capital regulations.   The report is available on the [UK Parliament](http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeconaf/101/10102.htm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.21 CEIOPS report on supervisory powers regime in the EU**  On 2 June 2009, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) presented a report to the European Commission titled "EU Supervisory Powers, Objectives, Sanctioning Powers and Regime". The report provides an overview of the existing powers of supervisory authorities in EU Member States, and an assessment of the differences in respective supervisory powers (both in terms of the legal attribution of powers and their actual use).  The report is available on the [CEIOPS](http://www.ceiops.eu/media/files/publications/reports/Supervisory-powers-rep-09/CEIOPS-report-on-supervisory-powers.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.22 Review of superannuation system**  On 29 May 2009, the Australian Government announced the details of the review into the governance, efficiency, structure and operation of Australia's superannuation system.  The Review will report to the Government by 30 June 2010, although it may report on particular issues prior to that date.   The terms of reference for review include:  1. The Review will examine and analyse the governance, efficiency, structure and operation of Australia's superannuation system, including both compulsory and voluntary aspects, addressing, but not limited to, the following issues:  1.1 Governance: examining the legal and regulatory framework of the superannuation system, including issues of trustee knowledge, skills and training; and thoroughly assess the risks involved in the use of debt and leverage and the development of investment options that lead to a weakening of the diversification principle in the superannuation system;   1.2 Efficiency: ensuring the most efficient operation of the superannuation system for all members, whether active or passive members and whether making compulsory or voluntary contributions, including removing unnecessary complexities from the system and ensuring, in light of its compulsory nature, that it operates in the most cost effective manner and in the best interests of members;    1.3 Structure: promoting effective competition in the superannuation system that leads to downward pressure on system costs, examining current add-on features of the superannuation system; and, examining other structural legacy features of the system; and   1.4 Operation: maximising returns to members, including through minimising costs, covering both passive defaulting members, who should receive maximum returns and value for money through soundly regulated default products, and active selecting members, who should not be negatively impacted by conflicts of interest that may inhibit advice being in the best interests of members.   2. The Review is to be conducted around the concepts of the best interests of the member and the maximising of retirement incomes for Australians.  3. The Review is to be conducted with reference to improving the regulation of the superannuation system, whilst also reducing business costs within the system.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.23 Options paper: Access to share registers and the regulation of unsolicited off market offers**  On 29 May 2009, the Australian Government released a public consultation and options paper titled 'Access to Share Registers and the Regulation of Unsolicited off Market Offers'.  This paper puts forward a range of options to address the continuing practice by some entities of making undervalued, unsolicited off market share offers to shareholders. While many in the community recognise the poor value of these offers, more vulnerable investors continue to accept them without necessarily appreciating the risk of doing so.  The paper seeks feedback on the appropriateness of the current framework for regulating these offers and puts forward a range of possible options for reform.  The paper is available on the [Treasury](http://www.treasury.gov.au/documents/1548/PDF/USO_Options_Paper.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.24 APRA consults on remuneration**   On 28 May 2009, the Australian Prudential Regulation Authority (APRA) released a consultation package on remuneration for authorised deposit‑taking institutions and general and life insurance companies.  The package comprises a discussion paper, draft extensions to the governance standards already applying in these industries and a draft prudential practice guide (PPG).   APRA's proposals on remuneration are designed to 'endorse and implement the FSF's tough new principles on pay and compensation' to quote from the Declaration by the Leaders of the G20 at their April meeting in London, by giving effect to the Financial Stability Forum's (FSF) Principles of Sound Compensation Practices. They deal with an important deficiency highlighted by the FSF's work, in which APRA participated, namely the lack of alignment of remuneration with risk management in many financial institutions. APRA's proposals also respond to the Prime Minister's request in October 2008 that APRA consider the linkages between remuneration practices and the capital adequacy requirements of regulated institutions.    APRA is intending to take a principles‑based approach in this area, by requiring Boards of regulated institutions to have a remuneration policy that aligns remuneration arrangements with the long‑term financial soundness of the institution and its risk management framework; at the same time, Boards would be able to design remuneration arrangements that suit the structure of their own institution. The policy would extend beyond senior executives to all persons who, because of their roles, have the capacity to make decisions that could materially affect the interests of depositors or policyholders, and owners.   APRA also proposes that regulated institutions have a Board Remuneration Committee, comprising only independent directors with the appropriate experience and expertise.     Boards of regulated institutions will be held accountable for compliance with APRA's prudential requirements for remuneration.  APRA's principles-based approach, rather than the prescription required in most disclosure regimes, together with its active supervision of regulated institutions, will be aimed at ensuring compliance with both the intent and the substance of these requirements.  Where the remuneration arrangements of a regulated institution are likely to encourage excessive risk‑taking, APRA has several supervisory options, including the power to impose additional capital requirements on that institution.   The PPG will assist regulated institutions to comply with the proposed requirements in the governance prudential standards and, more generally, will assist Boards in their consideration of prudent practice in remuneration.  The PPG covers a number of issues, including the use of deferred compensation, the links between incentives and risk, the use of shares in incentive arrangements, the need to link incentive compensation to both forward‑looking and backward‑looking risk measures, and the balance between cash and non‑cash incentives.    APRA is seeking submissions on the draft standards and PPG by 24 July.  Subject to consultation, it is expected that the final prudential standards and associated PPG will be released in September 2009 and be effective from 1 January 2010.   The consultation package is available on the [APRA](http://www.apra.gov.au/Policy/Remuneration-requirements-consultation-May-2009.cfm" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.25 OTC derivatives market in Australia: Survey**    On 22 May 2009, the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investments Commission (ASIC), and the Reserve Bank of Australia (RSA) released the 'Survey of the OTC Derivatives Market in Australia' report. Summarising key findings of a survey conducted by the authorities over recent months, it identifies areas in which operational and risk-management practices could be enhanced.  In response to the turbulence in financial markets, the international regulatory community has paid increasing attention to developments in this area. In April 2008, the Financial Stability Forum (now the Financial Stability Board) recommended that regulators take action to ensure a sound legal and operational infrastructure for the OTC derivatives market. In response, Australia's financial authorities formed a working group last year to assess market practices against this recommendation. One of the first tasks of this group was to carry out a survey of Australia's OTC derivatives landscape.  The report identifies a number of positive developments in recent years, including an increasing focus on risk-management issues, greater awareness of the importance of timely completion of industry-standard documentation, the more comprehensive use of collateral, and a gradual shift towards automation of post-trade processes.  Notwithstanding progress in these areas, however, Australia's financial authorities have concluded that there remains scope for further improvements to operational and risk-management practices. Industry participants are therefore encouraged to consolidate and build on recent enhancements, particularly in the areas of market transparency, legal documentation, collateralisation, and the use of infrastructure.  The report is available on the [APRA](http://www.apra.gov.au/Media-Releases/upload/Survey-of-the-OTC-Derivatives-Market-in-Australia-report.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.26 SEC votes to propose rule amendments to facilitate rights of shareholders to nominate directors**   On 20 May 2009 the US Securities and Exchange Commission (SEC) voted to propose a comprehensive series of rule amendments to facilitate the rights of shareholders to nominate directors on corporate boards.  **(a) Background**   Public companies in the US hold elections to select members of their boards of directors, which oversee the management of the company. In most cases, the existing directors nominate the slate of candidates and the company sends information to the shareholders, through so-called proxy materials, so those shareholders have information to vote their shares.   But, because the shareholders rarely have any input into the slate of candidates, they are not always able to vote for the person they believe may be best suited to fill the post.   In many situations, companies permit shareholders to show up to the annual shareholder meeting where the election occurs and nominate different candidates than the ones on the ballot. But, by then it is too late to be meaningful because the proxy votes will have already been cast.   As a result, shareholders who wish to nominate their own candidates must launch a proxy fight in which they mail out their own ballots - an extremely costly process.   Congress gave the Commission authority over the corporate proxy process as a means of ensuring that it functions, as nearly as possible, as a replacement for an actual in-person meeting of shareholders. Refining the proxy process so that it replicates, as nearly as possible, the annual meeting is particularly important given that the proxy process has become the primary way for shareholders to know about the matters to be decided by the shareholder and to make their views known to company management.   To address this situation, the Commission is proposing rule amendments that would provide shareholders with a meaningful ability to exercise their state law rights to nominate the directors of the companies that they own. Under the proposal, shareholders who otherwise are provided the opportunity to nominate directors at a shareholder meeting would be able to have their nominees included in the company proxy ballot that is sent to all voters. Shareholders would also have the ability to use shareholder proposals to modify the company's nomination procedures or disclosure about elections, so long as those proposals do not conflict with state law or Commission rules.   **(b) Getting nominees included in the company's proxy materials:**  **(i) New Exchange Act Rule 14a-11 - shareholders could, under certain circumstances, include a nominee or nominees for director in company proxy materials**  Under the proposed rule, certain shareholders would be able to include their nominees for director in the company's proxy materials unless the shareholders are otherwise prohibited - either by applicable state law or a company's charter/bylaws - from nominating a candidate for election as a director.  The proposed rule would apply to all Exchange Act reporting companies, including investment companies, other than debt-only companies.  **(ii) Which shareholders would be able to have their nominees included in the proxy materials?**  Shareholders would be eligible to have their nominee included in the proxy materials if:   * They own at least 1 percent of the voting securities of a "large accelerated filer" (a company with a worldwide market value of US$700 million or more) or of a registered investment company with net assets of US$700 million or more. * They own at least 3 percent of the voting securities of an "accelerated filer" (a company with a worldwide market value of US $75 million or more but less than US$700 million), or of a registered investment company with net assets of US$75 million or more but less than US$700 million. * They own at least 5 percent of the voting securities of a non-accelerated filer (a company with a worldwide market value of less than US$75 million) or of a registered investment company with net assets of less than US$75 million. * Shareholders would be able to aggregate holdings to meet applicable thresholds. * Shareholders would be required to have held their shares for at least one year. * Shareholders would be required to sign a statement declaring their intent to continue to own their shares through the annual meeting at which directors are elected. * Shareholders would be required to certify that they are not holding their stock for the purpose of changing control of the company, or to gain more than minority representation on the board of directors.   **(iii) What requirements would a shareholder's nominee be required to meet to be nominated?**   * The nominee's candidacy or, if elected, board membership must not violate applicable laws and regulations. * The nominee must satisfy objective independence standards of the applicable national securities exchange or national securities association. * The nominating shareholder may have no direct or indirect agreement with the company regarding the nomination of the nominee.   **(iv) How many board nominees for director would a shareholder be able to include in company proxy materials?**   * No more than one shareholder nominee, or a number of nominees that represents up to 25 percent of the company's board of directors, whichever is greater. (For example, if the board is comprised of three members, one shareholder nominee could be included in the proxy materials. If the board is comprised of eight members, up to two shareholder nominees could be included in the proxy materials.)   **(v) What would have to be disclosed about nominating shareholders and their nominees?**   * The nominating shareholder would be required to file with the Commission and submit to the company a new Schedule 14N. The Schedule 14N would require disclosure of the amount and percentage of securities owned by the nominating shareholder, the length of ownership, and intent to continue to hold the securities through the date of the meeting. The Schedule 14N would require a certification that the nominating shareholder is not seeking to change the control of the company or to gain more than minority representation on the board of directors. * The company would include in its proxy materials disclosure concerning the nominating shareholder, as well as the shareholder nominee or nominees, that is similar to the disclosure currently required in a contested election.   **(vi) Would the nominating shareholder be liable for information provided to the company?**   * As is the case when directors nominate candidates, the nominating shareholder or group would be liable for any false or misleading statements in information provided to the company that is then included in the company's proxy materials. * The proposed rule would provide that the company will not be responsible for information provided by the shareholder, unless the company knows or has reason to know the information is false.   **(c) Allowing shareholders proposals:**  **(i) Amended Exchange Act Rule 14a-8(i)(8) - shareholders could require companies, under certain circumstances, to include proposals in their proxy materials that would amend, or request an amendment to, the company's governing documents to address the company's nomination procedures or other director nomination disclosure provisions that do not conflict with the Commission's rules.**  Currently, Exchange Act Rule 14a-8(i)(8) permits companies to exclude shareholder proposals that "relate to an election." Under the proposal, this so-called "election exclusion" would be narrowed, thereby allowing in the proxy materials more shareholder proposals regarding elections. Specifically, shareholder proposals by qualifying shareholders that would amend, or that request an amendment to, provisions of a company's governing documents concerning the company's nomination procedures or other director nomination disclosure provisions (so long as those disclosure provisions don't conflict with proposed Rule 14a-11 above) would not be excludable.  **(ii) Which shareholders would be able to submit a shareholder proposal?**  The current eligibility provisions of Rule 14a-8 would continue to apply. Those provisions require that a shareholder proponent have continuously held at least US$2,000 in market value (or 1 percent, whichever is less) of the company's securities entitled to be voted on the proposal at the meeting, for a period of one year prior to submitting the proposal.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.27 Sound stress testing principles issued by Basel Committee**  On 20 May 2009, the Basel Committee on Banking Supervision issued a paper titled 'Principles for Sound Stress Testing Practices and Supervision'. The paper sets out a comprehensive set of principles for the sound governance, design and implementation of stress testing programmes at banks. The principles address the weaknesses in banks' stress tests that were highlighted by the financial crisis.   Stress testing is a critical tool used by banks as part of their internal risk management and capital planning. It is also a key component of the supervisory assessment process to identify vulnerabilities and assess the capital adequacy of banks. The principles establish expectations for the role and responsibilities of supervisors when evaluating banks' stress testing practices.    In developing the principles, the Basel Committee reviewed industry stress testing practices before and during the crisis. In January 2009, the Basel Committee published for public comment a consultative version of the sound stress testing paper. The comments received during that process helped inform the final version of the paper.   The paper is available on the [BIS](http://www.bis.org/publ/bcbs155.pdf?noframes=1" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.28 Sovereign wealth funds report**   On 20 May 2009, the US Government Accountability Office (GAO) published a second report on sovereign wealth funds.  Foreign investors in US companies or assets include individuals, companies, and government entities. One type of foreign investor that has been increasingly active in world markets is sovereign wealth funds (SWF), government-controlled funds that seek to invest in other countries. As the activities of these funds have grown they have been praised as providing valuable capital to world markets, but questions have been raised about their lack of transparency and the potential impact of their investments on recipient countries.    GAO's second report on SWFs reviews (1) US laws that specifically affect foreign investment, including that by SWFs, in the United States and (2) processes agencies use to enforce them.    The report is available on the [GAO](http://www.gao.gov/new.items/d09608.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1)  **1.29 Guidance issued for enhancing corporate governance**    In May 2009, the Professional Accountants in Business (PAIB) Committee of the International Federation of Accountants (IFAC) released a new International Good Practice Guidance document, titled 'Evaluating and Improving Governance in Organizations', to help professional accountants in business enhance governance and improve organizational performance. The document includes a framework, a series of fundamental principles, supporting guidance, and references on how PAIBs can contribute to evaluating and improving governance in organizations.    The guidance encourages organizations to achieve a balance between conformance with regulations and driving organizational performance. It is designed to complement existing governance codes, such as the 'OECD Principles of Corporate Governance' (2004) issued by the Organization for Economic Co-operation and Development (OECD).   The PAIB Committee has also issued a separate document, 'Preface to IFAC's International Good Practice Guidance', which sets out the scope, purpose, and due process of the committee's International Good Practice Guidance series. Both 'Evaluating and Improving Governance in Organizations' and the 'Preface to IFAC's International Good Practice Guidance' are available on the PAIB section of the [IFAC](http://www.ifac.org/store" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h1) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **2. Recent ASIC Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%233) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009_files/spacer%281%29.gif | | |  | | --- | | **2.1 New market disclosure measures to enhance capital raising and continuous disclosure by unlisted entities**  On 18 June 2009, the Australian Securities and Investments Commission (ASIC) released new measures to enhance market disclosure and efficiency in capital raisings and unlisted disclosing entities.  The new equity raising policies seek to streamline the fundraising process by faster and more effective disclosure. The measures also aim to make it easier to include retail investor participation in fundraisings by expanding situations where a full prospectus or product disclosure statement (PDS) is not required.  The policies allow listed companies and managed investment schemes engaging in equity raisings increased scope to update the market through continuous disclosure obligations and a 'cleansing notice' instead of the currently required prospectus or PDS. A 'cleansing notice' confirms that the market has all information the entity would be obliged to release under the continuous disclosure requirements, including information on incomplete proposals or negotiations. It should be issued at the time of the share offer.  ASIC has also announced measures to clarify how unlisted entities should provide continuous disclosure to investors. An unlisted disclosing entity includes unlisted companies and managed investment schemes with more than 100 members and unlisted debenture issuers.  The continuous disclosure laws apply to unlisted entities. Instead of lodging information with ASX, they must lodge with ASIC. In practice, many entities just put the information on their website, though not necessarily as expeditiously as the law may require.   ASIC recognises that for many entities, disclosure on their website provides a more useful and direct way of communicating with investors. For many investors, such a website is where they would expect to see important information they would use in deciding whether to buy, sell or hold particular investments.  The guide contains good practice guidelines for website publication, including ensuring information is easy to locate on the site and posted as soon as practicable. Entities should make clear how they intend to comply with their continuous disclosure obligations.   **(a) Capital raising**  The legal provisions associated with capital raisings will be made more efficient by allowing:   * existing shareholders or unitholders to purchase further shares or units worth up to $15,000 through share purchase plans without a prospectus or PDS; * listed managed investment schemes to make placements at a discount of more than ten per cent to the current unit price without member approval; * more rights issues and placements using a cleansing notice instead of a prospectus or PDS, even if a listed entity has been suspended for more than the current five day maximum period; * members to participate in accelerated rights issues and rights issue shortfall facilities even if they exceed the twenty per cent takeover threshold by doing so; and * a person to underwrite a dividend reinvestment plan even if they exceed the twenty per cent takeover threshold by doing so.   ASIC expects companies to ensure that investor protections are maintained and meet their obligations to ensure that:   * the market is fully informed at all relevant times; * investors are fully informed before they agree to buy securities; and * there is minimal risk of any unacceptable transfer of control resulting from the equity capital raising.   During the policy consultation process, ASIC received a number of submissions regarding market practices in effecting placements and other capital raisings. Of clear concern is the market anticipating a placement or share issue as a result of issuer's adviser's soundings on the prospect. ASIC intends to focus on how confidential information is managed in these transactions and expects to provide further guidance about this towards the end of the year.   **(b) Continuous disclosure by unlisted entities**  The new Regulatory Guide 198 'Unlisted disclosing entities: Continuous disclosing entities: Continuous disclosure obligations' (RG 198) sets out good practice guidelines for website publication, including ensuring such information is easily located and posted as soon as practicable after it comes to the entity's attention.   Further information is available on the [ASIC](http://www.asic.gov.au/" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h2)  **2.2 ASIC updates guidance on paperless issues and transfers under a global debenture**  On 25 May 2009, the Australian Securities and Investments Commission (ASIC) released an updated Regulatory Guide 30 titled 'Paperless Issues and Transfers Under a Global Debenture' (RG30).  RG 30 sets out ASIC's guidance on granting relief from the obligation under section 1071H of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for an issuer to provide certificates or other title documents for a paperless issue or transfer under a global debenture.   The update to RG30 has not changed ASIC's policy on the issue and transfer of global debentures.  The update makes reference to new provisions of the Corporations Act 2001 since RG30 was last published and reflects the current approaches to the management of global debenture issues. As a result of the update to RG 30, ASIC will retire Pro Forma 2 Paperless issues under a global debenture. Relief will now be provided in individual instruments reflecting the conditions outlined in RG30.   The guide is available on the [ASIC](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg30.pdf/$file/rg30.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h2)  **2.3 ASIC lifts ban on covered short selling of financial securities**  On 25 May 2009, the Australian Securities and Investments Commission (ASIC) announced it had lifted the ban on covered short selling of financial securities.  Covered short selling of all securities was temporarily banned on 21 September 2008 in circumstances of extreme market volatility. ASIC lifted the ban on covered short selling of non-financial securities on 19 November and advised the market on 5 March 2009 that the ban on short selling of financial securities (as defined in AD08-65 ASIC lifts ban on covered short selling for non-financial securities of 13 November 2008) would continue until 31 May 2009. ASIC advised this position would be kept under review.  **Reporting and disclosure**  The daily reporting by market participants to ASX of gross short sales will continue as will the publication to the market of aggregate short sales the day after trading.  This disclosure regime will operate until the commencement of the Government's permanent disclosure measures.  ASX has been working towards implementing the software capability to support real-time tagging of short sales in the Integrated Trading System. The aim of tagging is to make reporting by market participants more efficient by automating the reporting of short sales to the ASX.  Further information is available on the [ASIC](http://www.asic.gov.au/asic/asic.nsf/byheadline/Short+selling?openDocument" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h2) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **3. Recent ASX Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%234) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009_files/spacer%281%29.gif | | |  | | --- | | **3.1 Results of 2008 Australian share ownership study**  On 23 June 2009, ASX released its latest Australian Share Ownership Study (Study). Approximately 6.7 million people or 41% of the adult Australian population own shares, either directly (via shares or other listed investments) or indirectly (via unlisted managed funds), according to the Study.  While the total ownership level has declined from 46% when the Study was last conducted in 2006, reflecting investor responses to recent market volatility, there are signs of optimism and resilience among Australian investors.  The level of direct-only investors has remained stable at 25% of the adult population and 22% of all surveyed claim they will buy shares in the next 12 months. The Study also reveals that investors are developing transaction-based relationships with brokers, suggesting a greater self-reliance about financial decision-making.  The 2008 Study - the 11th in a series dating back to 1991 - was conducted nationally in November and December last year with a randomly selected sample of 2,400 adult Australians. It highlights the incidence of share ownership among the population and offers insights into the attitudes, knowledge and behaviour of retail share market investors in Australia.  For the first time, the 2008 Study also measured the attitudes and behaviour of lapsed investors - 15% of all Australian adults used to own shares or listed investments but no longer do so, and almost half of these lapsed investors are keen to return to the market at some stage.  Internationally, the finding that 41% of adult Australians own shares continues to rank Australia among the leading share-owning nations in the world on a per capita basis. Only the US, with 45% of share ownership among households, ranks higher.   The complete 2008 Australian Share Ownership Study is available on the [ASX](http://www.asx.com.au/about/pdf/mr_230609_sos_2008.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h3)  **3.2 Rule amendment - Underlying commodity update for ASX grain futures**   On 10 June 2009, ASX updated the wording of the Underlying Commodity for ASX Grain Futures contracts to reflect industry changes concerning applicable trading and receival standards that underpin the minimum specification for the deliverable contracts.   Further information is available on the [ASX](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_023737.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h3)  **3.3 ASX Disciplinary proceedings - State One Stockbroking Limited**   On 27 May 2009, the ASX Appeal Tribunal allowed an appeal by ASX and increased from $40,000 to $100,000 a penalty imposed by the Disciplinary Tribunal on State One Stockbroking Limited ("SOSL") for manipulative trading that created a false and misleading appearance with respect to the market as a result of four non-genuine bids made by traders employed by SOSL.  As a result of the Appeal the total fines imposed on SOSL were increased from $175,000 to $235,000 plus GST.    The Disciplinary Tribunal had made the following determinations:  **(a) No Change of Beneficial Ownership Transactions ("NCBO")**   SOSL contravened ASX Market Rule 13.4.1(a) in that it failed to ensure that it did not make Bids, Offers for, or deal in, any Product as Principal where those Bids, Offers or dealings had the effect or were likely to have the effect of creating a false or misleading appearance of active trading in any Product. Between 2 October 2006 and 15 March 2007, SOSL entered into over 3033 market transactions involving no change of beneficial ownership which remained uncancelled in a variety of securities. The transactions were carried out by employees of SOSL acting as day traders trading as Principal on SOSL accounts which they individually managed.  Profits were divided between the traders and SOSL. As the transactions involved no change of beneficial ownership, they thereby created a false or misleading appearance with respect to the market in breach of Rule 13.4.1. Further, on nine other occasions during this period SOSL entered into transactions that did not involve any change in beneficial ownership.    A fine of $35,000 plus GST was imposed for this contravention.   **(b) Unprofessional conduct**   SOSL contravened ASX Market Rule 4.1.1(w) in that it, as a Market Participant, engaged in Unprofessional Conduct where the conduct involved a substantial or consistent failure to reach reasonable standards of competence and diligence. SOSL was guilty of unprofessional conduct in that it did not respond adequately when ASX Surveillance first brought the NCBO transactions to its attention, and did not have appropriate management structures to ensure that it had operations and processes in place that were reasonably designed and implemented and functioned so as to achieve compliance with ASX Market Rules. A fine of $100,000 plus GST was imposed in respect of this contravention.   **(c) Manipulative trading**   SOSL contravened ASX Market Rule 13.4.1 in that as Principal it made Bids, Offers for and dealt in Products which had the effect of creating a false or misleading appearance of active trading in those Products or with respect to the market for, or the price of those Products.  Between 7 November 2006 and 1 December 2006, SOSL operators entered four small volume bids (typically 10 or 100 shares) above the existing priority bid price. It was alleged that each bid was not made with a genuine desire to acquire the shares, but was made for the purpose of increasing the priority bid price in the market to enable SOSL to sell a much larger parcel of shares at the new and higher priority bid price that had resulted from its original non-genuine bid for an insignificant quantity. For this contravention the Disciplinary Tribunal imposed a fine of $40,000 plus GST which the Appeal Tribunal increased to $100,000 plus GST.   Further information is available on the [ASX](https://www.asxonline.com/intradoc-cgi/groups/participant_services/documents/communications/asx_023663.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h3)  **3.4 Rule amendment - Changes to short sale reporting requirements**   On 25 May 2009, the Australian Securities and Investments Commission (ASIC) lifted the ban on covered short selling of financial securities. ASX has amended the ASX Market Rules Procedures to formalise the technical amendments as set out in ASIC Class Order [CO 09/39]. These technical changes do not affect the existing obligation on Trading Participants to include in their daily gross short sale report all "reportable short sales" as required by notional section 1020BC(5) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) which remains unchanged. Trading Participants must also continue to report their daily gross short sales via ASX Online in accordance with the current requirements of the ASX Market Rules and Procedures.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h3)  **3.5 Review of compliance with the JORC Code**   On 14 May 2009, ASX released its first public review of disclosure by listed mining entities of their compliance with the JORC Code.  The JORC Code is a set of practical and effective minimum reporting standards and guidelines for the mining industry, developed and maintained by the Joint Ore Reserves Committee (JORC) and ASX. The Code has become a blueprint for similar initiatives around the world and contributed to Australia's reputation for offering a well-regulated marketplace.   The JORC Code is incorporated into ASX's listing rules.  Mining entities or entities (including entities controlled by them or subsidiaries) that have an interest in a mining tenement must report in accordance with the JORC Code if they are announcing or reporting on exploration results, mineral resources or ore reserves. The reports are lodged via ASX's Company Announcements Platform and are monitored by ASX Markets Supervision (ASXMS).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h3)  **3.6 Listing fees**   Annual listing fees applicable for FY2010 will be increased. This is the first increase since 2006. The effect of this change for ASX will be an increase in total annual listing fee revenue equivalent to slightly less than the growth of CPI over the three-year period since these fees were last changed. Given that each listed entity's circumstances are different, the revised annual listing fee for each listed entity will vary depending upon individual share price performance and capital raising activity throughout the year, as well as any movement of an entity between the new market capitalisation bands that are used to calculate annual listing fees.  New rates for initial listing and subsequent listing fees will apply from 1 July 2009. New listing fees are available on the [ASX](http://www.asx.com.au/ListingRules/guidance/gn15_schedule_of_listing_fees_fy10.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h3) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **4. Recent Takeovers Panel Developments** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%235) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009_files/spacer%281%29.gif | | |  | | --- | | **4.1 DataDot Technology Limited - Declaration of unacceptable circumstances and orders**   On 17 June 2009, the Takeover Panel made a declaration of unacceptable circumstances and final orders in relation to an application dated 26 May 2009 from Mr William Cleugh, a shareholder of DataDot Technology Limited, in relation to DataDot's affairs.   **(a) Background**   DataDot undertook a 1:1 non-renounceable rights issue at 1 cent per share. The rights issue was underwritten by KTM Capital Pty Ltd, of whom Mr Tod McGrouther and Mr Keith Kerridge are the directors. The rights issue was sub-underwritten by TM Consulting Pty Limited, controlled by Tod McGrouther and his wife, and Bannaby Investments Pty Limited, controlled by Keith Kerridge. Following the sub-underwriting TM Consulting had a relevant interest in 17.2% of DataDot and Bannaby Investments had a relevant interest in 19.7% of DataDot.  **(b) Declaration**  The Panel considered that the circumstances were unacceptable because:  (a) all reasonable steps to minimise the potential control effects of the rights  issue were not taken, specifically:       i. no facility was offered for shareholders to take up shares in excess of their entitlement and       ii.no enquiries were made of any persons other than TM Consulting and Bannaby Investments to sub-underwrite the rights issue after the decision was made to revise the rights issue offer price to 1 cent per share  (b) the control effect of the rights issue was material because the Panel considered that TM Consulting and Bannaby Investments were associates in relation to the affairs of DataDot (c) the disclosure of the potential control effects and sub-underwriting arrangements in the letter of offer was insufficient and misleading and  (d) TM Consulting and Bannaby Investments had failed to comply with their substantial holding notice obligations.   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).  **(c) Orders**  The Panel has made orders to the effect that:  (a) TM Consulting and Bannaby Investments divest shares they received as sub-underwriters of the DataDot rights issue so that shareholders who were originally entitled to participate in the rights issue are offered:   * as many shares as is necessary for them to take up what was their full original entitlement in the rights issue (if applicable); and * shares in excess of their entitlement;   (b) applications to participate in the excess shares are scaled back by Datadot on a reasonable and fair basis; (c) the letter of offer for the sale discloses, among other matters, the possible control effect of the sub-underwriting on DataDot; and (d) TM Consulting and Bannaby Investments correct their respective substantial shareholder notices to reflect that they are associates and to attach a copy of the relevant sub-underwriting agreements.  Further information is available on the [Panel](http://www.takeovers.gov.au/content/Media_Releases/2009/downloads/MR09-48.pdf" \t "_new) website.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h4) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **5. Recent Corporate Law Decisions** |  | [ext Section](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h7) | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009_files/spacer%281%29.gif | | |  | | --- | | **5.1 Power of chairman and directors to postpone a meeting of shareholders**   (By Stephen Magee)   McKerlie v Drillsearch Energy Ltd [2009] NSWSC 488, Supreme Court of New South Wales, Barrett J, 4 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc488.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/june/2009nswsc488.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   An attempt to postpone a spill motion meeting foundered on a lack of power by the directors who purported to postpone the meeting. The decision contains some useful judicial discussion of the exercise of the powers of the chairman of a meeting.   **(b) Facts**   Drillsearch Energy Ltd had six directors. A general meeting was called to consider two sets of spill motions:   * one set of spill motions to remove three directors (the "majority spill motion"); * one set of motions to remove two other directors (the "minority spill motion").   The untargeted director was the recently-appointed managing director.    After notice of the meeting had been dispatched, the three directors who were the target of the majority spill motion signed a circular resolution to postpone the spill motion meeting and change the venue. The managing director signed a document saying that he abstained from voting on the resolution.   Drillsearch then announced to ASX that:   * the board had resolved to postpone the meeting; * the meeting would be postponed; * the meeting venue has been changed (to the company's registered office); * the chairman would adjourn the meeting as soon as it opened; and * this was part of a "renewal process" which would "maintain and enhance shareholder value".   The minority directors asked the court for:   * a declaration that the purported "resolution" of directors was invalid; * a declaration that the conduct of Drillsearch in releasing the announcement to and through ASX was misleading or deceptive and therefore contravened section 1041H(1) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) or, in the alternative, section 52 of the [Trade Practices Act 1974](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6426" \t "Default); * injunctive relief to restrain any of the majority directors from acting as chairman of the general meeting or, alternatively, from acting upon or giving effect to the purported circular resolution (including by not taking the purported resolution into account in considering whether or not to adjourn the meeting); and * an order under section 1324 of the Corporations Act or section 80 of the Trade Practices Act requiring Drillsearch to issue to ASX and to publish in the press a particular form of corrective notice.   **(c) Decision**    **(i) The circular resolution**   The company's constitution did allow a circular resolution, but only if a majority of board members entitled to vote on the resolution were in support of it. Having the resolution signed by only half of the board meant that it was ineffective.   **(ii) Directors' postponing the meeting**   It is fairly well established that directors can only postpone a general meeting if there is an express power in the constitution allowing them to do so. Drillsearch's constitution did not contain such a provision.   **(iii) The chairman's power to postpone the meeting**   Drillsearch's constitution gave the chairman power to postpone a meeting without a shareholder vote. However, the court said that a chairman must exercise his powers in good faith and for a proper purpose:   "38 It follows from the nature of the chairman's role and the responsibilities and expectations it entails that it is foreign to the chairman's function to exercise the power of adjournment to further some personal preference of the chairman or some policy of a body of which the chairman is a member. It is thus foreign to the chairman's function, when the chairman is a director, to exercise the chairman's powers to implement some policy or decision of the board of directors.    "39 This is particularly so in a context such as the present where the purpose of the general meeting is to determine the constitution of the board itself. The right of the general body of members to remove directors by resolution is a statutory right which may or may not have some parallel in the constitution. If, by ordinary corporate processes, a forum is created to enable members to exercise that right if minded to do so, it will be an abuse of the power of a chairman to remove the opportunity to exercise the right except for some good and proper reason calculated to promote the due exercise of the right in more suitable or constructive circumstances at a later time. It will be a clear abuse of power if the chairman removes or postpones the right simply because he or she (alone or in consultation with others) thinks that it would somehow be more conducive to the interests of the company if members were not allowed to exercise the right to remove directors."    **(iv) Announcement to ASX**   The announcement to ASX was held to be misleading or deceptive:   * it claimed that the board had passed a resolution when it hadn't; * it said that the board would be postponing the meeting when it could not; * it said that the board had agreed to a "renewal process" (clearly implying that the dissention and differences on the board had been resolved and that some agreement as to board re-constitution had been reached among the directors as a whole), which was not true.   The court went on to hold that this was a breach of section 1041H. That section prohibits misleading or deceptive conduct "in relation to a financial product". Applying ASIC v Narain [2008] FCAFC 120, the court held that an optimistic ASX announcement by a company is "in relation to" the shares of the issuing company. This conclusion was reinforced by the fact that the announcement in this case was more than just an upbeat announcement. It had said that the decision to postpone and the "renewal process" would "maintain and enhance shareholder value". This in the court's view, was a direct link to the company's shares:   "There was a clear statement in that paragraph linking the subject matter of the announcement (the supposedly agreed `renewal process') with enhancement of `shareholder value', that is, the price or underlying worth of shares in Drillsearch itself."   **(v) Orders**   The court refused to make orders preventing the majority directors from acting as chairman. However, it was wary of ordering the chairman not to postpone the meeting (just in case a postponement was genuinely required).    The other problem for the court was how to rectify the effect of the announcement and the purported change of venue, given that the court hearing was only four business days before the meeting:   * how could you stop members from going to the company's office in reliance on the ASX announcement? * what could you do about members who had decided not to go to the meeting once they read that the board disputes were apparently resolved?   The court decided to take submissions on these questions: "69 The difficulties just outlined may be reduced if ... Drillsearch is required to undertake corrective advertising (and an ASX announcement) making it clear that the `postponement' has no substance and that the meeting will go ahead at the originally notified time and place. But that too may not be entirely satisfactory when it is appreciated that, because of shortage of time ..., it will not be possible for a document to be sent to each member so as to give adequate notice of reversion to the original plan, added to which members unable to attend who may have held off lodging proxies upon becoming aware of the `postponement' will be unable to lodge before the deadline applicable to a 10 June meeting."  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.2 Is a forward contract a "derivative" for the purposes of the Corporations Act?**  (By Oendrila Roy, Freehills)   Keynes v Rural Directions Pty Ltd (No 2) [2009] FCA 567, Federal Court of Australia, Besanko J, 3 June 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca567.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/june/2009fca567.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   A forward contracts to sell wheat in the future at a price fixed at the beginning of the contract is not a derivative for the purposes of section 761D of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) as:   * the amount of consideration payable for the wheat does not change based on some other variable factor; * the seller's obligations cannot be wholly settled by cash; * it is not usual market practice for the seller's obligations to be closed out by matching up the contracts with an offsetting arrangement of the same kind.   **(b) Facts**   Keynes (Plaintiffs) operate a wheat and barley farming business. The judgment primarily focused on the forward contracts entered into by the Plaintiffs with ABB Grain Ltd (AAB Grain) and Glencore Grain Pty Ltd (Glencore Grain) (together, the Defendants). The Defendants are wholesalers of grain. The forward contracts obliged the Plaintiffs to provide wheat and barley to the Defendants at a fixed date in the future at a price fixed at the commencement of the contract.    The Plaintiffs were unable to deliver the required quantities of wheat and barley under the forward contracts due to production failure. The contracts were "washed out" under the terms of the contracts. The term "washed out agreement" referred to a process whereby the Plaintiffs indicated to the Defendants that they could not meet their contractual obligations and the Defendants elected to cancel the contracts and demand liquidated damages. The Plaintiffs alleged that they were not liable to pay the Defendants as the Defendants failed to comply with various obligations under the Act and because the Defendants were in breach of the duty of care they owed to the Plaintiffs.    **(c) Decision**   **(i) Summary judgment**   The Defendants sought a summary judgment of the case.   As the case depended on the proper construction of provisions of the Act, that is, a question of law, Justice Besanko was able to determine the matter by summary judgment on the basis of full submissions on the issues of construction.    **(ii) Breaches of the Act**  The Plaintiffs alleged that the forward contracts are financial products within the meaning of sections 763A and 763C of the Act. If that was the case, a Product Disclosure Statement (PDS) would be required by section 1012B(3)(i) and (ii) of the Act in the form (and containing the matters) specified in sections 1013A to 1013E. The Plaintiffs alleged that, had they been provided with a PDS, it would have contained the information that the price of barley/wheat "might rise substantially" and that they would not have entered into the contracts.   The main focus of the case was the definition of "financial product" in sections 763A to 763E. Section 764A contains a list of specific things which are financial products including derivatives. "Derivative" is  defined in section S761D(1) with exemptions to the definition contained in section 761D(3).    **(iii) Are forward contracts a derivative as defined by section 761D(1)?**  Section 761D(1) provides that each of the following conditions is to be satisfied for an arrangement to be a "derivative":  (a)   a party to the arrangement be required to provide consideration at a future time; and (b)   the future time is not less than the number of days specified in the regulations; and (c)   the amount of the consideration or the value of the arrangement is determined, derives from or varies by reference to (wholly or in part) the value of something else, for example, an asset, a rate (including interest rate or exchange rate), an index or a commodity.   Paragraphs (a) and (b) were made out in this case. In the case of paragraph (c), the Plaintiffs submitted that the value of the arrangement varies by reference to the market price of wheat or barley. For example, if the value of wheat or barley rises, a buyer can enter a contract to on-sell the same quantity of wheat/barley at this increased price thus extracting a greater value from the contract than they had expected. However, Justice Besanko was of the view that a broad definition of the section would mean that ordinary transactions like the sale and purchase of a motor vehicle with payment of the purchase price today and delivery in a week could be considered a derivative. This could not have been the intention of Parliament. Therefore, the forward contracts were not derivatives for the purpose of the Act and so did not require a PDS.   **(iv) Did the forward contracts fall into the exemption from the definition of derivative in section 761D(3)?**   Justice Besanko also considered whether the contracts met the requirements for the exemption. Even if an arrangement is within the definition of derivative in section 761D(1) it will not be a derivative if it is within section 761D(3) of the Act. For a contract or arrangement to satisfy section 761D(3)(a), each of the 3 limbs (i)(ii) and (iii) need to be satisfied.    Section 761D(3)(a)(i) requires one party to the arrangement to have (or may have) an obligation to sell and another party to have (or may have) an obligation to buy at a price and on a date in the future. This was not disputed in this case.    Section 761D(3)(a)(ii) requires that the arrangement does not permit  the seller's obligation to be wholly settled by cash, or by set-off between the parties by something rather than by delivery of property. The Plaintiffs submitted that the seller's obligations can be wholly settled by cash under the contracts, rather than by delivery of the property because: 1.  the buyer's remedies under the contract would be damages paid out in cash; or 2.  the washout provisions in the contract allow the seller's obligations to be wholly settled by cash.   Justice Besanko held that section 761D(3)(a)(i) required that the option to wholly settle an obligation by cash must be in the arrangement, it must be vested in the seller and the alternatives of paying cash or delivering property must be of similar nature or standing. This was not the case here. The obligation to pay damages arises when the seller breaches his obligations, not when he settles them. It was highly unlikely that Parliament would have intended that the application of the provision would have such broad interpretation.    Secondly, while the washout provisions do allow the seller's obligations to be wholly settled by cash rather than delivery of the property, these provisions were only triggered at the option of the buyer where the seller is in default.    Therefore Justice Besanko held that section 761D(3)(a)(ii) was satisfied.   Section 761D(3)(a)(iii) requires that neither usual market practice, nor the rules of a licensed market or a licensed CS facility, permits the seller's obligations to be closed out by the matching up of the arrangement with another arrangement of the same kind under which the seller has offsetting obligations to buy.    The Plaintiffs submitted it is possible for a seller who is facing a production failure to agree to buy an amount equal to what he has agreed to sell from another seller and thus offset his obligations and that this would satisfy subsection (iii). However, Justice Besanko held that this was not what was intended by the section. What the Plaintiff had identified was a way of making a profit or loss in a market for goods that are readily obtainable, not a usual market practice permitting the closing out of the seller's obligations by the means specified. It was the nature of the good (e.g. wheat, barley) which allows the seller to do this not the usual market practices (e.g. forward market practices).    Therefore as each of the limbs of section 761D(3)(a) was satisfied, the forward contracts are not financial products and a PDS was not required.   **(c) Duty of care**  The Plaintiffs also claimed that the Defendants had a duty of care because the Act required the Defendants to provide a PDS and therefore it was incumbent on the Defendants to ascertain, and include in the PDS, various matters which had the  Plaintiffs been aware of they would not have entered into a contract. The Plaintiffs alleged that such duty was breached.   Justice Besanko dismissed this claim as there was no obligation to provide a PDS. He went on to say that even if there was an obligation to provide a PDS there may not be a duty of care to ascertain information and provide it in the PDS as it would be inconsistent with the statutory scheme if the obligation to provide certain information gave rise to an obligation at common law to provide additional information.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.3 Proceedings against deregistered companies - proper construction of section 601AG of Corporations Act**    (By Bradley Urban, DLA Phillips Fox)   Tzaidas v Child [2009] NSWSC 465, New South Wales Supreme Court, McCallum J, 29 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc465.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc465.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The court held that in a claim for contribution against the insurer of a deregistered tortfeasor, what is required under section 601AG(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) is to prove that at the time of the hearing, the deregistered company was a joint tortfeasor immediately before its deregistration. In doing so, McCallum J interpreted "liability" under section 601AG(a) broadly, such that the liability was not required to have accrued or crystallised immediately before the deregistration of the company in question.  Rather, it was sufficient to establish at the time of the hearing of the claim under section 601AG that a liability existed immediately before deregistration.       **(b) Facts**   George Tzaidas suffered severe brain damage and impaired vision in 1996 shortly after he was born at the Hurtsville Community Co-operative Hospital (Hospital).  In 2001, proceedings were commenced by George and his parents (Plaintiffs) against the Hospital and two doctors.  The Plaintiffs claimed that George's injuries were caused as a result of negligence on the part of the Hospital and the two doctors.   In July 2002, the Plaintiffs sought to join the Hospital's insurer, CGU Insurance Limited (CGU), as a defendant under section 6(4) of the [Law Reform (Miscellaneous Provisions) Act 1946](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=4049" \t "Default). That provision enables a person to enforce a charge over insurance monies arising under section 6(1) of the Law Reform (Miscellaneous Provisions) Act 1946 in respect of a relevant contract of insurance.  The applications were based on the fact that CGU was the Hospital's professional indemnity insurer under a "claims made" policy that incepted on 30 June 1999.  Although no claim had been made during the period of insurance, the Plaintiffs relied on a deeming clause in the policy.    The Plaintiffs' applications were refused at first instance.  However the decision was overturned by the New South Wales Court of Appeal on 27 July 2004 and CGU was joined as a defendant.     On 24 May 2005, the Hospital was deregistered.   After several other developments, in May 2006, both doctors filed cross-claims against the now deregistered Hospital and against CGU as joint tortfeasors seeking contribution under section 5 of the Law Reform (Miscellaneous Provisions) Act 1946.  Broadly speaking, that Act enables a person to enforce a charge on insurance moneys in specified circumstances.     However, matters took an unexpected turn.  On 4 June 2007, the Court of Appeal gave its decision in the Owners-Strata Plan 50530 v Walter Construction Group Ltd (In Liquidation).  The case held that no charge arises under section 6(1) where the insurance policy in question was not in existence at the time of the events giving rise to the claim.  Given that any negligence in relation to the events following the birth of George was in 1996, while the contract of insurance with CGU commenced in 1999, her Honour noted it was now doubtful whether leave would have been granted to the Plaintiffs to commence proceedings against CGU.   Consequently, on 14 April 2008, CGU filed applications to strike out the doctors' cross claims based on the principle laid down in The Owners-Strata Plan 50530.  The doctors then applied to amend their cross claims against CGU to include a claim under section 601AG of the Act.  Section 601AG is a mechanism that allows a person with an insurable claim to recover directly from the insurer of a deregistered company.  The section provides:   A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if: (a)   the company had a liability to the person; and (b)   the insurance contract covered that liability immediately before deregistration.      **(c) Decision**   **(i) Issue**   The parties agreed to have McCallum J determine the following three questions (formulated by the parties) before further trial of the proceedings:  First, noting that the plaintiff commenced these proceedings against the doctors before the Hospital was deregistered, does the fact that the plaintiff had not obtained judgment against the doctors prior to the deregistration of the Hospital mean that the doctors cannot recover on their cross claims against CGU pursuant to section 601AG of the Act?   Secondly, in order for the doctors to recover pursuant to section 601AG of the Act, must they, when seeking to satisfy the requirement in section 601AG(a), establish that the Hospital had a liability to them immediately before deregistration of the Hospital?   Thirdly, if at a final hearing it is established that the Hospital and the doctors are tortfeasors each liable to the plaintiff and are entitled to recover contribution from each other, then will those findings establish that the Hospital "had a liability" to the doctors immediately before deregistration within the meaning of section 601AG(a) of the Act?    An additional question arose as to the meaning of the words "covered that liability" in section 601AG(b).    **(ii) Decision**   McCallum J answered these three questions: "No, Yes and Yes" and concluded that what is required under 601AG(a) is to prove, at the time of the hearing, that the deregistered company was a joint tortfeasor immediately before its deregistration.   In reaching her decision, McCallum J did not accept that section 601AG refers only to a liability that was determinate or crystallised immediately before the deregistration of the company in question.  Rather, the meaning of "liability" in section 601AG was to be given a broad interpretation, and it was sufficient if the determination that a liability existed immediately before the deregistration is made at the final hearing of the claim under section 601AG.            McCallum J did however note that based on the decision in *Almario v Allianz Australia Workers Compensation (NSW) Insurance Ltd* [2005], the words "immediately before deregistration" that only appear at the conclusion of section 601AG(b) also qualify the condition set out in section 601AG(a).  Therefore, in order for the doctors to recover pursuant to section 601AG, they were required to establish that the Hospital had a liability to them immediately before deregistration of the Hospital.     In relation to the additional question, McCallum J held that the meaning of the phrase "covered that liability" in section 601AG(b) did not require that the insurer was obliged to pay that liability before deregistration.  Rather, it only required that the relevant party establish that the scope of the policy extended to the risk that had manifested in the particular case.  Consequently, McCallum J concluded that it was reasonably arguable that, if the Hospital was found to have had a liability to the doctors and the doctors established that the policy, properly interpreted, would respond to that liability, the doctors would have shown that the policy "covered that liability" immediately before the deregistration of the Hospital.   Other arguments raised by CGU were held to raise questions of fact to be determined at the trial and hence her Honour did not agree to refuse leave to amend the cross-claims on that basis.   **(iii) Orders**   The three separate questions noted above were answered "No", "Yes" and "Yes" respectively. Leave was granted to the doctors to amend the cross claims and CGU's notices of motion were dismissed.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.4 Director who borrowed from third party financier to on-lend to their company could not claim contribution from fellow director**  (By Chloe Johns, Mallesons Stephen Jaques)   Friend v Brooker [2009] HCA 21, High Court of Australia, French CJ, Gummow, Hayne, Heydon and Bell JJ, 28 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/high/2009/may/2009hca21.htm](http://cclsr.law.unimelb.edu.au/judgments/states/high/2009/may/2009hca21.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   Mr Brooker ("the respondent") initiated proceedings seeking repayment from Mr Friend ("the appellant") for personal borrowings that the respondent had made from third party lenders on behalf of Friend & Brooker Pty Ltd ("the company"), of which the parties were directors.    In the original proceedings, the trial judge dismissed the respondent's suit in the Supreme Court of New South Wales.  The New South Wales Supreme Court of Appeal allowed an appeal by the respondent.  This decision was appealed to the High Court.   The High Court allowed the appeal, determining that a director of a company who borrowed from a third party to on-lend the money to the company could not claim contribution from a fellow director toward repaying the third party lender.  The High Court refused to recognise that the equitable doctrine of contribution should be expanded to include a category of "common design".    The court also held that there was no fiduciary obligation requiring the appellant and respondent to be personally liable for each others personal borrowings.     Finally, it was held that the Court of Appeal had denied procedural fairness because the majority had decided the case on a point of law which the respondent had not pleaded at trial or at the Court of Appeal.   Directors should be aware that the remedy of equitable contribution will not apply where there is no co-ordinate liability or common obligation on the part of the directors.  This means that directors who engage in personal borrowings from third party financiers to on-lend to their company will be unable to obtain repayment from fellow directors who have not also accepted personal liability for these loans.   **(b) Facts**   In May 1977 the appellant and respondent set up the company together.  Although the business relationship was initially created as a partnership, they incorporated the company on 18 July 1977 to carry on the business.  Each of the appellant and the respondent was a director and a shareholder of the company.  The appellant and respondent obtained personal loans from family and friends which were then advanced as loans to the company.  The company's indebtedness appeared in its books as debts due to either of the directors.  These debts were not equal by design, and fluctuated depending upon which director had borrowed funds which were on-lent to the company.   In November 1986, SMK Investments Pty Ltd ("SMK") agreed to lend $350,000, plus interest, to the respondent, to be applied to the company ("the SMK loan").  The respondent told the appellant of the proposed SMK loan, however did not inform him of the interest rate or other terms of the loan.  By December 1995, with the accrual of interest, the amount needed to repay the loan was $1.1 million.   The company ceased to trade in 1990 and was deregistered in 1996.  Thereafter the respondent and the appellant disputed the company accounts and responsibility for repayment of various loans.   The respondent commenced proceedings in 2000 and went to trial in December 2004, alleging that the company had been a corporate vehicle for the conduct of a partnership or joint venture between the two men.  He sought the taking of a full account of the partnership and recovery for loss suffered because the appellant refused to make equal contribution to the repayment of the SMK loan.   **(c) Trial judge's decision**   The trial judge dismissed the respondent's claim, having found that there was no evidence to prove that a partnership or joint venture existed after the incorporation of the company.  The trial judge held that the appellant never agreed to be jointly liable for, or to contribute to, the repayment of the SMK loan.  He considered that the law concerning corporate insolvency should determine how the debts owed by the company were to be dealt with.   **(d) Court of Appeal decision**   The Court of Appeal (2:1) allowed the respondent's appeal and set aside the orders of the trial judge.  The majority declared that the appellant had an equitable duty to contribute equally to the repayment of the SMK loan due to the parties' "common design", namely equal profit from the company.     Justice of Appeal McColl of the majority held that the parties, as directors, were subject to a fiduciary obligation with a positive rather than proscriptive content, and that this fiduciary obligation required each director to be equally and personally liable to each other for losses flowing from personal borrowings.   The majority rejected the appellant's submission that there were procedural irregularities resulting from the majority's reliance on the "common design" doctrine.  The appellant had alleged that the respondent did not plead or argue this point either at trial or before the Court of Appeal.   **(e) High Court decision**   The High Court unanimously allowed the appeal, setting aside the orders of the Court of Appeal and restoring the orders of the trial judge.   **(i) The doctrine of equitable contribution**   The doctrine of equitable contribution applies to those who have a "common obligation" or "co-ordinate liabilities".  The respondent submitted that the additional category of "common design" means that equity is also found "simply in commonality of benefit from the operation of that design".   In the leading judgment, Chief Justice French and Justices Gummow, Hayne and Bell decided that no "common design" category exists, and that the relationship between the directors did not result in the appellant bearing in equity any personal responsibility to the respondent to carry half the burden of repayment of the SMK loan.   The High Court considered that the doctrine of equitable contribution could not be extended to overcome the undisturbed findings of the trial judge that, after the company was incorporated, the respondent and the appellant were neither in a partnership, a joint venture, nor any other relationship which gave rise to an entitlement to an account between them.  The respondent and appellant had selected the corporate structure as the vehicle for their business enterprise, and the consequences are that the legal doctrines of corporate personality and limited personal liability from the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) apply.   **(ii) Reformulation of the fiduciary obligation**   The leading judgment rejected the Court of Appeal's reformulation of a director's fiduciary obligation, as it went beyond the imposition of proscriptive obligations.  Their Honours held that there was no fiduciary obligation requiring the respondent and the appellant to be personally liable to each other for losses flowing from their personal borrowings.   **(iii) Procedural irregularity - new material introduced on appeal**   Justice Heydon held that the appellant was correct in his contention that the "common design" category of the doctrine of equitable contribution upon which the Court of Appeal decided the case against him was not pleaded at either trial or to the Court of Appeal by the respondent.     Justice Heydon stated that this, combined with the obscurity of the supposed "common design" category of the doctrine, made it incumbent on the Court of Appeal majority to draw the details of the doctrine, and the primary authority on which it supposedly rested, to the attention of the parties, either during the oral argument if the details of the doctrine were then present on their minds, or whenever they became present during the nine month period during which judgment was reserved.     This duty was not complied with, as the Court of Appeal majority used the doctrine to solve a problem narrower than, and distinct from, that propounded by the respondent during the appeal.  His Honour stated that this resulted in a denial of procedural fairness.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.5 Calling a meeting - legal requirements**   (By Stephen Magee)   NSX Ltd v Pritchard [2009] FCA 584, Federal Court of Australia, Lindgren J, 22 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca584.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca584.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   In order to "call" a meeting within the meaning of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default), it is necessary to send out notices of the meeting,   **(b) Facts**   Shareholders of NSX Ltd requisitioned a meeting under section 249D(1). That provision requires directors to "call and arrange to hold" the requisitioned meeting. Section 249D(5) says that the directors must "call the meeting" within 21 days of receiving the requisition. Section 249E allows the requisitioning shareholders to "call and arrange to hold" the meeting "if the directors do not do so within 21 days".   On the 21st day after receiving the requisition, NSX's directors resolved to convene a meeting in response to the requisition and to send out notices of the meeting. This was announced to ASX.   On the following day, the requisitioning shareholders purported to exercise their rights under section 249E and sent out notices of their own meeting.    Their argument was that the directors had not "called and arranged" the meeting within 21 days of the requisition: deciding to hold a meeting and announcing that decision to ASX did not constitute "calling and arranging" the meeting.   NSX went to court, apparently to stop the shareholders from proceeding with their meeting, on the grounds that section 249E had not been triggered (ie, the directors had, in fact, called and arranged to hold a meeting within the 21 days).   **(c) Decision**  There was some discussion about the meaning of "arrange to hold" (see below), but that was largely irrelevant: the court held that the directors had not even "called" the meeting within 21 days. It said that Part 2G.2 Div 3 makes it clear that sending out notices is an essential element of "calling" a meeting. Resolving to hold a meeting, setting a date and announcing it to ASX were not sufficient by themselves.   NSX argued that, if "calling a meeting" included giving notice, the words "arrange to hold" (in "call and arrange to hold") would be redundant.    The court disagreed: "If, as I think, notification to members is an essential aspect of calling a meeting, other things remain covered by the expression `arrange to hold'. Indeed, perhaps those words were added in order to make it clear that the directors' obligation under s 249D(5) is not discharged by the mere taking of the decision and sending out of the notices of meeting. Depending on the size of the company, there could be many other things to be done in order that the request for the meeting is truly met and not frustrated, including, the arranging of a venue, arranging for the staffing of the meeting, and (perhaps) printing of meeting papers."  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.6 Capacity for a debtor to set aside a creditor's statutory demand**   (By Laura Keily and Virginia Burns, Corrs Chambers Westgarth)   Accordent Investment Pty Ltd v RMBL Investments Ltd [2009] SASC 144, Supreme Court of South Australia, Gray J, 22 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/may/2009sasc144.htm](http://cclsr.law.unimelb.edu.au/judgments/states/sa/2009/may/2009sasc144.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This case involved an appeal from an interlocutory decision in which Accordent Investment Pty Ltd (Accordent) applied to have a creditor's statutory demand issued by RMBL Investments Ltd (RMBL) set aside. This appeal was heard by Gray J in the Supreme Court of South Australia.   Accordent made three main submissions:  1. that the demand was defective as it did not specify a single debt within the meaning of section 459E(1)(a) of the [Corporations Act 2001 Cth](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (CA); and 2. that Accordent had provided sufficient security to RMBL that satisfied section 459E(2)(c) CA; and 3. in the alternative, there was 'some other reason' within the meaning of section 459J(1)(b) CA to set aside the demand.   Gray J dismissed the appeal.    In relation to the first submission, Gray J found that section 459E allows the creditor to demand the principal of a debt as a whole single debt within the meaning of section 459E(1)(a), despite the fact that there was interest being claimed on the principal.  In resolution of the second submission, Gray J decided that existing security was not able to satisfy the terms of section 459E(2)(c) that security had been provided to the reasonable satisfaction of the creditor and it appears to have been held that the reason was that it was not further security.  In addressing the third submission, his Honour found that the reasons claimed by Accordent (including a valuation of the property higher than the statutory demand and claimed inadequacies in the auction process) were not sufficient to set aside the statutory demand.   **(b) Facts**   On 19 August 2005 Accordent and RMBL entered into a secured loan agreement for $7,812,000.00 which was subsequently increased to $12,408,000.00.  On 26 February 2008, RMBL issued a notice of default pursuant to the terms of the loan agreement. The default arose from the non-payment of interest on the loan, and on default the total amount of the debt became due and payable.  Also on 26 February 2008, RMBL took possession of part of the security, Windsor Park Shopping Centre.    On 11 September 2008, RMBL auctioned the Windsor Park property, however the auction was unsuccessful with the highest bid being $11,750,000.00.  On 12 September 2008, RMBL served a statutory demand on Accordent pursuant to section 459E(2)(e), requiring Accordent to pay RMBL the amount of the debt or to secure or compound for the amount of the debt to RMBL's reasonable satisfaction.  The debt specified was the principal only and excluded interest and other charges which were disputed.   On 3 October 2008 Accordent applied to set aside the statutory demand, pursuant to sections 459H and 459J(1)(b).  This application was dismissed by a Master of the Supreme Court of South Australia on 6 March 2009. Accordent appealed the decision of the Master on 22 May 2009 (by way of rehearing).  In the initial hearing, the Master took into account matters that were genuinely in dispute to reduce the amount of the demand to $10,081,924.95.   **(c) Decision**   Accordent made the following submissions on appeal:   * The statutory demand was defective as it did not identify a single debt within the meaning of section 459E; * Accordent had complied with the statutory demand by providing security for the amount of the debt as required by section 459E(2)(c); and * In the alternative, 'some other reason' for setting aside the statutory demand had been established within the meaning of section 459J(1)(b).   Gray J rejected each submission and his Honour's treatment of each submission is detailed below.   **(i) Single debt under sections 459E**   Section 459E provides that a person may serve on a company a demand relating to a single debt (section 459E(1)(a)) or two or more debts (section 459E(1)(b)).  Section 459G allows a debtor to apply to have a statutory demand set aside if it relates to a disputed debt.  Accordent claimed that the debt referred to in the statutory demand was not a "single debt" within the meaning of section 459E because it was not the whole debt.  That is, it referred to the principal but not to the interest due on the principal.     Gray J indicated that the purpose of section 459E(1) is to prevent complicating proceedings for the winding up of the debtor company by ensuring that a creditor does not issue more than one statutory demand.  His Honour found that the principal and interest components of a loan are distinct debts and that RMBL was able to demand the principal as a single debt.   His Honour also noted that there may be good reasons to exclude amounts from a statutory demand.  In this case the purpose of excluding interest, which was a disputed debt, was to ensure Accordent did not have a basis for having the demand set aside under section 459G.   **(ii) Providing further security for the debt - section 459E(2)(c)**  Section 459E(2)(c) provides that a statutory demand must require the company to pay the debt or secure or compound to that amount or total to the creditor's reasonable satisfaction within 21 days of serving the demand.     Accordent relied on a valuation of the property after the auction which valued the property at between $14,500,000.00 and $16,500,000.00.  Accordant claimed that, given the value of the property according to the valuation, and in any case the highest bid at the auction, the value of the security exceeded the amount demanded.  Accordingly, Accordent claimed that it had satisfied clause 459(2)(c) because it had provided sufficient security for the debt to the creditor.     Gray J found that the reference in section 459E(2)(c) to securing the amount of the debt is intended to permit the debtor to provide further security to the reasonable satisfaction of the creditor.    Although the judgment does not expressly state this, in citing the judgment of Cusack v Rateki, it appears that the decision of his Honour was that he agreed with the reasoning of the Master, that the security needed to be given after the demand and that, accordingly, Accordent could not rely on security originally provided to satisfy section 459E(2)(c) as that was not further security given.   His Honour then went on to find that "in the circumstances of the present proceeding, RBML was claiming an indebtedness of substantially more than the auction bid price . and in the circumstances Accordent had not established that he value of the security was substantially greater than the indebtedness claimed".     The rationale behind this point is not entirely clear from the judgment (given that the value of the property at auction exceeded the revised value of the statutory demand).  However, his Honour later suggested that there may be real differences in opinion about the value of the security and this may be the reason for the statement.  Given that his Honour appears to have dismissed the appeal on this point for the reason set out above, it is not clear why it was necessary to make the point about the valuation of the property in response to this particular argument.    **(iii) 'Some other reason'- section 459J(1)(b)**  Section 459J(1)(b) provides the court with a discretionary power to set aside a demand for 'some other reason'.  Accordent submitted that the value of the property was between $14,500,000.00 and $16,500,000.00 and that because RMBL did not submit alternative valuation evidence, RMBL was not able to contest Accordent's submission that the security held by RMBL was sufficient.  Accordent further submitted that the process engaged in by RMBL for the sale of the secured property was inept and inadequate.  Accordent argued that the Master erred in failing to regard these facts as material considerations to be satisfied of the existence of 'some other reason' to set aside the demand by exercise of the power in section 459J.   In response to this submission, Gray J decided that there was no 'other reason' sufficient to set aside the demand. His Honour decided that the weight to be given to the valuation was to be limited because the letter was qualified and paid no regard to the circumstances of the auction.  His Honour noted that the valuer appeared to have been given separate advice about the auction process and had suggested inadequacies within that process.   His Honour found that the evidence and inferences to be drawn from it militated against Accordent's submissions that RMBL held more than adequate security for the alleged indebtedness (which his Honour, interestingly, noted as the principal of $10,081,924.95 and the further claims for interest and consequential expenses, notwithstanding that the statutory demand was only the amount of the principal).    Further, his Honour said that although Accordent had said that it wanted to refinance and the failed auction process had hampered that, Accordent had not led evidence of attempts to refinance.  The fact that, according to the evidence, Accordent had not sought to refinance allowed the inference to be drawn that there was a difference in opinion about the value of the loan security.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.7 Do sections 180, 181, 182 and 183 of the Corporations Act apply to acts and omissions which occur outside of Australia?**   (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth)   PCH Offshore Pty Ltd v Dunn [2009] FCA 553, Federal Court of Australia, Siopsis J, 20 May 2009  The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca553.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca553.htm" \t "_new)  or   [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The applicant, a company incorporated in Australia, made an application for leave to serve its application and statement of claim on the respondent in the United Kingdom pursuant to O 8 r 3 of the [Federal Court Rules](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=8830" \t "Default) (the Rules). The applicant alleged, amongst other things, that the respondent breached his duties under sections 180(1), 181(1), 182(1) and 183(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act). On the question of jurisdiction, the court was required to determine whether the Act, or at least those sections of the Act, operate extraterritorially.   The court held that sections 180, 181, 182 and 183 of the Act are to apply to acts and omissions which occur outside of Australia, based upon the intention of the Parliament as evidenced in section 5 of the Act and the policy considerations supporting the extraterritorial operation of similar provisions in the securities legislation of the United States.   **(b) Facts**   The respondent, a former employee and director of the applicant, was, prior to the termination of his relationship with the applicant, the manager of the applicant's branch office in each of the Republic of Azerbaijan and the Republic of Kazakhstan.   The applicant alleged that, whilst engaged as the branch manager of the applicant's business in each of those two countries, the respondent, without the authority of the applicant (i) withdrew monies from the applicant's Azerbaijan bank account; and (ii) caused payments due to the applicant, to be diverted to the bank account of a company which the respondent had established in which he had a beneficial interest.  Further, it was alleged that, after his position with the applicant was terminated, the respondent failed to return property which belonged to the applicant.  The applicant alleged that by reason of these matters the respondent breached his duties under sections 180(1), 181(1), 182(1) and 183(1) of the Act and that he breached his contract of employment and acted in breach of his fiduciary duty owed to the applicant.     In 2008, proceedings were commenced in Azerbaijan claiming compensation against the respondent in respect of the alleged breaches of duty and misappropriation referred to in the statement of claim.  Whilst the proceedings initially sought to claim compensation in respect of these alleged breaches, the court in Azerbaijan refused to accept jurisdiction to deal with those causes of action by reason of their connection to Australia.  The proceedings which are pending in Azerbaijan are now confined only to requiring the respondent to produce documents.   **(c) Decision**   In order for the court to be satisfied that leave should be granted to serve an originating process out of the jurisdiction, it is necessary that the court be satisfied that the court has jurisdiction in respect of the proceeding, the proceeding is of a kind which is referred to in O 8 r 2 of the Rules, and that the person seeking leave has a prima facie case for relief claimed in the proceeding (O 8 r 3 of the Rules).  There is also a discretion in the court which may be exercised to refuse leave to serve the proceeding out of the jurisdiction.    On the issue of jurisdiction, the applicant relied upon the court's jurisdiction under section 1337B(1) of the Act and the accrued jurisdiction. As the alleged breaches of the Act were said to have occurred in foreign countries, the question for the court was whether the Act, or at least those sections of the Act alleged to have been breached, operate extraterritorially.   As there is a presumption that Acts of Parliament operate territorially, it was necessary to find some evidence of Parliament's intention that sections 180, 181, 182 and 183 of the Act are to apply to acts and omissions which occur outside of Australia.  In the court's view, that intention is found in section 5 of the Act.    The court also referred to the position in the United States of America, where the extraterritorial operation of similar provisions in the securities legislation is justified on the grounds that breaches of duty overseas by officers of a United States corporation may have an adverse effect within the United States.  In the court's view, similar policy considerations apply to Australian corporations and the duties owed by their officers.   Further, the court held that it had jurisdiction in respect of the claims founded on breach of the employment contract and breach of ordinary fiduciary duties by reason of the accrued jurisdiction, which would attach to the primary jurisdiction, which arises under the Act.   On the basis that the applicant is an Australian company and the loss and damage claimed would be suffered in Australia, the court was satisfied that the proceeding falls within Item 12 of the table in O 8 r 2 of the Rules.  The court was also satisfied that the affidavit material relied on by the applicant provided sufficient evidence of a prima facie case when applying the test referred to by French J (as he then was) in *Western Australia v Vetter Trittler Pty Ltd (in liq)* (1991) 30 FCR 102 at 109‑110.   Accordingly, the court held that the provisions of O 8 of the Rules for service out of the jurisdiction were satisfied, subject only to the question of the exercise of the discretion.  The question for the court was whether the court should decline to permit th proceeding to be served out of this jurisdiction, on the grounds that it would be oppressive or vexatious on the part of the applicant to conduct proceedings against the respondent in both Azerbaijan and Australia, or that Australia would be an inconvenient forum within which to litigate the questions of breach of the respondent's statutory duties and breach of his common law duties.   On the first issue, as the relief sought in the Australian proceedings is, on the evidence, not available in the Azerbaijan proceedings, the court held that the co‑existence of local and foreign proceedings is not vexatious or oppressive.  On the second issue, the court held it cannot be said that Australia is clearly an inappropriate forum because there are strong connecting factors to Australia and the Azerbaijan court had declined to exercise jurisdiction in relation to these causes of action.     Accordingly, the court granted leave to serve the proceeding out of the jurisdiction.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.8 Directors duties in relation to matters in which director has a material personal interest**   (By Kane Loxley, Freehills)   Grand Enterprises Pty Ltd v Aurium Resources Limited [2009] FCA 513, Federal Court of Australia, Barker J, 19 May 2009    The full text of this judgment is available at:   [http://www.austlii.edu.au/au/cases/cth/FCA/2009/513.html](http://www.austlii.edu.au/au/cases/cth/FCA/2009/513.html" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   This case considers what constitutes a "material personal interest" in a matter under sections 191 and 195 of the [Corporations Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('Act'). Barker J found that even though the relevant directors had remained present while the board considered a particular matter, they had not breached section 195 as their disclosed interests were not of sufficient substance or value and did not have a realistic capacity or propensity to influence their decision.   **(b) Facts**   The board of directors of Aurium Resources Limited ('Aurium') convened a meeting to consider a proposal to vary a joint venture agreement ('JV Agreement') between Aurium and Greater Pacific Gold Limited ('GPN'). At this meeting, three of Aurium's five directors declared an interest in GPN and therefore the proposed JV Agreement. Mr Peter Remta declared an interest due to the fact that he was chairman of both Aurium and GPN. Mr Terry Quinn declared that he had an indirect shareholding in GPN and Mr Paul Benson declared both direct and indirect shareholdings in GPN.    Messrs Remta, Quinn and Benson remained present at the meeting while the two remaining directors considered the proposal. The two remaining directors resolved to vary the JV Agreement in accordance with the proposal, including the issue of 35 million shares to GPN. The meeting also resolved to give a notice of general meeting ('Notice') and explanatory memorandum ('EM') to shareholders to approve the share issue. The EM disclosed Mr Remta's interest but not Mr Quinn's or Mr Benson's.   During the course of the court proceedings, the shareholders of Aurium approved the share issue.   The plaintiffs, Grand Enterprises Pty Ltd and Meroliza Pty Ltd, sought relief that Aurium not act on the resolution passed at the general meeting on the basis that:  1.  the relevant resolutions passed at the board meeting were invalid because the three directors who had declared an interest at the meeting had, contrary to section 195(1), failed to withdraw from the meeting when the relevant matter was considered; and 2.  by failing to disclose Mr Quinn's or Mr Benson's declared interests in the EM, Aurium had not provided full information on material matters relevant to the resolution proposed at the general meeting.   **(c) Decision**   **(i) Conflict of interest - the validity of the board's resolutions**   Under section 195(1), a director of a public company with a material personal interest in a matter that is being considered at a directors' meeting must not, subject to certain exceptions, vote on, or be present while, the matter is being considered. Despite declaring their respective interests, Messrs Remta, Benson and Quinn remained present at the meeting while the other directors considered the proposal to vary the JV Agreement.   By virtue of section 195(5), which provides that a contravention of section 195(1) does not affect the validity of any resolution made, Barker J rejected the plaintiffs' allegation that the resolutions were invalid.   Notwithstanding that the resolutions would, in any event, remain valid, Barker J considered whether any of the declared interests constituted a "material personal interest" for the purposes of section 191 (which requires a director to notify the other company directors of the interest) and section 195.    With no shareholding in GPN or Aurium, Mr Remta's disclosure was due to a conflict in being chairman of both companies. Barker J found that his interest was subject to the "conflict of interest rule" (as opposed to the "profit rule") at general law. However,  Mr Remta's interest was not a "personal" interest for the purposes of the Act. On the other hand, Barker J regarded any interest arising from Mr Benson and Mr Quinn's shareholdings in GPN and Aurium as being subject to the "profit rule" at general law and capable of constituting a "personal" interest under the Act.   Citing Murray J in *McGellin v Mount King Mining NL* (1998) 144 FLR 288, Barker J held that the assessment of the materiality of a personal interest is to be undertaken not in a general manner but in relation to the specific matter under consideration. On this basis, Barker J distinguished the decision in McGellin where it was held that a company issuing shares to reimburse a director personally meant that director had a material personal interest in the matter.    Conversely, as ordinary shareholders in the companies, the variation to the JV Agreement could only potentially benefit Mr Benson and Mr Quinn if it led to share dividends or an increase in share value. Barker J considered these financial benefits "utterly speculative" and, in any case, available to all shareholders of GPN and Aurium. Barker J found it unrealistic to suggest that either Mr Benson or Mr Quinn had a degree of control such that their interest could be considered a "material" personal interest in a matter relating to the affairs of the company.   Further, Barker J considered that an interest would only be "material" if it was of some substance or value, or in the words of Mason J in Hospital Products v United States Surgical Corporation (1984) 156 CLR 41, not "remote or insubstantial". In this regard, Barker J found the shareholdings of each of Mr Benson and Mr Quinn insubstantial. In relation to Mr Benson's direct shareholding in GPN, representing merely 0.03% of GPN's issued share capital, Barker J considered this interest not to "have a realistic capacity or propensity to influence Mr Benson's decision in the administration of the company's affairs." Similarly, Mr Quinn's interest in a company owning 4.2% of the issued capital of GPN did not make him a "substantial holder" in GPN as defined in section 9 of the Act and in Barker J's opinion, was insufficient to qualify as a "material" personal interest.   In obiter, Barker J contemplated that a "personal" interest might extend to the situation where a director is trustee and the beneficial interest lay with someone else, for example if the trust operates to support the director's family and therefore reduces his or her obligation to provide support from other funds. Barker J also considered that a "personal" interest might be found where the director's position as an executive director of another company involved substantial performance-based remuneration.    His Honour concluded that none of Messrs Remta, Quinn or Benson had a material personal interest obliging them to absent themselves under section 195 or indeed notify the other directors under section 191, notwithstanding that they had done so "out of an abundance of caution in a ritual way".    In any event, a contravention of either section would not have affected the validity of any board resolution, by virtue of sections 195(5) and 191(4).   While the judgment focused upon the "material personal interest" test under the Act, Barker J observed that the directors interests could still amount to a breach at general law or under Aurium's constitution. This was because section 193 stipulates that section 191 is to have effect in addition to, and not in derogation of, the general law and a company's constitution.      Barker J held there to be no breach of general law principles and found that because the relevant clauses of Aurium's constitution depended on the operation of sections 191 and 192, there was no basis for finding any relevant contravention of Aurium's constitution.   **(ii) Disclosures in EM**   The plaintiffs also alleged that the failure to disclose Mr Quinn and Mr Benson's interest in the EM meant that shareholders received insufficient information in order to properly deal with the variation to the JV Agreement at the general meeting.   Given that the financial interests of Mr Quinn and Mr Benson in Aurium and GPN were considered to be insubstantial and remote, Barker J held there was no need for the EM to disclose these interests.   Further, in response to the plaintiffs' allegation that the fact that Mr Benson and Mr Quinn disclosed their interest at the board meeting - regardless of an obligation to do so - meant this interest should have been disclosed to shareholders in the EM, Barker J concluded that this would have resulted in the provision of too much information and would only serve to confuse shareholders.   **(iii) Orders**   The application was dismissed and the plaintiff was ordered to pay the defendant's costs.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.9 When are dividends in arrears?**   (By Megan Trethowan, Blake Dawson)   Trojan Equity Ltd v CMI Ltd [2009] QSC 114, Supreme Court of Queensland, Douglas J, 15 May 2009    The full text of this judgment is available at:   [http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/may/2009qsc114.htm](http://cclsr.law.unimelb.edu.au/judgments/states/qld/2009/may/2009qsc114.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)  **(a) Summary**   The issue in this case was whether the applicant was entitled to vote its shares at a general meeting of the respondent. As a Class A shareholder, the applicant was not entitled to vote its shares except during a period in which a dividend or part of a dividend on Class A shares was in arrears. The Chairman of the respondent denied Class A shareholders the opportunity to vote at a general meeting, on the basis that the dividend was not in arrears. Justice Douglas dismissed the applicant's application, concluding that the dividends could not be in arrears because they had never been payable and never would be payable.     **(b) Facts**   The applicant held approximately three million Class A shares in the respondent, a publicly listed company limited by shares. Under rule 30.16(c) of the respondent's constitution, the applicant was not entitled to vote those shares except during a period in which a dividend or part of a dividend on the Class A shares was in arrears. In this case, the applicant had not been paid dividends since 2007. At the respondent's annual general meeting, the Chairman of the respondent did not permit the holders of Class A shares to vote on the basis that the dividend was not in arrears. The issue for Justice Douglas' determination was whether the dividend was in arrears, so as to entitle the applicant to vote its shares at the general meeting.    Under rule 30.2 of the respondent's constitution, a Class A shareholder's entitlement to a dividend arises quarterly, at a rate determined by the directors, but not less than 14 cents a year. Under rule 30.4, payment of this dividend is subject to the discretion of the directors in declaring the dividend payable and funds being legally available for that payment. Rule 30.5 further provides that if a dividend is not paid because of rule 30.4, Class A shareholders have no claim in respect of such non-payment. However, rule 30.13(a) restricts the respondent from declaring or paying dividends on other classes of shares if a dividend payable to Class A shareholders in any of the four quarterly periods immediately preceding the cash dividend for distribution had not been paid or otherwise satisfied in full.    The respondent submitted that the applicant was not entitled to vote its shares because the dividend on Class A shares was not in arrears; no payment had been declared to be payable, and therefore, no payment was overdue. The respondent submitted that the dividends were properly described as non-cumulative preference shares.    The applicant submitted that it was entitled to vote its shares because the preferential entitlement of Class A shareholders over other classes of shareholders was cumulative for a period of up to four quarters, and the dividend was in arrears simply if it had not been paid.    **(c) Decision**   Justice Douglas dismissed the applicant's application.    Justice Douglas considered the distinction made by the respondent between non-cumulative preference shares and cumulative preference shares. The dividend rights of non-cumulative preference shares lapse if relevant pre-conditions (such as a declaration of dividends) are not satisfied. The dividend rights of cumulative preference shares accumulate over time, whether or not a dividend has been declared. Justice Douglas noted the respondent's submission that the concept of dividends being "in arrears" has never been applied to refer to dividend rights which have simply lapsed because they are non-cumulative in nature.    Justice Douglas considered that where the directors had not declared a dividend to be payable, it was difficult to see how any amount that a Class A shareholder may otherwise have been entitled to could be in arrears. Justice Douglas referred to the strict meaning of "in arrears" adopted by Justice Tomlin in *Coulson v Austin Motors Company Limited*. Justice Tomlin defined "in arrears" as "a sum which had become due and payable and had not been paid". On this interpretation, Justice Douglas did not consider the Class A shareholders to have a claim to dividends in arrears because dividends had never been payable and never would be payable. Justice Douglas rejected the applicant's construction of rule 30.13(a) as requiring the conclusion that undeclared dividends were in arrears.   Justice Douglas considered the applicant's submission that common parlance contained the meaning for the words "in arrears" of "the amount which would have been paid if dividends at the fixed rate had been declared during the period when dividends were passed", but did not consider this to apply to non-cumulative preference shares. Justice Douglas concluded that in essence, rule 30.5 had the effect of making the Class A shares non-preference shares. Justice Douglas held that the authorities, normal use of language and the meaning of the rules of the respondent's constitution were all against treating the dividends as being "in arrears".  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.10 Presumption of insolvency following the appointment of receivers pursuant to a floating charge**   (By Jodene Chia, DLA Phillips Fox)    Australian Securities and Investments Commission v Lanepoint Enterprises Pty Ltd (Receiver and Manager Appointed) (No 2) [2009] FCA 493, Federal Court of Australia, Gilmour J, 14 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca493.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2009/may/2009fca493.htm" \t "_new)   [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The Australian Securities and Investments Commission (ASIC) applied to wind up Lanepoint Enterprises Pty Ltd (Lanepoint) on the basis that Lanepoint was insolvent pursuant to the presumption of insolvency which applies when receivers are appointed under a floating charge in accordance with section 459C(2)(c) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act).   Lanepoint opposed the application on the grounds that it was solvent. By reason of the presumption, Lanepoint bore the onus of establishing its own solvency.   Lanepoint was indebted to its financiers Suncorp Metway Limited (Suncorp) and Westpoint Management Pty Ltd (Westpoint Management) from which it borrowed money in order to undertake the redevelopment of commercial property in Western Australia.   In order to rebut the presumption of insolvency, Lanepoint argued that:   * Lanepoint's receivers would or should retire on receipt of payment easily obtained from the sale of Lanepoint's property. * Lanepoint's assets were available to meet its debts. * The claim of Westpoint Management as a secured creditor was either nil or limited to $750,000, the income tax payable was or would be nil and the only other liability, an inter company liability of $495,000, could be ignored as a demand would not be made.   The threshold issue was the amount of Lanepoint's indebtedness to Westpoint Management, there being a clear dispute between the level of indebtedness  claimed by the liquidator of Westpoint Management and that of Lanepoint, which relied on several transactions that purported to reduce or extinguish the amount of Lanepoint's indebtedness to Westpoint Management.   ASIC claimed that such purported transactions were ineffective and, in the alternative, were liable to be set aside as they were insolvent trading transactions within Part 5.7B of the Act.   Gilmour J held that Lanepoint was unable to pay its debts as they fell due and payable and thereby failed to establish its solvency and rebut the statutory presumption.   On this basis Gilmour J ordered that Lanepoint be wound up in insolvency and that a liquidator be appointed to the company.    **(b) Facts**   Lanepoint was a company within the Westpoint Group, a group of companies that raised finance and undertook building construction projects.   Lanepoint redeveloped the Regency Motel site on the Great Eastern Highway, Rivervale in Western Australia. This was financed, in part, by secured funds obtained from Suncorp and from Westpoint Management, a related or associated company within the Westpoint Group which operated as a managed investment scheme and raised funds from the public for use in relation to Westpoint Group projects.   Suncorp appointed receivers to Lanepoint on 3 March 2006. The Suncorp receivers took possession of the redevelopment, completed it and proceeded to settle contracts for the sale of strata title lots almost completed as part of the first stage of the redevelopment. As at the date of this judgment, the receivers remained appointed. The receivers paid the secured debt owed but await clearance from income tax obligations and a release from anticipated litigation before returning surplus funds to Westpoint Management as the next secured creditor.   Westpoint Management appointed receivers to Lanepoint on 9 March 2006. The Westpoint Management receivers took possession of the balance of unsold property but, as at the date of this judgment, had not yet been able to recover the secured debt.   Since the appointment of receivers, Lanepoint ceased its property development activities. Although Lanepoint sold developed units, it was in the process of selling the balance of its property and had earned income on deposited funds.    Lanepoint had assets amounting to $5,729,837 comprising cash with receivers of $1,280,900, land valued at $3,168,000 and a tax refund held in Lanepoint's solicitor's trust account of $1,280,936.77.   **(c) Decision**   On the issue of Lanepoint's indebtedness to Westpoint Management, Gilmour J found that Lanepoint owed Westpoint Management not less than $6.6 million and was obliged to repay that amount with interest.    In drawing this conclusion his Honour held that the transactions claimed by Lanepoint to have reduced or extinguished such indebtedness were ineffective and could not be relied upon.   His Honour further held that such transactions were insolvent transactions within the meaning of section 588FC of the Act and liable to be set aside at the instance of the liquidator of Westpoint Management.    As to the general issue of Lanepoint's solvency, Gilmour J referred to earlier authority confirming that commercial solvency of a company is not proved by merely looking at its accounts and making a mechanical comparison of its assets and liabilities. Insolvency is a question of fact falling to be decided as a matter of commercial reality in light of all the circumstances with things being viewed as it would be by someone operating in a practical business environment.   On the facts, Gilmour J held that Lanepoint failed to establish its solvency and rebut the statutory presumption and was not able to pay its debts as they fell due and payable. His Honour's decision was based on the following:   * There was a significant shortfall in assets to pay liabilities - the amount owed to Westpoint Management alone exceeded Lanepoint's total assets. * In view of the fact that Lanepoint had not traded since the appointment of receivers it had insufficient recurrent income, which was in the nature of interest earned, to pay its secured and unsecured liabilities. * Lanepoint's debts to the secured creditors were due and payable and had not been paid. * Until the retirement of the receiver appointed by Suncorp, which would not likely occur until released by the company directors and the Australian Taxation Office, the cash held by Suncorp would not be available for the payment of Lanepoint's debts as they fell due. * The value of the remaining Lanepoint real estate was insufficient to meet the liability to Westpoint Management. Until the retirement of the receiver appointed by Westpoint Management, which would not likely occur until its liability was paid, the property held by Lanepoint was not available to pay Lanepoint's debts as they fell due.   Accordingly, Gilmour J ordered that Lanepoint be wound up in insolvency and that a liquidator be appointed to the company.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.11 Reinstatement of company - validating orders sought**   (By Kathryn Finlayson, Minter Ellison)  In the matter of Datatech Communications (Aust) Pty Ltd [2009] NSWSC 402, Supreme Court of New South Wales, Barrett J, 14 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc402.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc402.htm" \t "_new)   or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   The court's power to validate under section 601AH(3) was only available in circumstances where the court reinstated the registration of a company pursuant to section 601AH(2).    In circumstances where reinstatement was effected under section 601AH(1), a company can only rely on the protection afforded by section 601AH(5).   **(b) Facts**   The first plaintiff, Datatech Communications (Aust) Pty Ltd was registered on 21 May 1993 under the Corporations Law of Queensland.  The second plaintiff was the first plaintiff's sole director.   On or about 16 May 2004, the Australian Securities and Investments Commission (ASIC) deregistered the applicant apparently pursuant to section 601AB of the Corporations Act 2001 (Cth).     On 11 February 2009, ASIC wrote to the second plaintiff stating that it had reinstated the first plaintiff to the register on that date. The first and second plaintiffs commenced proceedings seeking the following orders:   * An order to validate the reinstatement of the first plaintiff by ASIC on 19 February 2009 pursuant to section 601AH(1) of the [Corporations Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). * An order to reinstate the first plaintiff pursuant to section 601AH(2) of the Corporations Act 2001, endorsing ASIC's reinstatement of the first plaintiff on 11 February 2009. * An order to validate anything done by the first plaintiff and second plaintiff or any other officer of the first plaintiff between the deregistration of the first plaintiff and its reinstatement.   **(c) Decision**   In relation to the first order sought, Justice Barrett held that ASIC had exercised its power under section 601AH(1) and the reinstatement of the first plaintiff's registration was regularly and properly made and was complete.  His Honour did not decide whether the court had power to validate ASIC's action, but noted that in any event no need or occasion for validation had been demonstrated.   In relation to the second order sought, Justice Barrett held that the power to reinstate registration of a company under section 601AH(2) was not available to be exercised by the court as the first plaintiff's registration had been reinstated by ASIC.     In relation to the third order sought, Justice Barrett held that the court had no power to make the order because the reinstatement of the plaintiff occurred pursuant to section 601AH(1).  In his Honour's view, the court's power under section 601AH(3) was only available in circumstances where the court reinstated the registration of a company pursuant to section 601AH(2).  As reinstatement had been effected under section 601AH(1), the plaintiffs could only rely on the protection afforded by section 601AH(5).  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.12 Inappropriate use of the statutory demand regime - genuine dispute and the prevention of abuse of process**   (By Tim Hall, Mallesons Stephen Jaques)   Createc Pty Ltd v Design Signs Pty Ltd [2009] WASCA 85, Supreme Court of Western Australia, Court of Appeal, Martin CJ, Owen and Miller JJA, 12 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/may/2009wasca85.htm](http://cclsr.law.unimelb.edu.au/judgments/states/wa/2009/may/2009wasca85.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)   **(a) Summary**   The matter involved an appeal from a decision of the Supreme Court of WA to uphold an application under section 459G of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ("the Act") to set aside a statutory demand for payment of a debt served on Design Signs Pty Ltd ("Design Signs") by Createc Pty Ltd ("Createc").   Section 459H of the Act provides that a court may set aside a statutory demand where there is a genuine dispute about the existence (or amount) of the debt claimed, or where there is a sufficient offsetting claim or claims against the amount of the debt claimed.   Createc issued a statutory demand to Design Signs for payment of a debt ostensibly due for the supply of a commercial printer.  Design Signs disputed the nature of the debt on the basis, inter alia, that the machine was not fit for the purpose for which it was acquired.   The court held that the appeal should be dismissed because:   * there was a genuine dispute over the debt that was the substance of the statutory demand, and there may have been an offsetting claim exceeding the amount of the debt; * the function of the court in assessing an application to set aside a statutory demand is to determine whether there is a genuine dispute, and not to resolve the dispute; and * to make a statutory demand under Part 5.4 of the Act where (i) the debtor's solvency is not questionable, (ii) the creditor has knowledge that the debtor disputes the nature of the debt, and (iii) the demand has been made as a commercial tactic to compel payment of an obligation, is an abuse of process which the court may restrain.   **(b) Facts**   Design was (and remains) a printing company based in Western Australia.  Createc was (and remains) a company that operates throughout Australia selling printers and printing supplies and providing related services.   **(i) October 2007 - the purchase of a printer**   In October 2007, Design Signs was seeking a new printer and their preferred model was the Colorspan UVX 98 printer ("UVX Printer"). Createc advised Design Signs that they had a UVX Printer to sell and that the particular printer had been used solely for demonstration purposes at Createc's Melbourne office.   Createc provided Design Signs with a brochure which made certain representations and claims about the capabilities, efficiency and quality of UVX Printers generally.  Design Signs provided affidavit evidence that Createc had made further representations regarding the quality and capabilities of the specific printer that was to be sold.   Design Signs agreed to the purchase and Createc provided an invoice (made out to Design Signs' bank) for the UVX Printer, together with a 12 month warranty and full technical support.   **(ii) November and December 2007 - the UVX Printer fails to work**   The UVX Printer was delivered to Design Signs on 6 November 2007.  However, Createc did not press Design Signs for payment.  Throughout November and December 2007, technicians employed by Createc tried to install and improve the printer, however it continued to perform below expectations and Design Signs could not use it to produce commercial signs.   On 5 December 2007 Design Signs requested that Createc remove the UVX Printer from their premises.   **(iii) January 2008 - the dispute begins**   By 14 January 2008 Design Signs had not paid for the UVX Printer. Createc offered to exchange the UVX Printer for a similar printer, however Design Signs deemed the replacement to be inadequate.   The following events took place in 2008 with regard to the statutory demand for the invoiced amount:   * 15 January: Internal communications between Createc's employees noted that there was a dispute about the quality of the UVX Printer and that a "legal fight" was a possibility; * 21 January: Createc sent Design Signs a demand for payment.  Design Signs responded that the UVX Printer was not working and it would not pay for it; * 31 January: Createc's solicitors sent a letter to Design Signs demanding payment; * 7 February: Design Signs' solicitors responded, inter alia, that the UVX Printer was not fit for the purpose for which it was bought.  Further, Design Signs had incurred costs in installing the printer.  Any proceedings would be "vigorously defended" and would involve a counterclaim against Createc; * 28 February: Createc's solicitors issued the statutory demand under section 459E of the Act; and * 4 March: Design Signs' solicitors advised Createc's solicitors that the claimed debt was "strongly disputed".  As Createc's solicitors refused to withdraw the demand, Design Signs' solicitors made the application to set aside the demand under section 459G of the Act.   **(c) Decision**   Chief Justice Martin, with whom Justices of Appeal Owen and Miller agreed, held that there was a genuine dispute regarding the debt claimed in the statutory demand, and the appeal was dismissed.   **(i) Genuine dispute - requirement for a "plausible contention requiring investigation"**   The standard to be met when applying to set aside a statutory demand due to a genuine dispute about the debt is that of a "plausible contention requiring investigation", similar to the standard applied for interlocutory injunctions (that of a "serious question to be tried") (McLelland CJ in Eq in Eyota Pty Ltd v Hanave Pty Ltd (1994) 12 ASCR 785 followed).  The court need not devote consideration to the merits of the dispute or the proving of the debt.   Chief Justice Martin found that: "Any reasonable person would appreciate. that where a prospective acquirer of goods makes known to the supplier of those goods the purpose for which they are required, and the goods supplied are not fit for that purpose, there will be grounds for a dispute as to payment of the purchase price."   The circumstances of the case, and the wording of communications between the parties showed the existence of a genuine dispute regarding the debt.   **(ii) Abuse of process occurs where a company uses a statutory demand to compel payment**   Chief Justice Martin referred to a long and established line of precedent, including the view of the High Court in Williams v Spautz [1992] HCA 34 referred to by Justice Gummow in David Grant and Co Pty Ltd v Westpac Banking Corp [1995] HCA 43, to the effect that:   ".there will be an abuse of process if the purpose of the party issuing the statutory demand is not the purpose of pursuing the statutory demand to wind up the company on the ground of insolvency, but rather to use the process as a means of obtaining advantage for which the process is not designed .such as the application of pressure to compel payment of the disputed debt."   Createc's employees' appreciation of the potential for a "legal fight" coupled with the language in Design Signs' letters that any proceedings would be "vigorously defended" evinced a genuine dispute over the claimed debt.  Chief Justice Martin considered that Createc had decided not to bring an action to prove the debt, and chose instead to issue the statutory demand to avoid a legal dispute and place pressure on Design Signs to pay for the UVX Printer.  This was an improper and collateral purpose, and gave rise to an abuse of process.   Finally, his Honour drew attention to the irony that by issuing the statutory demand and pursuing it on appeal, Createc had extended the process of recovery or settlement beyond the time it would have taken had the company originally chosen to prove the debt and recover it outside the statutory demand process.  A tactic conceived for expedience had produced the contrary effect.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5)  **5.13 Conflict of duties in the context of applying for leave to bring proceedings on behalf of a company under section 237 of the Corporations Act**   (By Audrius Skeivys, Blake Dawson)   Transmetro Corp Ltd v Kol Tov Pty Ltd [2009] NSWSC 350, New South Wales Supreme Court, Barrett J, 5 May 2009   The full text of this judgment is available at:  [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc350.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2009/may/2009nswsc350.htm" \t "_new)  or  [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp" \t "_new)    **(a) Summary**   This decision concerned an application under section 237 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (Corporations Act) made by Mr McEvoy (McEvoy) for leave to bring proceedings by way of a second cross-claim in an existing suit on behalf of two companies, Kol Tov Pty Limited (KT) and Kol Tov Operations Pty Limited (KTO).   As a director of KT, as well as managing director of the defendant companies in the existing suit, Metro Hotel Sydney Pty Ltd (Metro) and Transmetro Corporation Limited (Transmetro), McEvoy was in fundamental conflict with his duties as a director of Transmetro and Metro in applying to bring proceedings on behalf of KT and KTO.     The application was therefore not in the best interests of KT and KTO for the purposes of section 237(2)(c) of the Corporations Act and the application was dismissed with costs.   **(b) Facts**   In November 2007, Metro and Transmetro commenced proceedings against KT, KTO and a director of KT and KTO, alleging that KTO had not validly terminated a management agreement between KTO, Metro, KT and Transmetro, under which KTO appointed Metro to manage a hotel for a period of 10 years.  Under an existing cross-claim, KTO sought a declaration that it had validly terminated the management agreement.   Under a proposed second cross-claim, McEvoy sought to bring an action on behalf of KT and KTO against three directors of KT and KTO, claiming that these directors had breached their duties to KT and KTO by seeking to have KTO terminate the management agreement and to oust Metro as manager, so that Aspen Hotels Management Pty Ltd (Aspen) a company in which these directors had financial interests might become the manager of the hotel in place of Metro.   McEvoy was a director of KT but not KTO.  McEvoy was also the managing director of Transmetro and Metro.   **(c) Decision**   As member and a director of KT, McEvoy had standing under sections 236(1)(a)(i) and 236(1)(a)(ii) to bring the application on behalf of KT and KTO.  However, the key question considered by the Court was whether the proposed proceedings were in the best interests of KT and KTO, such that McEvoy should be granted leave in accordance with section 237(2)(c).  Section 237(2)(c) provides that "The court must grant the application if it is satisfied that . it is in the best interests of the company that the applicant be granted leave".   As managing director of Transmetro and Metro, McEvoy had a duty to see that the principal claims of Transmetro and Metro were duly and properly prosecuted and to therefore pursue the allegation that the management agreement was not validly terminated by KTO and remained on foot for the benefit of Metro.  However, by bringing the claim on behalf of KT and KTO, McEvoy would also be bound to contend that the management agreement had been validly terminated.   Integral to the section 237 inquiry is the question whether it is in the "best interests" of the company that the proceedings should be brought on behalf of the company by the particular person who seeks leave.  Referring to *Chahwan v Euphoric Pty Ltd* [2008] NSWCA 52, Barrett J considered that the position occupied, in the whole of the context of the litigation, by the applicant for section 237 leave may have a significant bearing on the section 237(2)(c) question whether it is in the best interests of the company that that applicant be granted leave.   Barrett J held that the inconsistency between the two propositions for which McEvoy would be compelled to contend was so stark that it was simply not feasible for him to play both roles.  The existence of the duties McEvoy owed to Transmetro and Metro meant that McEvoy was under equitable constraints forbidding him from pursuing on behalf of KT and KTO the case that would need to be made out for the proposed second cross-claim to succeed.  Therefore, Barrett J dismissed the application to bring the second cross-claim with costs.   While the cross-claim was dismissed, the court stated that it may be, at some point, in the best interests of KT and KTO for the three directors to be sued as McEvoy envisaged.  However, this would logically happen, if at all, once it was seen that the management agreement was validly terminated and Aspen in reality derived the benefit of becoming the manager of the hotel in place of Metro.  [etailed Contents](file:///localhost/C:/Documents%20and%20Settings/petersj/Local%20Settings/Temporary%20Internet%20Files/OLK1F/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009.htm%23h5) | |  |  |  |  |  | | --- | --- | --- | --- | | |  |  |  | | --- | --- | --- | | **6. Contributions** |  |  | | | http://www.law.unimelb.edu.au/bulletins/SAI-Global-old-editions/SAI%20Global%20Corporate%20Law%20Bulletin%20No%20142%20June%202009_files/spacer%281%29.gif | | |  | | --- | | 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)".  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