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| **Bulletin No. 126**Editor: Professor Ian Ramsay, Director, Centre for Corporate Law and Securities Regulation Published by Lawlex on behalf of [Centre for Corporate Law and Securities Regulation](http://cclsr.law.unimelb.edu.au/%22%20%5Ct%20%22_new), Faculty of Law, the University of Melbourne with the support of the [Australian Securities and Investments Commission](http://www.asic.gov.au/%22%20%5Ct%20%22_new), the [Australian Securities Exchange](http://www.asx.com.au/%22%20%5Ct%20%22_new) and the leading law firms: [Blake Dawson Waldron](http://www.bdw.com.au/%22%20%5Ct%20%22_new), [Clayton Utz](http://www.claytonutz.com/%22%20%5Ct%20%22_new), [Corrs Chambers Westgarth](http://www.corrs.com.au/%22%20%5Ct%20%22_new), [DLA Phillips Fox](http://www.dlaphillipsfox.com/%22%20%5Ct%20%22_new), [Freehills](http://www.freehills.com/%22%20%5Ct%20%22_new), [Mallesons Stephen Jaques](http://www.mallesons.com/%22%20%5Ct%20%22_new).1. [Recent Corporate Law and Corporate Governance Developments](http://www.law.unimelb.edu.au/bulletins/LAWLEX-old-editions/LAWLEX%20Corporate%20Law%20Bulletin%20No.%20126-%20February%202008.htm#h1)
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| **1. Recent Corporate Law and Corporate Governance Developments**  |  |  |

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| **1.1 Seminar - Directors' Duties: Navigating the Storm on Board - Melbourne and Sydney** Directors' duties have recently been the subject of extensive media and regulatory scrutiny. High-profile transactions have highlighted difficult issues for directors, and ASIC enforcement actions against executive and non-executive directors have brought issues of liability to the fore. This seminar brings together eminent speakers to discuss topical issues in directors' duties, from the perspectives both of directors and of their legal advisers. These include:* The standard of care applicable to a director occupying a special position, such as the chair of a board committee:  is it higher than that of other directors?
* Directors' duties in the context of management buyouts: what protocols should directors follow when management presents a buyout offer?

The seminar will be convened by Professor Ian Ramsay, Director of the Centre for Corporation Law & Securities Regulation at The University of Melbourne.Speakers for the Melbourne seminar are: Sir Rod Eddington, Bob Baxt AO, Alison Lansley and Jon Webster. Speakers for the Sydney seminar are: Alan Cameron AM, David Gonsky AC, Tim Bednall and Stuart McCulloch.  The seminar is being held in Melbourne on 19 March 2008 and Sydney on 1 May 2008, 5.30pm to 7.15pm.  Further information is available at: [http://cclsr.law.unimelb.edu.au/go/news/index.cfm](http://cclsr.law.unimelb.edu.au/go/news/index.cfm%22%20%5Ct%20%22_new).etailed Contents**1.2 Australian Government releases principles on foreign government related investment in Australia**  On 17 February 2008, the Australian Treasurer released a set of principles to guide consideration of proposed investments by foreign governments and their agencies in Australia.  The Australian Government is obliged under the [Foreign Acquisitions and Takeovers Act 1975 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6803" \t "Default) to determine whether proposed foreign acquisitions are consistent with Australia's national interest. The Principles Guiding Consideration of Foreign Government Related Investment in Australia set out the additional factors that need to be considered in relation to investment proposals by foreign governments and their agencies over and above those that apply to normal private sector proposals. In examining proposed investments by foreign governments and their agencies, the Australian Government will typically have regard to the following six issues: **(a) An investor's operations are independent from the relevant foreign government** In considering issues relating to independence, the Government will focus on the extent to which the prospective foreign investor operates at arm's length from the relevant government.It also considers whether the prospective investor's governance arrangements could facilitate actual or potential control by a foreign government (including through the investor's funding arrangements). Where the investor has been partly privatised, the Government would consider the size and composition of any non‑government interests, including any restrictions on governance rights.**(b) An investor is subject to and adheres to the law and observes common standards of business behaviour**To this end, the Government considers the extent to which the investor has clear commercial objectives and has been subject to adequate and transparent regulation and supervision in other jurisdictions. The Government will examine the corporate governance practices of foreign government investors. In the case of a sovereign wealth fund, the Government would also consider the fund's investment policy and how it proposes to exercise voting power in relation to Australian companies. Proposals by foreign government owned or controlled investors that operate on a transparent and commercial basis are less likely to raise additional national interest concerns than proposals from those that do not. **(c) An investment may hinder competition or lead to undue concentration or control in the industry or sectors concerned**These issues are also examined by the Australian Competition and Consumer Commission in accordance with Australia's competition policy regime.  **(d) An investment may impact on Australian Government revenue or other policies**For example, investments by foreign government entities must be taxed on the same basis as operations by other commercial entities. They must also be consistent with the Government's objectives in relation to matters such as the environment. **(e) An investment may impact on Australia's national security**The Government would consider the extent to which investments might affect Australia's ability to protect its strategic and security interests.**(f) An investment may impact on the operations and directions of an Australian business as well as its contribution to the Australian economy and broader community**The Government would consider any plans by an acquiring entity to restructure an Australian business following its acquisition. Key interests would include impacts on imports, exports, local processing of materials, research and development and industrial relations.  The Government would also consider the extent of Australian participation in ownership, control and management of an enterprise that would remain after a foreign investment, including the interests of employees, creditors and other stakeholders. The Principles Guiding Consideration of Foreign Government Related Investment in Australia are available on the [Australian Treasurer's](http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/009.htm&pageID=003&min=wms&Year=&DocType" \t "_new) website. etailed Contents**1.3 SEC launches online tool to make analysing corporate performance easier for investors** On 15 February 2008, the US Securities and Exchange Commission (SEC) announced the launch of an online tool that will help investors quickly and easily analyse the financial results of public companies. 'Financial Explorer' provides information on corporate financial performance with diagrams and charts, using financial information provided to the SEC as 'interactive data' in eXtensible Business Reporting Language (XBRL).  Financial Explorer lets investors automatically generate financial ratios, graphs, and charts depicting important information from financial statements. Information including earnings, expenses, cash flows, assets, and liabilities can be analysed and compared across competing public companies.  XBRL data can give investors nearly real-time access to the complete and actual data reported by companies under USGenerally Accepted Accounting Principles. Financial Explorer is part of the SEC's interactive data initiative, which is designed to make financial information more accessible, more understandable, and more useful to investors.  The Financial Explorer is available on the [SEC](http://www.sec.gov/xbrl%22%20%5Ct%20%22_new) website.etailed Contents**1.4 Reforms to arrangements for reviewing prudential decisions introduced into Parliament** On 13 February 2008, the Australian Government introduced the [Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=100309" \t "Default) into Parliament. The Bill contains a package of reforms to arrangements for reviewing administrative decisions of the Australian Prudential Regulation Authority (APRA). It amends financial sector legislation to ensure that individuals and entities can seek appropriate review of APRA's decisions, while ensuring that APRA is still able to act decisively to address prudential risks. The measures include:* the introduction of a court‑based process for disqualifying an individual from operating an entity regulated by APRA;
* enhanced flexibility and consistency through streamlined directions powers;
* removal of the requirement for ministerial consent for certain APRA decisions which do not involve broader policy issues; and
* an expansion of the availability of merits review for APRA decisions.

The measures are a response to recommendations of the HIH Royal Commission, the Taskforce on Reducing Regulatory Burdens on Business and the IMF's 2006 Financial Sector Assessment of Australia. The Financial Sector Legislation Amendment (Review of Prudential Decisions) Bill 2008 amends the [Banking Act 1959](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6665" \t "Default), [Insurance Act 1973](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6398" \t "Default), [Life Insurance Act 1995](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6638" \t "Default) and [Superannuation Industry (Supervision) Act 1993](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6785" \t "Default), the [Retirement Savings Accounts Act 1997](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6652" \t "Default) and the [Financial Sector (Collection of Data) Act 2001](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=57996" \t "Default).The Bill and the Explanatory Memorandum are available on the [Australian Parliamentary](http://parlinfoweb.aph.gov.au/piweb/browse.aspx?path=Legislation%20%3e%20Current%20Bills%20by%20Title%20%3e%20Financial%20Sector%20Legislation%20Amendment%20%28Review%20of%20Prudential%20Decisions%29%20Bill%202008" \t "_new) website.etailed Contents**1.5 Cross-Border Insolvency Bill introduced into Parliament**On 13 February 2008, the Minister for Superannuation and Corporate Law, Senator Nick Sherry, introduced the [Cross‑Border Insolvency Bill 2008](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=100308" \t "Default) into Parliament. The Bill addresses issues arising when an insolvent debtor has assets and/or creditors in more than one country, and gives effect to the Model Law on Cross‑Border Insolvency developed by the United Nations Commission on International Trade Law. The Cross-Border Insolvency Bill would:* encourage cooperation between courts and insolvency practitioners of different jurisdictions;
* clarify the rights of foreign creditors to participate in Australian insolvency proceedings; and
* allow for the coordination of insolvency proceedings across jurisdictions.

Other States that have adopted the Model Law include the United Kingdom, Japan, New Zealand, South Africa and the United States of America.The Bill and the Explanatory Memorandum are available on the [Australian Parliamentary](http://www.aph.gov.au/bills/index.htm%22%20%5Ct%20%22_new) website. etailed Contents**1.6 SEC votes to propose all-electronic disclosure for foreign issuers** On 13 February 2008, the US Securities and Exchange Commission (SEC) unanimously voted to propose amendments to modernise its disclosure requirements for foreign companies, including eliminating all requirements for paper submissions. Many of the proposed SEC rule changes are designed to update the Commission's rules, reflect advancements in technology, and respond to the increasing globalisation of capital. One set of proposals, known as the Foreign Issuer Reporting Enhancements, would update Exchange Act filing requirements and enhance disclosure required by foreign private issuers in response to changes in foreign filing requirements, market practices, and other areas of the Commission's regulation. Another proposal would amend Exchange Act Rule 12g3-2(b), which exempts a foreign private issuer from having to register a class of equity securities under Section 12(g) of the Exchange Act based on the submission to the Commission of certain information published outside the United States, in order to reflect advances in technology and other recent global changes. The proposals are available on the [SEC](http://www.sec.gov/news/press/2008/2008-20.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.7 SEC proposes plain English narrative disclosure by investment advisers to investors**On 13 February 2008, the US Securities and Exchange Commission (SEC) voted unanimously to propose rule amendments requiring investment advisers to prepare and deliver to clients and prospective clients a narrative brochure written in plain English.Brochures would be made available to the general public through the SEC sponsored Investment Adviser Public Disclosure Web site. The narrative would publicly disclose to investors more detailed information about an investment adviser's business practices, conflicts of interest, and disciplinary history.The Commission is proposing amendments to Part 2 of Form ADV, the adviser brochure, and related rules under the Investment Advisers Act of 1940. If adopted, more than 10,000 investment advisers registered with the SEC would be required to provide clear, current, and meaningful disclosure in narrative form to nearly 20 million advisory clients.Most advisers currently use a check-the-box, fill-in-the-blank form for their brochures. The plain English narrative brochure being proposed by the SEC would provide investors with more detailed information about an adviser's business practices, including the types of advisory services they provide, fees they charge, and the risks that clients can anticipate. The narrative also would disclose the disciplinary history of an investment adviser including any violation of the securities laws, as well as conflicts of interest such as the use of affiliates to execute transactions, the use of client brokerage to obtain 'soft dollars benefits', and the adviser's interests in certain transactions.The SEC proposal also would address developing areas of concern, including conflicts of interest arising from the side-by-side management of clients who pay performance fees (such as hedge funds) and those who do not; conflicts of interest arising from an adviser's receipt of compensation from issuers of financial products the adviser recommends to clients; and qualifications of a firm's employees who give advice to clients.etailed Contents**1.8 CESR launches consultation on the role of credit rating agencies in structured finance** On 13 February 2008, the Committee of European Securities Regulations (CESR) published a consultation paper entitled 'The Role of Credit Rating Agencies in Structured Finance'. The paper follows the European Commission's request for CESR to review several aspects of the rating process regarding structured finance instruments. The consultation paper seeks market participants' views on the main issues included in the European Commission's request. The consultation paper covers the following areas in relation to structured finance:* Transparency of rating processes and methodologies: In particular the consultation focuses on the ease of investor access to information on key limitations and assumptions in complex structured finance methodologies. The paper also seeks opinions on the procedures followed by the credit rating agencies (CRAs) when applying changes to their methodologies, for example, on the need for clear disclosure to investors of which methodology a rating is based on.
* Monitoring of rating performance: CESR seeks views on the need for regular public disclosure of structured finance rating performance and the need for CRAs to maintain sufficient resource and organisational flexibility to act promptly in reviewing structured finance ratings.
* CRA staff resourcing: The consultation seeks market participants views on the whether CRAs were adequately resourced for the volume and complexity of structured finance ratings they were producing and whether there needs to be more transparency from the CRAs over their resourcing and levels of staff experience. In addition, CESR asks market participants in their consultation paper, whether they agree that more clarity and greater independence is desirable for analyst remuneration at the CRAs.
* Conflicts of interest: The key focus of the consultation is on whether the nature of CRA interaction with issuers during the structured finance presents additional, unmanaged or poorly managed conflicts of interest leading to reduced rating integrity; whether the CRAs' activities constitute advisory activity in this area; whether some of the ancillary services offered may lead to potential conflicts of interest and whether greater disclosure is required on the fees CRAs earn from structured finance activity as a result of the "issuer pays" model and the specific "success" fee structure for this activity.

The paper remains open regarding the possible policy options, setting out the costs and benefits associated with the current self-regulatory approach and with any regulatory regime. CESR's final report will also include an assessment of the rating agencies' progress in implementing the IOSCO code. This will be the second year of review of the rating agencies' codes of conduct under CESR's voluntary framework.  The CESR expects the final report to be submitted to European Commission and published on the CESR website in mid May 2008. The consultation paper is available on the [CESR](http://www.cesr-eu.org/index.php?page=groups&mac=0&id=43" \t "_new) website.etailed Contents**1.9 The European Commission publishes new research on investment policies of UCITS funds**On 12 February 2008, the European Commission published new research on European investment funds. The study, 'Investment Funds in the European Union: Comparative Analysis of Use of Investment Powers, Investment Outcomes and Related Risk Features in Both UCITS and Non-harmonised Markets', will feed into the Commission's reflections and preparatory work for the forthcoming communication on non-harmonised investment funds to be published in autumn 2008. The study will be one of the items discussed at an open hearing on non-harmonised retail funds and real estate funds that the Commission will organise in Brussels on 8 April 2008. The study surveys the investment outcomes (performance and related risks) of UCITS and non-UCITS funds over the five past years. UCITS III Directive (which entered into force in 2004) allowed UCITS fund managers to invest in a much wider range of eligible assets, to invest in derivates for hedging and leveraging purposes, and to pursue new types of investment strategy (index-based investing, fund of fund strategies). The study takes stock of how UCITS managers have used these new investment possibilities.  The study finds that a large number of UCITS funds have started to invest in derivatives. Intensive use of derivatives is confined to a small subset of UCITS funds. Generally, UCITS tend to use derivatives more intensively than non-harmonised fund managers who either do not use leverage, or have recourse to other methods to leverage fund performance (borrowing, short selling). UCITS funds making intensive use of derivatives do not exhibit a higher level of market risk in comparison with other surveyed funds. The current UCITS framework is judged by fund managers to provide a high level of flexibility in terms of investment powers.  The study examines the risks associated with the use of enlarged investment powers such as leverage risk, valuation risk, liquidity risk and counterparty risk. The survey finds that fund managers develop strong risk management procedures before launching new, more complex products. Asset managers consider the suitability of their funds for retail investors as well as the risk management process they need before launching such funds..  This study represents one input to a report that the Commission will publish in autumn 2008. That Commission report will take stock of the European market for retail investment funds - both those accommodated within the UCITS framework and those currently excluded.  The study is available on the [Europa](http://ec.europa.eu/internal_market/investment/other_docs/index_en.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.10 APRA releases Basel II reporting requirements** On 6 February 2008, the Australian Prudential Regulation Authority (APRA) released its reporting requirements for authorised deposit-taking institutions (ADIs) under the new Basel II capital adequacy regime, known as the Basel II Framework (the Framework). The reporting requirements have been finalised after consultation with industry and other interested parties. They deal with the calculation of minimum regulatory capital for credit risk, market risk, operational risk and, for ADIs approved by APRA to use the Basel II advanced approaches, interest rate risk in the banking book. APRA also released a response paper that addresses issues raised in submissions on the draft reporting proposals put out in September 2007. The majority of ADIs in Australia use the standardised approaches available under the Framework. The reporting requirements for these ADIs broadly replicate the previous capital reporting requirements, with some additions in areas such as operational risk and securitisation. For ADIs approved by APRA to adopt the Basel II advanced approaches, the bulk of the reporting requirements are new. The full suite of Basel II reporting standards comes into effect on 1 April 2008 and the first submission of data will cover the period 1 January 2008 to 31 March 2008. The suite of reporting standards, forms and instructions and the response paper is available on the [APRA](http://www.apra.gov.au/ADI/Basel-II-implementation-in-Australia.cfm%22%20%5Ct%20%22_new) website.etailed Contents**1.11 European Commission and the US Securities and Exchange Commission make progress towards mutual recognition in securities markets** On 1 February 2008, the US Securities and Exchange Commission (SEC) Chairman Christopher Cox and the European Commissioner for the Internal Market and Services Charlie McCreevy agreed that the goals of a mutual recognition arrangement would be to increase transatlantic market efficiency and liquidity while enhancing investor protection. An EU-US mutual recognition arrangement for securities would have the potential to facilitate access of EU and US investors to a broader and deeper transatlantic market, increase the availability of information about foreign investment opportunities, promote greater diversification of securities portfolios, significantly reduce transatlantic trading and transaction costs, and increase oversight coordination among regulators. As a first step, SEC and European Commission staff, assisted by the Committee of European Securities Regulators, would need to develop a framework for mutual recognition discussions. The mutual recognition process will also require consideration of a fair and orderly methodology for initiating discussions with the EU and interested Member States, taking into account limitations on resources available for carrying out the relevant assessments. Without prejudice to their respective domestic processes, Chairman Cox and Commissioner McCreevy jointly mandated their respective staffs to intensify work on a possible framework for EU-US mutual recognition for securities in 2008. Commissioner McCreevy and Chairman Cox agreed to work closely together during 2008 to review overall progress. In addition, SEC and European Commission officials and CESR staff plan to hold regular technical meetings over the year to begin to develop a mutual recognition framework.etailed Contents**1.12 SEC commences study on the costs and benefits of s404 of the Sabanes-Oxley Act for small business** On 1 February 2008, the US Securities and Exchange Commission (SEC) announced that it had commenced a cost-benefit study of an upcoming auditor attestation requirement for smaller companies under Section 404(b) of the Sarbanes-Oxley Act of 2002. The study will collect and analyse extensive 'real world' cost and benefit data from a broad array of companies currently complying with Section 404 under newly-issued guidance for companies and auditors. The new guidance for management and the new auditing standard were intended to reduce the compliance costs of Section 404 while strengthening its focus on material controls. In addition to assessing the Section 404 cost reductions resulting from the Commission's recent actions, the final report also will inform any decision to improve the efficiency and effectiveness of Section 404 implementation. In connection with the study, the four-member Commission unanimously proposed the one-year extension of the Section 404(b) auditor attestation requirement for smaller companies that SEC Chairman Christopher Cox had previously announced in testimony before the House Small Business Committee in December 2007. The postponement would allow time for completion of the study. Under the proposed extension, the Section 404(b) requirements would apply to smaller public companies beginning with fiscal years ending on or after 15 December 2009.According to the SEC, the study will give the Commission the opportunity to ensure that the investor protections of Section 404 are implemented in the way that Congress intended, and do not impose unnecessary or disproportionate burdens on smaller companies.The Commission's proposal to extend the Section 404(b) compliance date for smaller companies is the latest in a series of recent efforts to help reduce unnecessary costs of compliance for smaller companies, without diminishing important investor protections.Section 404 has two provisions: 404(a) requires company management to assess the effectiveness of the company's internal controls over financial reporting, while 404(b) requires an auditor attestation on management's assessment. Larger companies, representing more than 95 percent of the market capitalization of US equity securities markets, have been subject to both provisions since 2004, but with significantly higher costs than were projected when the SEC's original rules implementing Sarbanes-Oxley were adopted.To reduce Section 404 costs while preserving its benefits, the SEC last year issued new guidance for management's Section 404 assessment. The guidance helps companies focus their reviews on the internal control issues that matter most to investors. Companies of all sizes, including smaller companies, will file their first 404(a) reports using the Commission's guidance this year.At the same time, the Commission and the Public Company Accounting Oversight Board voted unanimously to replace the standard for the 404(b) auditor attestation, which is intended to make the process more efficient. Larger companies are now filing their first 404(b) reports under the new audit standard.The SEC's study will consist of two main parts: a web-based survey of companies that are subject to section 404; and in-depth interviews with companies that are just now becoming compliant. The dual approach will enable the Commission to gather data from a large cross-section of companies and analyze more detailed information about what drives costs and where companies and investors derive the benefits.etailed Contents**1.13 Survey of executive opinion on climate change**  On 30 January 2008, Pricewaterhouse Coopers (PwC) released a report detailing Australian business leaders' views on climate change. The report 'Carbon Countdown', presents findings of a survey conducted in November 2007 of CEO's and CFO's from 303 major Australian companies, with turnovers greater than A$150 million.  Key findings of the survey include:* Over 80 per cent of respondents agree that business should take an active role in responding to climate change and expressed a strong desire for more information about how to respond.
* Many respondents are worried about compliance requirements with the impending regulations, with 67 per cent saying they were concerned or unsure what their obligations were. Only 2 per cent of the surveyed business leaders expressed a high level of confidence in the greenhouse gas (GHG) emissions data they had, while as many as 36 per cent had no data about their business's emissions at all.
* Over 75 per cent of businesses are not yet formally assessing climate change as a risk to their business.
* Resources (mining and energy) companies are significantly ahead in terms of responding to climate change. All of them believe that climate change will be a risk to their business by 2012. Furthermore, 74 per cent have already assessed risk at a Board level - compared to just 4 per cent industry average. Moreover, 28 per cent of resources companies have established a budget to respond to climate risks and opportunities - compared to 5 per cent of the total sample. Nearly all (92 per cent) of these organisations are formally factoring a value for carbon into their CAPEX decisions - as opposed to 20 per cent of total.
* Overall, only 22 per cent of survey respondents (including resources companies) have undertaken actions in response to climate change. Most of these have created new internal policies and procedures.

Further information is available on the [PwC](http://www.pwc.com/extweb/onlineforms.nsf/docid/0edacffba83712ab852573db000f55ff%22%20%5Ct%20%22_new) website. etailed Contents**1.14 KPMG UK forecasts major increase in joint venture activity**On 29 January 2008, professional services firm KPMG in the UK released data on the state of the joint venture (JV) market which suggests that next twelve months are set to be characterised by a major increase in JV activity. With the global economic outlook continuing to weaken but with numerous corporates still keen to do business, the idea of a JV will now be rocketing up many Board agendas, claims KPMG.The data, sourced by Thomson Financial, shows that there were 1,759 JV deals globally during 2007; well down on the 3,391 from the boom days of 2000 but - significantly - more than double the 810 deals registered in 2004. When taken in conjunction with the number of Strategic Alliance (SA) deals also announced, it becomes clear that total JV / SA activity has been reasonably flat for six years, constantly hovering between 4,000 and 5,000 deals. However, in the latter three years, JVs have been steadily gaining on their SA counterparts and now account for 36 per cent of total JV/ SA activity, as opposed to the low point of 19 per cent in 2004.Other findings to emerge from the research include:* In terms of their involvement with JV and SA deals, the US, Japan, UK, Canada, China, Australia, India, Germany, France and Hong Kong have been the top ten most active countries over an eight year period.
* Japan dropped out of the top five for the first time in 2007, China has been in the top five since 2001 while Russia is the big mover in recent times; breaking into the top 15 for the first time in 2006.
* The US is the single greatest participant in the JV market, responsible for 404 JVs in 2007 alone. However, this is still only about 30 per cent of the activity it registered in 2000. Japan's fall has been even greater with 2007 JV activity levels a mere one-seventh of that in 2000.

Further information is available on the [KPMG](http://www.kpmg.com/Press/FocusswingstoJointVentures.htm%22%20%5Ct%20%22_new) website.etailed Contents**1.15 GC100 publishes guidance paper on directors' conflict of interest under the Companies Act 2006 (UK)**On 18 January 2008, the Association of General Counsel and Company Secretaries of the FTSE 100 (GC100) published a guidance paper on directors' conflicts of interest.  From 1 October 2008, a director will have a statutory duty under section 175 of the Companies Act 2006 to avoid a situation in which he or she has, or can have, a conflict of interest or a possible conflict of interest with the company's interests.  There will be no breach of this duty if the relevant matter has been authorised by the directors in advance. For a public company the directors can only authorise the matter if permitted to do so by the company's constitution. As the statutory power for a board to authorise conflicts is a new one (previously the power lay with shareholders), the GC100 concluded that boards might find it helpful to have some guidance on the exercise of this power. The Guidance Paper sets out:* a summary of the 2006 Act provisions on conflicts;
* an explanation of changes companies might make to their articles of association to reflect the 2006 Act provisions on conflicts and a paragraph to include in the AGM circular explaining those changes;
* guidance for directors on exercising the power to authorise conflicts including suggested procedures for authorising conflict situations and reviewing authorisations; and
* potential situations of conflict to provide boards and individual directors with a reference point.

The Guidance Paper, and the suggested amendments to articles of association included therein, has been reviewed by the Association of British Insurers (ABI). The Guidance Paper is available [here](http://corporate.practicallaw.com/downloadFile.do?item=:40396048" \t "_new).etailed Contents |

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

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| **2.1 ASIC response to Treasurer's initiatives on switching fees on home loans**On 11 February 2008, the Australian Securities and Investment Commission (ASIC) responded to the Federal Treasurer's initiatives around switching fees on home loans by announcing a review of exit and entry fees on home loans. The review will commence immediately and will focus on making information that is clear and comparable on these fees available to the market as soon as possible. ASIC will consult with industry and consumer groups to examine the level of exit and entry fees on home loans, the industry rationale for charging them, how they work in practice and the current disclosure of these fees. ASIC will also look at the exit and entry fees on home loans in other countries to see how Australia compares.ASIC has also committed to enhancing the complaints mechanisms available to consumers on banking products and services to ensure consumers are directed to the right regulator or disputes scheme if they feel they have problems.etailed Contents |

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| **3. Recent ASX Developments** |  |  |

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| **3.1 Australian Securities Exchange Disciplinary Processes and Appeals Rulebook** At the end of March 2008, ASX will implement its new rulebook, the Australian Securities Exchange Disciplinary Processes and Appeals Rulebook. The rulebook deals with all disciplinary and appeal (both disciplinary and non-disciplinary) processes. The key features of the new rulebook are:* a single 'peer review' Disciplinary Tribunal which incorporates the ASX's Disciplinary Tribunals with the SFE's Business Conduct and Market Practices Committees;
* the maintenance of the 'peer review' Tribunal model to ensure industry relevance and confidence;
* the streamlining of procedures to create efficiencies in terms of process, cost and time; and
* the safeguarding of procedural fairness protections for Participants through the requirements and processes incorporated within the integrated disciplinary model.

Changes have been made to the Operating Rules of each ASX licensed facility to give effect to this proposal. Further operational and transitional information will be provided to the market in March.etailed Contents**3.2 Emissions trading - The role of ASX** ASX is developing a strategy to support Australia's national emissions trading scheme (NETS). Australia's NETS is scheduled to commence in 2010. It will be a 'cap and trade' system whereby total emissions are capped, permits are allocated up to a cap, and trading of emissions permits and credits is allowed to enable the market to find the most cost effective means of meeting the cap. There will also be a national registry to record ownership of permits and credits.The Garnaut Climate Change Review recently issued a paper on 'Financial Services for Managing Risk: Climate Change and Carbon Trading', seeking feedback on design features that will impact the efficiency of the related financial markets and how governments can facilitate Australia becoming a regional hub for carbon markets in the Asia Pacific. Details of the NETS and an exposure draft of the emissions trading legislation are to be finalised by the end of 2008.Financial markets play an essential role in an emissions trading scheme. In particular, financial markets:* reduce transaction costs for emissions trading;
* facilitate price discovery and the transfer of risk in relation to emissions trading, which underpins investment decision making; and
* minimise counter-party default and settlement risk in relation to emissions trading.

Based on overseas experience, it is likely that the majority of trading in emissions permits and credits will gravitate to the forward market. Further, trading on the forward market is likely to commence in advance of the formal start of the NETS. The forward market will involve both exchange traded futures and OTC products. ASX proposes to offer a futures contract over emissions permits and credits as soon as the Government passes legislation and provides its emission reduction targets (the 'supply constraint'). The contract will be traded on the SFE market. Trades will be novated to a central counterparty, thereby significantly reducing the risk of counterparty default. ASX also proposes to offer a settlement service for emissions permits and credits. It is proposed that the existing Austraclear infrastructure will be used to provide safe keeping and settlement services. Most of the likely participants in Australia's NETS, including the stationary power sector and large corporates in the resource sector, are already Austraclear users. Settlement will be on a delivery versus payment (DvP) basis and will therefore effectively remove settlement risk (where the seller does not deliver or the buyer does not pay).etailed Contents |

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| **4. Recent Corporate Law Decisions** |  |  |

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| **4.1 Irregularity in section 1322 and impracticability in section 252E(1)** (By Kathryn Finlayson, Minter Ellison) Australian Olives Limited v Stout (No 2) [2007] FCA 2090, Federal Court of Australia, Greenwood J, 24 December 2007  The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2090.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2090.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** An order confirming the passing of a resolution moved, voted upon and declared carried by a person other than the chair at a meeting of members is not a procedural irregularity and does not fall within the scope of sections 1322(1) or 1322(2) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default).A failure to realise the expectations underlying consent orders is not a matter which renders it impracticable for a meeting of members to be called in any other way than by court order for the purposes of section 252E(1).**(b) Facts** The respondent applicant is the responsible entity for a managed investment scheme, Australian Olives Project No. 6 (Project 6), registered by the Australian Securities and Investments Commission for the purposes of Chapter 5C of the Corporations Act 2001. The respondents are members of Project 6. On 5 October 2007, the applicant respondents caused a Notice of Meeting of Members to be issued to all members calling a meeting for 30 October 2007 at a nominated address in Fremantle, Western Australia, to conduct certain business. On 25 October 2007, the respondent applicant commenced proceedings against the members of Project 6 who called the meeting, seeking a declaration that the Notice of Meeting did not comply with the Corporations Act 2001 in a number of respects and related relief.  On 29 October 2007, the Federal Court made a number of orders in respect of the application by consent including that the meeting scheduled for 30 October 2007 be adjourned until 7 November 2007.  During the course of the meeting on 7 November 2007, the chair refused to put a resolution to the meeting which proposed that the respondent applicant be removed as the responsible entity of Project 6 and that Primary Securities Limited be appointed as the new responsible entity. One of the members of Project 6 purported to put the resolution to the meeting, voted in favour of the resolution and declared that the resolution was carried. The chair refused to recognise the casting of the votes as the resolution had not been properly put to the meeting and after further refusing to put the resolution, closed the meeting. On 15 November 2007, the applicant respondents filed an interlocutory application seeking various orders including:* a declaration that at the meeting of the members of the managed investment scheme known as Project No. 6 . held 7 November 2007, the chair failed to put and adjourn the motion.
* pursuant to section 1322 of the Corporations Act 2001, the court make an order confirming the passing of the resolutions moved through the member of Project 6 who had purported to put the resolution to the meeting, voted in favour of the resolution and declared that the resolution was carried.
* alternatively, pursuant to section 252E(1) of the Corporations Act 2001, meetings of the members of Project No. 6 be held on the day of December 2007 at the offices of Frenkel Partners, Level 18, 500 Collins Street, Melbourne at 12 noon at which time and place the following resolutions will be voted upon by the meeting:
	+ Pursuant to section 601FM(1) of the Corporations Act 2001, the  respondent applicant . be removed as the responsible entity of the managed investment scheme Project No. 6 .
	+ Pursuant to section 601FM(1) of the Corporations Act 2001,  Primary Securities Limited ... be appointed as the new responsible entity of the managed investment scheme Project No. 6 .
	+ various orders pursuant to section 1319 of the Corporations Act 2001.

During the hearing of the application, counsel for the applicant respondents stated that Primary Securities Limited no longer consented to act as the responsible entity for Project 6. An alternative company, Huntley Management Limited, was proposed as the new responsible entity should the respondent applicant be removed. Counsel for the applicant respondents also sought leave to amend the date in proposed order 3 to 28 February 2008. **(c) Decision** Justice Greenwood refused relief on all bases.  In relation to paragraph 1, as the respondent applicant accepted that the chair did not put the proposed resolution to the meeting and closed the meeting rather than adjourned it, there was no relevant controversy between the parties and accordingly, there was no utility in making the declaration sought. As to paragraph 2, as Primary Securities Limited would not act as the responsible entity for Project 6, there was no purpose in making the proposed order. Further, in his Honour's view, the proposed order did not fall within the scope of sections 1322(1) or 1322(2) as the matter sought to be remedied by the proposed order was not a procedural irregularity. Although his Honour discussed the principles relevant to the proposition that the question of whether a motion ought to be put to a meeting is one for the chair to decide and the circumstances in which the court will intervene in a supervisory review of the exercise of the discretion, he did not decide whether an invalidity had arisen, for the purposes of section 1322(4), by reason of the chair's refusal to put the resolution to the meeting. As to paragraph 3, Justice Greenwood held that the terms of section 252E(1) required a court to be satisfied that it was impracticable to call a meeting in any other way, other than by court order, before it could exercise its discretion. His Honour was not satisfied on the material before him that it was impracticable to call a meeting of members of Project 6 by 28 February 2008. His Honour rejected the applicant respondents' contention that the failure to realise the expectation underlying the consent orders made on 29 October 2007 was a matter which rendered it impracticable for the meeting to be called in any other way. Consequential upon his decision in relation to paragraph 3, Justice Greenwood made no order pursuant to paragraph 4.etailed Contents**4.2 Judicial review and enforceability of a determination by an expert appointed to establish a value or price under a contract**  (By Sabrina Ng and Katrina Sleiman, Corrs Chambers Westgarth) Beevers v Port Phillip Sea Pilots Pty Ltd [2007] VSC 556, Supreme Court of Victoria, Dodds-Streeton J, 21 December 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/december/2007vsc556.htm](http://cclsr.law.unimelb.edu.au/judgments/states/vic/2007/december/2007vsc556.htm%22%20%5Ct%20%22_new) **(a) Summary** Mrs Dianne Beevers and Ms Chloe Beevers (Plaintiffs) commenced proceedings against Port Phillip Sea Pilots Pty Ltd (Pilot Co) and Port Phillip Sea Pilots Nominees Pty Ltd (Nominee Co). The Plaintiffs' primary complaint was that their income shares were transferred to Nominee Co at a gross undervalue, without their consent and in breach of contract which amounted to oppression.The court dismissed the Plaintiffs' claims for damages for breach of contract, breach of duty, an order under section 233 of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) and equitable compensation. However, the court held that the Plaintiffs were entitled to declarations that the purchase of the Plaintiffs' income shares by Nominee Co and the auditor's certificate, which determined the sale price, were not in accordance with the Articles of Pilot Co. The court also made orders for the appointment of an independent valuer agreed on by the parties to determine the fair selling value of the income shares, or alternatively, an order referring that question to an expert under the court rules.**(b) Facts**Pursuant to the Articles of Pilot Co, only Port Phillip Sea Pilots employed by Pilot Co as pilots are allowed to hold voting shares in Pilot Co and only such pilots or their family members, defined to include a company controlled by a Port Phillip Sea Pilot, are allowed to hold income shares in Pilot Co.  The Articles of Pilot Co contain pre-emption provisions which prescribe a process for the transfer of the income shares of a retiring pilot or their family when eligibility to hold the income shares ceases upon the termination of the pilot's employment. That process entails:(a) the income shareholder giving written notice of intention to transfer the income shares in accordance with the Articles within a 14 day period; (b) the board of Pilot Co becoming the shareholder's agent for sale at a price agreed on by the shareholder and the board;(c) if there is no agreement, the price is to be the price as certified by Pilot Co's auditor to be, in its opinion, the fair selling value as between a willing vendor and a willing purchaser; and(d) if at the expiration of the 14 day period, the income shareholder has not given notice, it is deemed to be given.Nominee Co was established to hold the income shares of outgoing pilots until they could be acquired by an incoming pilot. Its sole shareholders consisted of two directors of Pilot Co, who held the shares in Nominee Co as trustees for the working pilots.  Prior to his resignation from Pilot Co on 7 February 2005, Captain Beevers (who is the husband of Dianne Beevers and the father of Chloe Beevers) transferred his income shares in Pilot Co to the Plaintiffs. Following Captain Beevers' resignation, on 9 February 2005, the Plaintiffs' income shares were transferred by the board of Pilot Co to Nominee Co and Pilot Co's accountant paid $44,508 into the joint bank account of the Plaintiffs as consideration for their income shares.As at the date of the transfer, the 14 day period in which the Plaintiffs were required to give notice had not yet expired, the Plaintiffs had not agreed with the board on a price for their income shares and Pilot Co's auditor had not provided a certificate giving his opinion of the fair selling value.  On 14 February 2005, the Plaintiffs wrote to Pilot Co to protest at the failure to consult them. However, they accepted the amounts as a part payment only and gave notice requesting that their income shares be valued in accordance with the Articles. On about 20 March 2005, the managing director of Pilot Co contacted Pilot Co's auditor and requested him to produce a valuation of the Plaintiffs' income shares. Neither the articles nor the letter of engagement prescribed any fixed, objective criteria for the valuation. During the course of preparing the valuation certificate, Pilot Co's auditor had numerous exchanges and communications with officers of Pilot Co, including Pilot Co's accountant and a number of directors. During these conversations, offices of Pilot Co advanced to Pilot Co's auditor the methodology by which the valuation was to be conducted. Pilot Co's auditor obtained a large number of financial documents from Pilot Co's accountant and documents frequently passed between the two after each had added alterations, input or amendments. The auditor's work was substantially based on these documents. The auditor also communicated with the solicitors for Pilot Co and Nominee Co, but when the Plaintiffs sought to provide submissions to the auditor in relation to the valuation of their income shares, the auditor declined to receive them.The auditor, by a valuation report dated 2 June 2005, certified that, in his opinion, the fair selling value of the Plaintiffs' income shares as between a willing vendor and a willing purchaser was $6,809.  **(c) Decision**Dodds-Streeton J of the Supreme Court of Victoria held that the Plaintiffs' letter to Pilot Co on 14 February 2005 ratified the transfer of their shares to Nominee Co despite non-compliance with Pilot Co's Articles. However, as the Plaintiffs disagreed with the board on the price for their shares, they were required to be valued in accordance with the Articles. The Plaintiffs' contract of sale with Nominee Co therefore incorporated a term that, in the absence of agreement, the price of the income shares would be the fair selling value as certified by Pilot Co's auditor. While the Articles did not specify that the auditor's determination would be final and binding, provided that the valuation was duly made, it would still bind the parties because a procedure to delegate valuation to a third party had been nominated in the contract.Following a review of the case law governing the judicial review and enforceability of a determination by an expert appointed to establish a value or price under a contract, Dodds-Streeton J identified the following principles:(a) where the contract provides for fixed objective criteria for the valuation, the valuation would be set aside if it did not accord with those criteria;(b) where the contract provides for the exercise of a broad discretionary judgment and there are no objective criteria to follow, the parties are bound by the expert opinion even if there are different possible and reasonable methods of assessing value that lead to different outcomes; but(c) where the determination was vitiated by dishonesty, fraud or partiality or a species of mistake which deprived the valuation of conformity to the terms of the contract, the expert's valuation may be set aside.In applying these principles, Dodds-Streeton J accepted that there was no evidence of collusion, dishonesty or conscious partiality and the method of valuation adopted by the auditor was a reasonable and possible method of valuation in the circumstances. However, Dodds-Streeton J held that the auditor's valuation was not conducted with the degree of independent skill and judgment and impartiality required of an expert acting between two parties. The following factors influenced Dodds-Streeton J's decision:(a) Although the auditor's evidence that he disregarded the comments made by Pilot Co's officers in relation to the valuation methodology was accepted, the fact that Pilot Co's auditor employed the approach indirectly advocated by Pilot Co's officers indicated that it was probable that those comments influenced the auditor.(b) Despite no requirement to consider submissions in the conduct of an expert valuation, the auditor had received unsolicited submissions from Pilot Co's officers and had familiarity with Pilot Co but had declined the Plaintiffs' attempts to make submissions.(c) The auditor's valuation was substantially (90 per cent) based on the work of Pilot Co's accountant, even though the work of Pilot Co's accountant was said to be largely mechanical.Dodds-Streeton J dismissed the Plaintiffs' claims for damages for breach of contract, breach of duty, an order under section 233 of the Corporations Act and equitable compensation. Instead, Dodds-Streeton J made declarations that Nominee Co on 9 February purchased the Plaintiffs' income shares, that the auditor's certificate dated 2 June 2005 was not in accordance with Pilot Co's Articles and orders for the appointment of an independent valuer agreed on by the parties determine the fair selling value of the income shares, or failing agreement, an order referring that question to an expert pursuant to Order 50 of the Supreme Court Rules.etailed Contents**4.3 Person entitled to be registered as shareholder retrospectively to permit application for winding up to be granted** (By Emily Collin, Mallesons Stephen Jaques) Winspear v Mackinnon [2007] FCA 2077, Federal Court of Australia, Marshall J, 24 December 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2077.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2077.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary**The litigation arose out of a family dispute relating to a property in Tasmania. It specifically concerned Rosalind Winspear's (the plaintiff) entitlement to shares in the Mackinnon family companies which owned and farmed the property, and her consequential right to apply for a winding up order on the grounds of oppressive conduct of the affairs of the companies. The defendants, Deidre Mackinnon (Rosalind's mother) and Neil Mackinnon (Rosalind's brother), alleged that Rosalind had agreed to relinquish her entitlement to those shares. Marshall J largely accepted the evidence of Rosalind that she had not agreed to relinquish those shares and held that Rosalind was entitled to:* an order correcting the share registers of those companies to reflect her entitlement; and
* an order nunc pro tunc retrospectively recognising her as a member, giving her standing to make an application under section 233 [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) for winding up of those companies based on oppressive conduct of their affairs.

**(b) Facts**The Mackinnon family had owned a property in Tasmania, Dalness, since the 1820s. Since 1961, the property had been held by Dalness Pty Ltd ("Dalness"). Pursuant to a deed of trust and a deed of appointment, upon the death of Donald Mackinnon (Rosalind's father), those shares were to be held on trust equally between Neil and Rosalind. The farming business on the property was carried out by a partnership of Donald, Deidre, Michael (another brother) and Neil. Rocklands Pty Ltd ("Rocklands") was incorporated in 1975. Its activities are not clear from the judgment. In 1988, a family arrangement was entered into whereby:* one of Donald's shares in the partnership and Michael's shares in the partnership would be sold to Rosalind; and
* shares in Rocklands would be sold to Rosalind.

Rosalind paid only in part for these shares at the time of arrangement. Donald also lent her money to finance her up-front payments. She paid some interest on these amounts, but ceased making payments in 1991 due to financial difficulties. The judge accepted evidence that, upon Donald's instruction, this requirement had been waived. The family and their advisers met several times in 2001 to discuss a rearrangement of interests in the property. A proposal was put to Rosalind involving her forfeiting her shares in Dalness and Rocklands. The defendants claimed that Rosalind agreed to this proposal, which Rosalind denied. Donald died in February 2004 and Rosalind completed payments for her shares in July 2005. She then applied to be registered as a shareholder in Dalness and Rocklands. **(c) Decision** **(i) Rosalind entitled to the shares** Marshall J ultimately accepted the evidence of Rosalind that she had never agreed to relinquish her shares in the property. The evidence did not support the defendants' argument that the parties, though without a formally documented agreement, had agreed to its material terms and intended to be bound by those terms, creating a Masters v Cameron (1954) 91 CLR 353 style binding agreement. As a result, Rosalind was entitled to be recognised as the holder of shares in the two companies.  **(ii) No other disentitling conduct** Marshall J also rejected the defendant's argument that Rosalind was estopped from denying the existence of an argument or that it was unconscionable or unjust for her to do so. There was no evidence to support these arguments. **(iii) Rosalind entitled to registration** As a result, Rosalind was entitled to an order under section 175(1) Corporations Act 2001 (Cth) correcting the share registers of Rocklands and Dalness to reflect her entitlements. **(iv) Oppressive conduct** Rosalind also made an application under section 233 Corporations Act 2001 (Cth) on grounds of oppressive conduct of the affairs of the companies. Marshall J held that "the failure of the other shareholders in the companies to recognise Rosalind's stake in them has denied her the opportunity to play a part in the functioning of those companies and is in that sense 'oppressive'". The defendants alleged that Rosalind did not have standing to apply under section 233 because section 234 Corporations Act 2001 No. 51 (Cth) provides that a person can make an application under section 233 if they are a member of a company. However, Marshall J made an order nunc pro tunc, justified due to the unnecessary delay in registering Rosalind as a shareholder, recognising Rosalind as a shareholder since at least July 2005. No order was made to wind up the company at that point, as counsel for both parties indicated that the parties would first attempt to resolve the issues between them without appointment of liquidators.etailed Contents**4.4 Determining whether the period of time in which a compulsory acquisition notice must be lodged could be extended** (By James Williams, DLA Phillips Fox) Mitsui & Co Ltd v Hanwha (HK) Co Ltd [No 2] [2007] FCA 2071, Federal Court of Australia, 20 December 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2071.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2071.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary**The case involved an application under section 1322(4)(d) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) (the Act) to extend the period in which a compulsory acquisition notice was to be lodged pursuant to section 664AA of the Act. The question to be determined was whether section 1322(4)(d) of the Act empowers a court to extend the time provided for in section 664AA of the Act and if so, whether the power should be exercised in this case. Gilmour J held that section 1322(4)(d) of the Act does empower a court to extend the time provided for in section 664AA of the Act and that, in the circumstances, the time should be extended. **(b) Facts** Mitsui & Co Ltd ('Plaintiff'), a foreign company registered with the Australian Securities and Investments Commission ('ASIC'), and Mitsui & Co (Australia) Ltd ('Mitsui Australia'), a wholly owned subsidiary of the Plaintiff, together acquired an aggregate 94.2% interest in the ordinary shares of Salt Asia Holdings Pty Ltd ('Company') and a 73.9% interest in the A class shares of the Company on 31 July 2006 pursuant to a Share Sale Agreement ('Agreement') entered into with Akzo Nobel Chemicals International BV ('Akzo') and Akzo Nobel NV ('Akzo NV'), both companies incorporated in the Netherlands. As a result of the acquisitions, the Plaintiff became a '90% Holder' in the Company for the purposes of section 664A of the Act. Hanwha (HK) Co Ltd ('Defendant'), a company incorporated in Hong Kong, and PT Sempurna Caturguna ('Sempurna'), a company incorporated in Indonesia, were the remaining shareholders in the Company. Onslow Salt Pty Ltd ('Onslow') was a wholly owned subsidiary of the Company.The Plaintiff, by the Notice dated 25 January 2007, offered to pay the Defendant the same amount per share as had been paid to Akzo under the Agreement. The cash amount contemplated was also subject to the four specified adjustments provided for in the Agreement. The adjustments were made conditional on the occurrence of a number of events, such as whether Onslow received a particular insurance payment, and whether Akzo's interest in the net assets of the Company and Onslow as at 31 July 2006 was more or less than its interest as at 31 December 2005. The Defendant lodged an objection under section 664E of the Act to the compulsory acquisition by the Plaintiff of its ordinary and A class shares in the Company. Sempurna also lodged an objection under the aforementioned section to the acquisition of its A class shares. The Defendant claimed that the Notice did not set out the 'cash sum' for which the Plaintiff proposed to acquire its ordinary shares in the Company. The Plaintiff applied for approval under section 664F of the Act of its acquisition of the relevant shares from the Defendant and Sempurna. The Plaintiff also sought an order that the Defendant's 'cash sum' objection be determined by the court as a preliminary issue. The Plaintiff sought a further order under section 1322(4)(d) of the Act that the time period in which a compulsory acquisition notice was to be lodged pursuant to section 664AA of the Act be extended so that the period ended three months after the date of such an order being made. Section 1322(4)(d) of the Act provides that the court may make an order extending the period for doing any act, matter or thing under the Act and may make such consequential or ancillary orders as the Court thinks fit. Section 664AA of the Act states that a '90% Holder' may compulsorily acquire the relevant securities under section 664A of the Act only if it lodged the compulsory acquisition notice for the acquisition with ASIC within the period of six months after the date on which it became a 90% holder.  Thus, the reason for seeking the time extension was due to the fact that if the preliminary issue was decided against the Plaintiff, then the Plaintiff couldn't, without further order of the Court, seek to compulsorily acquire the ordinary shares, as the six month period for issuing a notice of compulsory acquisition had ended. The preliminary issue was decided against the Plaintiff and the Court was therefore required to determine the Plaintiff's application for the extension of time so as to enable it to lodge with ASIC and despatch to the Defendant and Sempurna further compulsory acquisition notices. The question to be determined was whether section 1322(4)(d) of the Act empowers a Court to extend the time provided for in section 664AA of the Act and if so, whether the power should be exercised in this case. **(c) Decision**In relation to the applicability of section 1322(4)(d) of the Act, Gilmour J held that section 664AA of the Act does not operate to exclude the operation of section 1322(4)(d). In reaching his decision, his Honour found that the use of the word 'only' in section 664AA of the Act was not determinative of the question as to the applicability of section 1322(4)(d). Further, his Honour accepted the submission made by the Plaintiff that given the fact that circumstances could arise where relief might be sought by a '90% Holder' as a result of matters beyond its control, such as delays experienced in briefing the independent expert or where the independent expert takes longer than expected to complete its report, it is not possible to attribute to Parliament an intention that the six month limit be immune to judicial extension under section 1322(4)(d) of the Act. His Honour also found that Chapter 6 of the Act, as opposed to certain other sections of the Act possessing significantly different legislative purposes, is not a self contained and complete code for the resolution of disputes involving the statutory process. Having established the applicability of section 1322(4)(d) of the Act, Gilmour J granted the relief sought in the application and extended the period stipulated in section 664AA of the Act by three months from the date of the orders made. His Honour noted that the aforementioned orders were conditional on the Plaintiff undertaking to the court that it would issue any such compulsory acquisition notices in a fixed amount not less than the theoretical maximum price, together with simple interest at 10.5% per annum, from the date that the first Notice was lodged. In reaching his decision, his Honour accepted the Plaintiff's submission that the Plaintiff had sought at each stage to advance the resolution of the compulsory acquisition process. Gilmour J noted that the undertaking given by the Plaintiff ensured that the Defendant would not be prejudiced by any change in the business conditions or value between the date of the issuance of the Notice and any second notice of compulsory acquisition. His Honour also stated that there was no restriction on the sale of securities in the Company as a consequence of the compulsory acquisition process and that further, the Defendant had not tended evidence to support a suggestion that any offer to purchase, or sale of, the securities in the Company had been frustrated or prevented by the compulsory acquisition process.etailed Contents**4.5 Determining whether a cash amount, which was subject to a number of adjustments, offered under a compulsory acquisition notice constituted a 'cash sum'** (By James Williams, DLA Phillips Fox) Mitsui & Co Ltd v Hanwha (HK) Co Ltd [2007] FCA 2070, Federal Court of Australia, 20 December 2007 The full text of this judgement is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2070.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2070.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The case involved the determination of a preliminary issue, namely whether a cash amount, which was subject to a number of adjustments, offered under a compulsory acquisition notice ('Notice') constituted a 'cash sum' within the meaning of section 664C(1)(a) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) ('the Act'). Gilmour J held that a 'cash sum' ". means either a specified sum of money or a stated mechanism or formula which is capable of being applied according to some objective standard so that the sum can be calculated or ascertained definitely". His Honour found that the information necessary to definitely determine the cash amount in question was not available at the time the Notice was received and therefore held that the cash amount did not constitute a 'cash sum' for the purposes of the Act. **(b) Facts** Mitsui & Co Ltd ('Applicant'), a foreign company registered with the Australian Securities and Investments Commission ('ASIC'), and Mitsui & Co (Australia) Ltd ('Mitsui Australia'), a wholly owned subsidiary of the Applicant, together acquired an aggregate 94.2% interest in the ordinary shares of Salt Asia Holdings Pty Ltd ('Company') and a 73.9% interest in the A class shares of the Company on 31 July 2006 pursuant to a Share Sale Agreement ('Agreement') entered into with Akzo Nobel Chemicals International BV ('Akzo') and Akzo Nobel NV ('Akzo NV'), both companies incorporated in the Netherlands. As a result of the acquisitions, the Applicant became a '90% Holder' in the Company for the purposes of section 664A of the Act. Hanwha (HK) Co Ltd ('Respondent'), a company incorporated in Hong Kong, and PT Sempurna Caturguna ('Sempurna'), a company incorporated in Indonesia, were the remaining shareholders in the Company. Onslow Salt Pty Ltd ('Onslow') was a wholly owned subsidiary of the Company.The Applicant, by the Notice dated 25 January 2007, offered to pay the Respondent the same amount per share as had been paid to Akzo under the Agreement. The cash amount contemplated was also subject to the four specified adjustments provided for in the Agreement. The adjustments were made conditional on the occurrence of a number of events, such as whether Onslow received a particular insurance payment, and whether Akzo's interest in the net assets of the Company and Onslow as at 31 July 2006 was more or less than its interest as at 31 December 2005. The Respondent lodged an objection under section 664E of the Act to the compulsory acquisition by the Applicant of its ordinary and A class shares in the Company. Sempurna also lodged an objection under the aforementioned section to the acquisition of its A class shares. The Respondent claimed that the Notice did not set out the 'cash sum' for which the Applicant proposed to acquire its ordinary shares in the Company. The Applicant applied for approval under section 664F of the Act of its acquisition of the relevant shares from the Respondent and Sempurna. The Applicant also sought an order that the Respondent's 'cash sum' objection be determined by the court as a preliminary issue. Thus, the issue for determination by the Court was whether on the proper construction and application of section 664C(1)(a), the Notice sets out a 'cash sum' for which the Applicant, as a '90% Holder', proposed to acquire the Respondent's ordinary shares in the Company. **(c) Decision** Gilmour J held that "'cash sum' means either a specified sum of money or a stated mechanism or formula which is capable of being applied according to some objective standard so that the sum can be calculated or ascertained definitely". His Honour cited the requirement that a court's evaluation of whether the terms set out in a notice of compulsory acquisition provide a fair value for the securities must be conducted at or about the date the notice is lodged with ASIC and despatched to shareholders. Therefore, the timing of the court's evaluation means that the cash sum in question must be ascertainable as at the date of the notice, rather than at some indeterminate time in the future. His Honour concluded that the information required to determine definitely the 'cash sum' in the Notice was not available at the date of the Notice by virtue of the potential adjustments and therefore, did not constitute a 'cash sum' within the meaning of section 664C(1)(a) of the Act. In reaching his decision, his Honour also referred to a number of other provisions contained within the Act, such as section 621, 636(1) and 666A(1), which support the conclusion that the words 'cash sum' mean an amount which is fixed and certain. In the case of section 666A(1) such a meaning is necessary, as, if the 'cash sum' could be an uncertain, unquantified or conditional amount, then the '90% Holder' may not be able to complete the compulsory acquisition under section 664A or 664F of the Act within the earliest of the time periods set down in section 666A(3)(a).etailed Contents**4.6 Date of the contract reigns supreme in determining provable debts** (By Sarah Hickey, Blake Dawson)Walker re One.Tel Limited [2007] NSWSC 1478, New South Wales Supreme Court, Barrett J 18 December 2007 [http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/december/2007nswsc1478.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/december/2007nswsc1478.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** The liquidators of One Tel Limited approached the court to determine whether credits in a number of customer accounts were "provable debts" under section 553(1) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). The court found that those debts arising from contracts that were entered into before the "relevant date" were provable debts under this provision, even though the event giving rise to the actual debt (One Tel's failure to perform its service obligations) did not occur until after this date. However, the court found that the debts were not "priority claims" under section 556(1) of the Corporations Act, as they were not expenses properly incurred by One Tel's liquidators, nor debts for which One Tel's liquidators were responsible. **(b) Facts** The liquidators of One Tel Limited sought the court's determination on how to treat claims that a number of former customers of One Tel may have held against the company in winding up. The potential claims were in respect of credit balances that existed in the relevant customers' accounts, prior to One Tel becoming subject to voluntary administration.  Three categories of potential claimants were identified:* customers with credit in their account before the "relevant date";
* customers that accrued credit in their account after the "relevant date", due to duplicated or excess payments made by these customers, or prepayments for services (such as line rental) that extended beyond the last date on which One Tel provided the services; and
* customers that had "invalid" credits, being credits that had been recognised incorrectly or due to administrative error.

The liquidators asked the court whether any of the categories of claims should be treated as provable debts under section 553(1) of the Corporations Act. In the event that the claims were provable under section 553(1), the liquidators also wished to know whether any of the claims fell within the priority categories for creditors, listed in section 556(1) of the Act. **(c) Decision****(i) Were the claims "provable debts" under section 553(1)?** In determining whether the claims constituted "provable debts", Barrett J paid regard to the wording of section 553(1), noting that it refers to debts or claims that have arisen due to "circumstances" that occurred before the relevant date of winding up. His Honour compared this to the corresponding provision in bankruptcy law (section 82 of the [Bankruptcy Act 1966 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=6559" \t "Default)), which states that "provable debts" include debts that have arisen by reason of an "obligation" incurred before the date of bankruptcy. His Honour found that the wording in section 553(1) is broader than that its counterpart in the Bankruptcy Act, as it does not require any particular obligation (i.e., actual debt or liability) to have been incurred before the "relevant date". Rather, section 553(1) looks at when the "circumstances" giving rise to the future debt or liability occur. This means that the actual debts or liabilities need not exist before the "relevant date", provided that the circumstances that inevitably give rise to these debts (i.e., the relevant contracts) have been entered into. His Honour then looked to the categories of potential claimants. As expected, those customers who had entered into contracts with One Tel before the relevant date, and who had also accrued credit in their account before the relevant date, were taken to have "provable debts" under section 553(1). Applying the reasoning outlined above, those customers who had entered into contracts prior to the "relevant date", but whose credit had arisen after this date, were also held to have "provable debts" under section 553(1). Barrett J noted that, even though the contracts required One Tel to provide ongoing services to the customers, "the circumstances giving rise to the claim occurred when the contracts were made, and not when subsequent steps, incidental to the obligations on either side to perform, took place" (at paragraph 25). In respect of credit that arose due to "invalid" circumstances (i.e., without foundation or incorrectly), Barrett J stated that the credits had never really existed at all. For this reason, his Honour found that the credits were not provable debts under section 553(1), and indicated that the liquidators should simply ignore the credits. **(ii) Were any of the provable debts "priority claims" under section 556(1)?** Barrett J then considered whether the categories of claims that he had found to be "provable debts" were priority claims for the purposes of section 556(1).  His Honour looked at three potentially relevant "priority" categories:* expenses properly incurred by a relevant authority in preserving or carrying on the company's business (section 556(1)(a));
* debts for which paragraph 443D(a) of the Corporations Act entitles an administrator of the company to be indemnified; and
* any other expenses properly incurred by a relevant authority (section 556(1)(dd)).

His Honour dealt with sections 556(1)(a) and 556(1)(dd) together, noting that they both require the relevant debts to be "expenses . properly incurred". His Honour found that the liability to refund moneys to the customers was not an "expense", and was not "properly incurred" by a "relevant authority", as the liquidators did nothing to trigger the liability (rather, the liability already existed at the relevant date). His Honour also found that section 556(1)(c) did not apply, as it referred to debts for which an administrator of a company can been indemnified, under section 443D(a). Section 443D(a) sets out certain debts for which an administrator is deemed liable under Division 9, Part 5.3A of the Corporations Act. These include debts that the administrator incurs in exercising their powers, including debts for services rendered and goods bought. Using similar reasoning to that above, his Honour found that, as the customers' debts were not incurred by the liquidators, the debts were not "priority claims" under this provision.etailed Contents**4.7 Reinstatement of a deregistered company does not automatically validate purported acts of the company during deregistration** (By Emily Collin, Mallesons Stephen Jaques) Foxman v Credex [2007] NSWSC 1422, New South Wales Supreme Court, White J, 12 December 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/december/2007nswsc1422.htm](http://cclsr.law.unimelb.edu.au/judgments/states/nsw/2007/december/2007nswsc1422.htm%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** The applicants applied to have examination summonses relating to the winding up of Credex National Australian Trade Exchange Pty Ltd ("CNATE") set aside. The claims of the creditors instructing the liquidator arose from transactions which occurred while CNATE was deregistered. Accordingly, the applicants argued that the summonses should be set aside because:* the liquidator was acting for an improper purpose, being to advance the private interests of the claimed creditors; and
* the summons did not relate to the affairs of CNATE because CNATE was only marginally involved in the transactions leading to those debts.

White J, acknowledging the unclear drafting of the relevant legislation, held that the reinstatement of a company did not automatically validate all acts purportedly carried out by the company during deregistration. However, this did not mean that the summonses did not relate to examinable affairs for the purposes of sections 596A or 596B [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) as:* the acts could potentially be validated by a court; and
* in any event, the acts concerned the affairs of a connected entity of CNATE.

**(b) Facts**   CNATE was a company limited by guarantee, incorporated in order to carry out a trading and barter exchange scheme. Another company, CANMC, managed that scheme on behalf of CNATE. CNATE was deregistered on 18 February 2002 by ASIC pursuant to section 601AB Corporations Act 2001 (Cth), on the grounds that the company had failed to lodge required documents and ASIC had no grounds to believe it was carrying on business.  However, the trading scheme continued to operate, allegedly through associated entities. One of the respondents, Ms Foxman, claimed to be a creditor of CNATE pursuant to a transaction entered into while the company was deregistered which allowed her credit in the barter scheme. CNATE was reinstated by the Court on 18 September 2006 on application of Ms Foxman.  Ms Foxman contacted a liquidator to determine whether she could obtain any redress and, along with other claimed creditors, provided funds for investigations to commence. The liquidator obtained examination summonses against a number of persons involved in the scheme. The applicants brought an application to set aside those summonses. **(c) Decision** **(i) CNATE's involvement in the trading scheme** White J rejected the submissions of the applicants that CNATE was not involved in the day to day operations of the trading scheme, on the basis that the applicants adduced no evidence to support that claim. **(ii) Applicant's argument regarding improper purpose of summons** The judge accepted the evidence of the liquidator that his purpose in seeking examination summonses was to get a full picture of the affairs of the company.  However, the applicants claimed that the liquidator had an improper purpose. The persons funding the liquidator could not be creditors of CNATE because their claims arose from participation in the trading scheme after CNATE was deregistered. Accordingly, the purpose of the examination summonses was to obtain evidence to support them in other claims against third parties. **(iii) Effect of section 601AH** White J first considered whether the reinstatement of CNATE validated those acts, thereby permitting those persons funding the liquidator to make claims against CNATE. White J was critical of the drafting of section 601AH Corporations Act 2001 (Cth) which provides for deregistered companies to be reinstated. Specifically, he was concerned with the effect of subsection 601AH(5) which provides that:"If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC revests in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim".The key issue was whether the first sentence of the subsection had the effect that all actions purportedly taking by the company during deregistration were validated by the reinstatement. Predecessors of section 601AH were interpreted to mean that acts purportedly done while the corporation was deregistered were valid as if the company then existed (Tyman's Ltd v Craven [1952] QB, R v Helibronn [1999] QCA 095). White J considered it unlikely that the redrafting of the sections by the [Company Law Review Act 1998 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=5793" \t "Default) was intended to change this position. However, due to the qualifications in the last three sentences of the clause, the first sentence could only be interpreted to provide a limited measure of retrospectivity. It merely "preserves the identity of the company as the same legal personality as that which was previously dissolved so that the legal effect of dealings prior to deregistration can be resuscitated" (at [65]). This was supported by recent authority (White v Baycorp Advantage Business Information Services Ltd (2006) 24 ACLC 969, CGU Workers Compensation (NSW) Ltd v Rockwall Interiors Pty Ltd (2006) 201 FLR 296, Oates v Consolidated Capital Services Pty Ltd [2007] NSWSC 680) He noted that subsection 601AH(3), which allows the court to validate acts done during a period of deregistration, could ameliorate the consequences of this limited retrospectivity of the reinstatement. **(iv) Conclusion**White J therefore considered that because:* the acts leading to the purported debts could be validated pursuant to subsection 601AH(3); and
* the same acts concerned the affairs of CANMC, a connected entity of CNATE,the summonses did relate to the examinable affairs of CNATE.

Accordingly, the application to have the summonses set aside was dismissed along with a number of ancillary orders requested by the applicants to which White J gave little attention.etailed Contents**4.8 "Naked no vote" break fee provisions in schemes of arrangement** (By Alex Dunlop, Blake Dawson) Bolnisi Gold NL, in the matter of Bolnisi Gold NL (No 2) [2007] FCA 2078, Federal Court of Australia, Lindgren J, 10 December 2007 The full text of this judgment is available at:[http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2078.htm](http://cclsr.law.unimelb.edu.au/judgments/states/federal/2007/december/2007fca2078.htm%22%20%5Ct%20%22_new)or [http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new) **(a) Summary** A "break fee" is a deal protection method that is common to corporate takeovers, whereby the directors of the target company agree to pay a fee to the acquiring company when the proposed acquisition fails in certain pre-agreed circumstances. This case concerned a "naked no vote" break fee, whereby the fee was payable by the target (Bolnisi Gold NL ("Bolnisi")) in the event that its shareholders did not approve the scheme of arrangement ("scheme") that the potential acquirer, Coeur d'Alene Mines Corporation ("Coeur") had put in place to affect the takeover. Importantly, the break fee in this case was also reciprocal, in that Coeur would have to pay the break fee to Bolnisi in the event its shareholders did not approve an increase in capital that was necessary for Coeur to go through with the scheme.  Naked no vote break fees are problematic in that the fee may be so large that the target's shareholders may be coerced into approving a scheme merely because of the quantum of the penalty to the company for failing to do so, instead of approving the scheme on its merits. His Honour noted that the Court should decline to order a scheme meeting or to approve a scheme where the naked no vote break fee "is so large as to be likely to coerce the shareholders into agreeing to the scheme, rather than assessing the offer on its merits" (at [12]). However, his Honour was ultimately of the opinion that this was not the case, as the break fee, which was valued at US$7.78 million, was less than 1% of the value of Bolnisi's shares.  **(b) Facts** Bolnisi was a listed Australian company that conducted silver and mineral explorations. A large North American primary silver producer, Coeur, aimed to take over Bolnisi through a proposed scheme of arrangement. Under the scheme, Couer (through its Australian subsidiary) would acquire all of the shares in Bolnisi in a part-cash, part-scrip offer to Bolnisi shareholders. The implementation of the scheme was subject to a number of conditions, including Coeur's shareholders approving an increase in Coeur's share capital, and approval of the scheme by Bolnisi's shareholders.  In an earlier decision by Lindgren J, his Honour had approved Bolnisi holding a meeting of its members to consider the scheme. (See Bolnisi Gold NL, in the matter of Bolnisi Gold NL [2007] FCA 1668 ("Bolnisi No 1")). However, his Honour was not aware that the break fee that applied under the scheme was to be paid by Bolnisi even if the reason for the scheme's failure was that a majority of Bolnisi's shareholders were not in favour of it. This type of break fee is known as a "naked no vote" break fee in America, and his Honour referred to it as such throughout his judgment. His Honour called for the matter to be re-listed to consider whether the Court should approve the scheme in light of the naked no vote break fee. His Honour heard evidence from Couer that the break fee amount of US$7.78 million was "a genuine and reasonable pre-estimate of the loss which may be suffered" by Couer in the event that the scheme was unsuccessful, which Couer estimated would amount to US$10,781,442.  Additionally, in Bolnisi No 1, his Honour heard evidence that the break fee represented approximately 0.68% of the value of Bolnisi's shares. Importantly, this was less than the threshold of 1% that Takeover's Panel (in its "Guidance Note 7: Lock-up Devices") considered to be the "ceiling" above which the break fee would be too large, and therefore likely to coerce shareholders into agreeing to the scheme, rather than considering the scheme on its merits.  Also of importance was the fact that the break fee was reciprocal, in that if Coeur's shareholders did not approve the company's increase in share capital (which was necessary for Coeur to affect the takeover), the fee was payable by Coeur to Bolnisi. As his Honour noted, "the break fee payable by Coeur is payable in comparable circumstances to those in which the Bolnisi break fee is payable" (at [38]).  **(c) Decision** Ultimately, his Honour was satisfied that the break fee was not objectionable and that Bolnisi's directors believed they were acting in the shareholder's best interests in agreeing that the break fee should be a "naked no vote" fee. Incidentally, his Honour was also required to consider whether the Bolnisi shareholders' resolution was invalidated by virtue of the fact that nine shareholders were not provided with copies of the Scheme Booklet with at least 28 days notice of the Scheme Meeting that was required by section 249HA of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default). However, as this number was minimal compared to the more than 3,000 scheme booklets that were sent in total, his Honour considered that the shareholders' resolution should not be invalidated by this irregularity.etailed Contents**4.9 High Court rejects constitutional challenge to the Takeovers Panel**(By George Durbridge, Freehills) Attorney-General of the Commonwealth of Australia v Alinta Limited [2008] HCA 2, High Court of Australia, Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 31 January 2008 The full text of this judgment is available at:[http://www.austlii.edu.au/au/cases/cth/HCA/2008/2.html](http://www.austlii.edu.au/au/cases/cth/HCA/2008/2.html%22%20%5Ct%20%22_new)or[http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp](http://cclsr.law.unimelb.edu.au/judgments/search/advcorp.asp%22%20%5Ct%20%22_new)  **(a) Summary** By a unanimous decision, the High Court has reversed the decision of the Full Court of the Federal Court (Gyles and Lander JJ, Finkelstein J dissenting) in Australian Pipeline Ltd v Alinta Ltd (2007) 159 FCR 301 that former paragraph 657A(2)(b) of the [Corporations Act 2001 (Cth)](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=56482" \t "Default) was invalid as purporting to confer the judicial power of the Commonwealth on the Takeovers Panel. (Former paragraph 657A(2)(b) has been repealed and re-enacted as paragraph 657A(2)(c), but the former number is retained in this note for consistency with the court's reasons.) The High Court rejected the conclusion of the majority in the Federal Court that Precision Data Holdings Ltd v Wills [1991] HCA 58; (1991) 173 CLR 167 should be distinguished, because of differences between the law which now governs the Takeovers Panel and the law which governed the Corporations and Securities Panel in 1991. **(b) Federal Court decision** The Panel found that Alinta had contravened section 606 of the Corporations Act by acquiring units in the Australian Pipeline Trust contrary to the requirements of an exemption given by ASIC under section 655A (Australian Pipeline Trust 01R [2006] ATP 29). It also found that Alinta's conduct had had adverse effects on control of the Trust and on an acquisition of a substantial interest in the Trust. It made a declaration of unacceptable circumstances based on the contravention and alternatively on the effects, and orders for divestment of units in the Trust. Alinta sought review under the [Administrative Decisions (Judicial Review) Act](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119" \t "Default) [1977](http://my.lawlex.com.au/index.asp?pact=coredoc&nav=col&cid=7119). At first instance Emmett J upheld the Panel's decision (Australian Pipeline Ltd v Alinta Ltd (2006) 237 ALR 158). Although Emmett J disagreed with the Panel's finding that Alinta had contravened section 606, he found no error in the Panel's alternative ground for its declaration. He rejected a submission that subsection 657A(2) was invalid, following the decision in Precision Data v Wills that a power to vary rights and obligations pursuant to the application of policy considerations is not judicial in nature. On appeal, all three judges held that Alinta had contravened section 606, and the court referred the matter back to Emmett J to be dealt with on that basis. In the event, the commercial dispute was settled, and Emmett J made consent orders for disposal of the relevant units in the Trust. Although they agreed with the Panel that Alinta had contravened section 606, however, the Full Court was divided over whether the Panel's declaration was valid, principally because they were divided over whether paragraph 657A(2)(b) was valid to confer the power which the Panel purported to exercise to declare that circumstances were unacceptable because they constituted a contravention of Chapter 6 of the Act. Finkelstein J (dissenting) held that the Panel's declaration was valid. His Honour came to the same conclusion as the Panel that Alinta had contravened Chapter 6, and he held that paragraph 657A(2)(b) was valid, because Precision Data v Wills was still relevant to the Takeovers Panel, despite the changes in the applicable law since 1991. He rejected submissions that Precision Data v Wills should be distinguished on four grounds:* the Takeovers Panel may base a declaration of unacceptable circumstances on a finding that Chapter 6 has been contravened;
* private parties may apply to the Takeovers Panel (formerly only the ASC could make an application to the Corporations and Securities Panel);
* the Takeovers Panel has wider powers to make orders than the CSP had in 1991; and
* private parties are now prevented by section 659B from pursuing judicial remedies in relation to a current takeover, and limited by section 659C in the remedies they can seek over a takeover which has closed.

The majority held that the Panel's declaration was invalid, because paragraph 657A(2)(b) itself was invalid. Their Honours held that the four points of distinction set out above indicated that Precision Data v Wills was no longer relevant to paragraph 657A(2)(b), which was an attempt to transfer jurisdiction from the courts to a non-judicial body. On this basis, the first limb of the declaration (which related to the contravention) was plainly invalid. Their Honours found that the second limb of the declaration was also invalid because it relied in part on paragraph (b). Although the second limb was partly based on considerations relevant to paragraph 657A(2)(a) (power to declare that circumstances were unacceptable because of their effect on control of a company or on an acquisition of a substantial interest in a company), their Honours held that it was also partly based on the finding that Alinta had contravened section 606, so that the second limb was also infected with the invalidity of paragraph 657A(2)(b). On this view as to the structure of the declaration, no decision was required as to whether paragraph 657A(2)(a) was valid, but the majority made it plain that they doubted that it was valid. **(c) The appeal** The Attorney-General (who had been a party in the Full Court) obtained special leave to appeal. By the time the appeal was argued in October 2007 the commercial parties had settled their differences and had obtained and performed consent orders requiring dispersal of the relevant units in the trust. The High Court nonetheless held that the issue of the validity of paragraph 657A(2)(b), which was a proper concern of the Attorney-General and had been decided in contested proceedings between parties, had not become moot or hypothetical when most of those parties lost interest. The Attorney-General arranged for an eminent constitutional lawyer to oppose the appeal as an amicus curiae and, after some discussion, the High Court allowed the appeal to proceed, although confined so as to preclude reinstatement of the Panel's orders. The Attorney argued that the Panel lacks essential indicia of judicial power, principally the power to make binding decisions by applying existing law to the facts. On the contrary, it is directed to apply policy criteria, not all of them articulated in the Act, in deciding whether to vary existing rights and obligations. In the course of doing so, it must inquire what rights and obligations already exist, but that is not a preliminary to enforcing those rights and obligations, but merely a step along the way to a decision whether to vary them. Any order the Panel does make can only be enforced by the Court, under section 657G. The fact that access to the Court has been removed during a bid does not alter the character of the Panel's functions and powers. The amicus argued that the majority in the Full Court had been substantially correct in seeing the provisions enacted in 1999 as removing a judicial function from the court and recreating it in substantially the same form as a function of the Panel. The Panel's function is substantially the same as that of the court, namely to quell controversies, it decides on substantially the same grounds as would the court and the orders it can make are much the same as those section 1325A empowers the court to make. **(d) The decision**The High Court made orders in December 2007, upholding the appeal and declaring that paragraph 657A(2)(b) was not invalid as purporting to confer judicial power on the Panel, but did not publish reasons until 31 January 2008. The leading judgement was given by Hayne J, with whom Gleeson CJ and Gummow J substantially agreed. Kirby J gave broadly similar reasons, as did Crennan and Kiefel JJ jointly (with whom Gummow also agreed). Heydon J agreed with the reasons Finkelstein J had given in the Federal Court. Although there are shades of difference, the whole court held that the principle laid down in Precision Data v Wills still applies and that the grounds of distinction accepted by the majority in the Federal Court are insufficient. Hayne J rejected the grounds on which the majority in the Full Court distinguished Precision Data v Wills and on which the amicus sought to support that decision:* a finding by the Panel that a person has contravened a provision of Chapter 6 does not lead automatically to a declaration of unacceptable circumstances. While contraventions will generally be unacceptable, the Panel must consider the public interest and policy considerations before deciding whether to make a declaration, let alone orders. Accordingly, for the Panel to find a contravention is a step along the way to making a declaration or orders;
* many tribunals entertain applications by private parties, without exercising judicial power;
* the privative clauses impose only a temporary limit on access to the court. More to the point, however, their existence does not alter the character of the functions and powers actually conferred on the Panel;
* the Panel does not enforce its own orders. No criminal or civil remedy is available for failure to comply with a Panel order, except through a court, and the court's powers are not fettered in any such way as in Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; (1995) 127 ALR 1;
* the Panel's orders create a new charter of rights and obligations, which may differ from those previously existing. The rights and interests they are designed to protect are not pre-existing rights and interests, but those recognised and created by the orders themselves. The courts then enforce the law as affected by the Panel's declaration and orders;
* accordingly, it is inappropriate to describe the Panel's function as quelling controversies about existing rights and obligations.

In adopting these reasons, Gleeson CJ added a few remarks which went to the heart of the issue. Citing Kitto J in R v Trade Practices Tribunal; ex parte Tasmanian Breweries Ltd [1970] HCA 8; (1970) 123 CLR 361, he pointed out that the Panel and similar tribunals have been given powers too indefinite to be suitable to be conferred on a court, because they are entitled to create new rights and obligations, by taking into account policy considerations which are not set out in, or imported into, the governing law. He does not cite Kitto J's characterisation of such legislation as a delegation of the legislative function, in relation to particular cases. Although Gummow J was careful to allow the courts to have regard to policy considerations, and was more emphatic about the extent to which the Panel can change pre-existing rights and obligations, his remarks are similar. Kirby, Heydon, Crennan and Kiefel JJ followed broadly parallel paths to the same end point. In each case, their conclusion is that the Panel is still a body of the kind to which the principle in Precision Data v Wills applies. That is, its functions are not judicial because it does not ascertain and enforce pre-existing rights and obligations, but decides on the basis of policy considerations, which extend beyond the provisions of the Act, whether to make orders imposing new rights and obligations. Kirby J's reasons are notable for their caution over accepting the privative clauses. Crennan and Kiefel JJ suggest that circumstances are unacceptable if and only if something needs to be done about them, which brings out the limitation to particular fact situations of the Panel's powers. **(d) Where to now?** This decision deals conclusively with the main concern about the constitutional validity of the provisions of the Corporations Act dealing with the Takeovers Panel. As mentioned above, sections 657A and 657D have been amended since the Panel's decision in Australian Pipeline Trust. Those amendments seem unlikely to affect the applicability of the High Court's decision, however. Although paragraph 657A(2)(a) and new paragraph 657A(2)(b) were not examined, the High Court has removed the basis on which the majority in the Federal Court doubted the validity of paragraph 657A(2)(a) as it then stood. The re-examination of the principle in Precision Data v Wills has cast new light on the width and nature of the Panel's powers. Although very different in content and availability, as they relate to particular cases, those powers are comparable in nature with the Commission's powers under section 655A. In future, the Panel can be expected to be more robust in remedying what it sees as unacceptable circumstances, including in requiring departures from the procedural and even the substantive requirements of Chapter 6. The decision also provides some support for proposals for similar expert tribunals to deal with comparable issues in other areas. Such a tribunal would need to possess such expertise as would justify Parliament in turning over to it the selection of relevant policy criteria. For instance, an expert body might decide difficult issues about continuous disclosure for the purpose of deciding whether the market in certain securities should be suspended, or certain trades reversed. It could not, of course, impose criminal or quasi-criminal penalties.etailed Contents |

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| **5. Contributions** |  |  |

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